Neutral Citation Number:

Case No: K00SM0085

IN THE COUNTY COURT AT STAINES

Date: 4th March 2024

Before His Honour Judge Simpkiss

Between :

ENVIRONMENT AGENCY

Claimant

- and –

(1) MRS JACQUELINE CASEY AND MR JOHN CASEY
(2) MR SERGIU SIDEI
(3) MR MATTHEW CROSLAND
(4) MR STEPHEN PEABODY
(5) MR ERION GJIKA
(6) MRS LINDA AVDULAJ
(7) MRS FRANCES LAUGENIE
(8) MR STEPHEN CROSS
(9) PAUL THATCHER
(10) PERSONS UNKNOWN

Defendants

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Mr. Nicholas Ostrowski (instructed by Geldards) for the Claimant
(Mr. Stephen Cottle instructed under the Public Interest
Law Centre) for the Third, Eighth and Ninth Defendants
Mr. James Stark (instructed by Public Interest Law Centre) for the Second, Fourth, Fifth and Sixth Defendants
The remaining Defendants in person

Hearing dates: 30th and 31st October 2023

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APPROVED JUDGMENT

Introduction

1. This claim is brought by the Claimant for possession of freehold land it owns, namely the riverbed of the River Thames adjacent to Cherry Orchard Gardens around Sunbury-on-Thames ("the Land"). The Land is registered at HM Land Registry under title numbers: TGL279736, SY53853 AND SY49480. It is the riverbed of the Thames for a length of just under 2 miles.

2. The objective of these proceedings is to obtain court orders to remove a number of vessels currently moored in the river and therefore lying over, and at times on, the Land. The named Defendants own and/or occupy vessels which the Claimant wants moved off the Land and adjacent to the southern riverbanks.

3. Ownership of the relevant sections of the adjoining riverbanks (ie those adjacent to the vessels) are in dispute and for the purposes of this hearing neither side is to be treated as owning them. The Claimant had applied to register title to the whole of the riverbank to the south of the Land but withdrew that application but has not given up the option of re-applying at a later date. No-one has suggested that any of the boat owners or occupiers has any interest in the riverbed.

4. The proceedings were issued under CPR 55 and this 3 day hearing was not the trial but to determine whether the claim was genuinely disputed on substantial ground and should be allowed to proceed further to a trial.

5. The Defendants between them raise a number of generic points which apply to each of them and also individual matters. I will deal with the latter separately, but the generic points are as follows:

(a) they dispute that the Claimant can bring a claim for possession as owner of the riverbed;

(b) even if it can, they argue that a claim can't be brought if the Claimant does not own the riverbank (which for the purposes of this hearing it is to be assumed they don't);

(c) their Article 8 rights have been breached;

(d) the Claimant's decision to bring this claim and to proceed with it is ultra vires because it does not have any authority to bring possession proceedings and also because it is said that it acted in breach of various public law principles which I will set out in more detail later;

(e) It would not be appropriate for the court to make a possession order in relation to the whole of the Land as it would include substantial areas which the Defendants are not trespassing on.

6. The Claimant's case is in summary as follows:

(a) as owner of the riverbed at this location it is entitled to claim possession of the Land on the conventional grounds that the Defendants are trespassers either directly onto the riverbed or in the airspace above it;

(b) while the ownership of the riverbank is contested, the ownership of the riverbank does not entitle the riparian owner to moor vessels permanently at the locations where they are currently moored;

(c) The Defendants' defence that their Article 8 rights have been breached is disputed on the grounds (i) that Article 8 is not engaged, and (ii) that any interference with those rights is proportionate;

(d) The Defendants' case of ultra vires and that a possession order should not be made because the Claimant had breached article 1 of protocol 1 of the **European Convention on Human Rights**("ECHR"), failed to adhere to the public sector equality duty under the **Equality Act 2010** ("PSED") and brought the claim for improper purposes is not seriously arguable.

(e) The court does have jurisdiction and should grant the possession order because a possession order simply in respect of the area actually occupied by the vessels would result in their being moved a boat length to either side.

The procedural framework

7. This claim originally came before DDJ Reynolds at a preliminary hearing when he adjourned it to be listed before me for 3 days to determine whether it was genuinely disputed.

8. CPR 55 provides:

55.8
(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may:
(a) decide the claim; or
(b) give case management directions.
(2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to track or directions to enable it to be allocated.

9. The principles are not in dispute. The hearing is the equivalent to a summary judgment application. In **Easyair (Trading as Openair) v Opal Telecom Limited** [2009] EWHC 339 (Ch) Lewison J set out some helpful guidance to courts dealing with summary judgment applications. This was an application by a defendant but the principles apply equally where the court is considering the defence:

"(i) The court must consider whether the [defendant] has a "realistic" as opposed to a "fanciful" prospect of success;

(ii) A realistic claim is one that carries some degree of conviction. This means that a claim that is more than merely arguable.

(iii) In reaching this conclusion the court must not conduct a mini trial;

(iv) This does not mean that a court must take at face value and without analysis everything [the defendant] says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

(v) However, in reaching its conclusion the court must take into account not only evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the

court should hesitate before making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something might turn up which would have a bearing on the question of construction."

10. In this case the Defendants have had ample opportunity to develop their legal arguments and although there is a voluminous quantity of documentation and authority and substantial skeleton arguments from those Defendants who are represented, most of the defence arguments are points of law. It is not particularly common for a summary judgment application to be listed for 3 days but if I am satisfied that there are no factual issues which genuinely need resolving at trial or that a fuller investigation of the facts is required, or if there is no evidence that there are documents or material not currently before the court that might put a different light on the construction of legal points then I ought to decide the legal points at this hearing.

Background facts

11. There can be no substantial dispute that the Claimant owns the riverbed of the Thames. It is registered at the Land Registry with freehold title and all the vessels relevant to these proceedings are moored on the river and either sitting on the bed of the river or floating directly above it.

12. The background facts are set out in the witness statement of Nicholas McKie-Smith, who is the Harbour Master of the non-tidal Thames appointed under s. 51 of the **Harbours Docks and Piers Clauses Act 1847** and s. 81 of the **Thames Conservancy Act 1932 ("the TCA 1932**"). I will indicate whenever a relevant or potentially relevant fact is disputed.

13. The river which flows over the Land is non-tidal being upstream of Teddington Lock. Down river it would have been under the control of the Port of London Authority.

14. Mr. McKie Smith points out in his evidence that in 1884 the then Deputy Chairman of the Thames Conservancy gave oral evidence to Parliament that the towpaths adjoining the river below Staines (which would include this section of the river) "*are entirely our own*". There is a dispute about ownership of the riverbank bordering this stretch of the Thames but the Claimant continues to maintain that it is the owner.

15. Every year there are thousands of boat transits over this stretch of the Thames and there are short stay moorings provided by the Claimant near the locks. It does not routinely record all transits routinely. If the Claimant gets notice of what Mr. McKie Smith calls "*overstayers*" then it this would be recorded.

16. Mr. McKie Smith's witness statement sets out a table of 21 vessels which were at the time moored on or over the Land. The Claimant has been unable to identify the owners or occupants of 7 of them and 2 of them appear to have no names. The table sets out when the Claimant's officers first recorded the presence of each vessel. Some of the vessels had been moved and this is also recorded.

17. All of the named Defendants agree that they own the vessels attributed to them in the witness statement and none dispute that they are where Mr. McKie Smith says they are. They have had ample time to bring forward evidence that they have occupied for longer periods than recorded by the Claimant or to dispute the record.

18. From the autumn of 2014 the Claimant has been more active in patrolling the riverbank, identifying vessels which appear to have been permanently moored there. An increase in numbers was noticed in 2014 as a result of steps taken by Richmond-Upon-Thames LBC to prevent mooring along the stretch of the Thames under its control. Another increase in moorings occurred in 2016. Mr. McKie Smith's evidence is that the Claimant's aim is to maintain this stretch as a "*natural, rural section of the Thames in an otherwise urbanised area on the outskirts of West London*". He also says that damage is now being done to trees bordering the river as branches are cut down to enable mooring. The extent to which any of these particular concerns applies to the Defendants is not one that was or could have been explored in the context of this hearing.

19. Various requests have been made for the owners or occupiers of the vessels to be moved.

20. The planning authority, Elmbridge Borough Council served enforcement notices on a number of the Defendants. This led to applications by those Defendants for retrospective planning permission to allow residential mooring and these applications were all refused. These Defendants (1st, 3rd, 4th, 6th, 9th and 10th) appealed and the planning inspector rejected all the appeals with the exception of the 6th, Mr Gjika.

21. The site where the vessels are moored is all Green Belt. The inspector gave serious consideration to whether he should give temporary permission for all the appeals so as to allow the appellants to remain while the Council completed an assessment of need and to set out a mitigation solution "*if applicable and required*". The inspector rejected this except in the case of Mr. Gjika. This was because of the interests of his son, Zeus, who was at that stage residing in the vessel with Mr. Gjika and his mother. The inspector described his decision as "*exceptional*" to enable the family to find alternative accommodation or an appropriate suitable alternative location and the period was for 2 years. Since then, the situation has changed as mentioned later in this judgment and Zeus only spends part of each week with his father. He lives with his mother on shore for the remainder of the week.

22. On 26th September 2022 the Claimant sent letters to all of the Defendants known to them informing them that they did not have the landowner's consent to remain on the land and putting them on notice that they must move their vessels within 7 days. These were delivered by putting the letters on the various vessels and also by first class post where the vessel owners' names were known.

23. A further letter was sent on 25th October 2022 informing the Defendants that court proceedings would be issued and inviting them to contact the Claimant to indicate whether they had any specific rights which might be relevant to them under Articles 6 and 8 of the ECHR. Another letter was sent on 10th November 2022 asking the named Defendants to inform them of any vulnerabilities that they wished to bring to their attention.

24. These proceedings were issued on 2nd May 2023.

THE PRIVATE LAW ISSUES

Issue 1 – Can a claimant bring possession proceedings as freehold owner of the riverbed?

25. Although some of the unrepresented Defendants tried to suggest that the ownership of the riverbed was in dispute, none of the barristers argued this point (Mr. Cottle submitting that the 8th Defendant put the Claimant to proof that its title didn't extend "*up onto the river bank*" and whether its title boundaries "*related to the river bed adjacent to the 8th Defendant's portion of the river bank*"). It is clear that the Claimant is registered with freehold title to the whole of the riverbed along the relevant stretch of river and there is no argument that the boundary is

up to the riverbank which has any prospect of success. There is no claim to rectify the register of title. I will deal with any possible adverse possession claim by a Defendant when I turn to the potential "*non-generic*" defences

26. Mr. Ostrowski referred to James VC in **Corbett v Hill** (1869) L.R. 9 Eq 671:

"Now the ordinary rule of law is that whoever has got the solum – whoever has got the site – is the owner of everything up to the sky and down to the centre of the earth".

27. He also quoted McNair J in **Kelson v Imperial Tobacco** [1957] 2 QB 334 where an advertising sign was held to have trespassed over a single-story shop by encroaching on its airspace. The most modern statement of the law is by Lewison J in **Moore v British Waterways Board** [2013] 1 Ch 488:

"Since it is ownership or possession of the bed of the waterway that counts, it follows that a person commits a trespass against the owner or possessor of the bed if, for example, he sails or rows a boat in the water above the bed".

28. Neither Mr. Cottle nor Mr. Stark developed any point challenging the principle set out above nor did they contend that their clients could challenge the Claimant's freehold ownership. Mr. Cottle focusses on the question of ownership of the riverbank which I will turn to shortly but, subject to his points about riparian rights and navigation cannot argue against the principle that the owner or person in possession of the riverbed can, bring trespass proceedings against a vessel in the water above the riverbed.

29. **Issue 2** – can a claimant bring a claim for possession as freehold owner of the riverbed when ownership of the bank is contested?

30. In his skeleton arguments for the 3rd, 8th and 9th Defendants Mr. Cottle says in relation to the private law trespass claim that the Claimant is not entitled to bring proceedings for possession because:

a. The Claimant is a creature of statute and has no statutory power to bring possession proceedings;

b. Each of the Defendants has a licence under **Environment Agency (Inland Waterways) Order 2010** (the "**EA Order**"); and

c. the Claimant does not own the riverbank alongside the vessels and the vessels are moored to the bank; and

31. None of the Defendants claims to have acquired possessory title to the riverbank save for the Second and Third Defendants, although some claim to have been in possession of a section of it for some time short of the necessary 12 years. No Defendant claims possessory title of the riverbed. The 3rd Defendant's amended defence admits that the Claimant is the legal owner of it and puts the Claimant to proof that it is entitled to bring this claim.

(a) Statutory power

32. Mr. Cottle submits that there is a triable issue as to the extent of the Claimant's statutory enforcement powers. The Claimant clearly has power to bring these proceedings.

33. Mr. Cottle referred to the **Thames Navigation and General Bye-Laws** 1993 ("the 1993 Bye-Laws"); the **Environment Act** 1995 ("**the EA 1995**"); and the **Thames Conservancy Act** 1932 ("TCA 1932"). I will not set out the provisions that he cited as, in my judgment, his submissions miss the real point which I will deal with below. The provisions Mr. Cottle relies on start with the **EA 1995** which created the Claimant. These, and the other provisions, set out the regulatory powers given specifically to the Claimant (or inherited by it) to control the use of the waterways, navigation on the non-tidal stretch of the Thames and the mooring of vessels on it.

34. Mr. Cottle specifically referred to parts 3(a) to (e) of the **TCA 1932** which contain no power to remove boats unless they are sunken or stranded. Therefore, he submits, there is no power to bring possession proceedings to enforce a common law right.

35. Mr. Ostrowski referred to **D & J Nicol v Dundee Harbour Trustees** [1914] 2SLT 418. The appellants in that case were a statutory body deriving authority from an Act of Parliament. In his judgment Lord Parmoor said this:

"It is settled law that a body such as the appellants, constituted by statute have no authority except such as Parliament has conferred upon them, and that must find a sanction for any powers, which they claim to possess, in their incorporating statute or statutes. These powers may be expressly authorised or implied as fairly incidental to what is expressly authorised. It is within this border that the difficulty of definition usually arises."

36. The starting point is the **Thames Conservancy Act** 1857 ("**the TCA 1857**"). By section 50 all estate, right, title and interest of the Mayor Commonalty and Citizens of the City of London in the bed soil and shores of the River Thames from Staines downstream to Yantlett Creek in Kent was vested in the Thames Conservators. At this stage the whole length was tidal but the relevant stretch of the Thames (which is no longer tidal because of Teddington Lock) was included.

37. There were a number of further **Thames Conservancy Acts** and the **TCA 1932** provided the Conservators with various regulatory powers which Mr. Cottle referred to.

38. **The Environment Agency Act 1995** ("**EA 1995**") set up the Environment Agency and transferred various functions which had previously been vested in other corporate agencies, such as the National Rivers Authority.

39. Section 3 of the **EA 1995** transferred to the Claimant the property rights and liabilities of the National Rivers Authority and the London Waste Regulation Authority. The Claimant is registered as freehold owner of all the relevant land in this case. I cannot conceive that Parliament would have created a corporate body to which property was transferred (and which is now registered as freeholder) without providing for that body to exercise all the normal rights of an owner of property. The body would, for example, need a head office and accommodation in which to house its employees.

40. Nor is it surprising that there are no express provisions referring to the enforcement of property rights by seeking possession or bringing injunction proceedings without establishing that one of the detailed regulations enables that action. The reason for this is that section 37 of the **EA 1995** gives the Claimant all the powers it needs and provides as follows:

"37 – Incidental general functions

(1) Each new Agency (that is to say in this case [the EA] or SEPA

(a) may do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to the carrying out of its functions; and

(b) without prejudice to the generality of that power, may, for the purpose of, or in connection with, the carrying out of those functions, acquire and dispose of land and other property and carry out such engineering or building operations as it considers appropriate;

and the Agency may institute criminal proceedings in England and Wales."

41. Even if this provision was not present, there is nothing in the **EA 1995** which takes away or restricts a landowner's rights as landowner (which would include bringing a trespass or injunction action) in order to defend the land. These are rights that clearly go with the land. It has not been argued that the Claimant does not have authority to own land and nothing has been drawn to my attention to suggest that it does not.

42. There is really nothing more to say on this point. Mr. Cottle's references to the regulatory powers and the Defendants' submissions that there are issues to be tried about whether they were breached and whether the Claimant has power to bring these proceedings are therefore completely irrelevant. As freeholder of the riverbed the Claimant is entitled to bring this claim

Licence

43. The Defendants argue that because they have registered their vessels with the Claimant under Article 5 of the **2010 Order** they are permitted to moor alongside the riverbank. The way in which this point has been advanced is somewhat vague and unclear. In the defences it is pleaded that the licence gives a right to moor but it does not go into particulars of the nature and extent of that right. The case is based solely on the registration.

44. This involves looking at the rights of boat owners on the non-tidal reaches of the Thames in more detail and overlaps, to an extent, with the next point. I will therefore deal with the 2 points together, but I find that there is no reasonably arguable defence based on licences or registrations of the vessels with the Claimant.

45. The 8th Defendant says that she has an implied licence to moor if the Claimant owns the adjoining riverbank as a result of "*tacit acquiescence in her possession of the land for such a prolonged period of time as to amount to an implied tenancy or licence and that implied contractual relationship still exists*". I deal with that below when I consider individual Defendant's defences.

Riparian Rights

46. The **TCA 1932** codified the public right of navigation on the Thames. Section 79 provides as follows:

"79 –

(1) Subject to the provisions of this Act it shall be lawful for all persons whether for pleasure or profit to go pass and repass in vessels over or upon any and every part of the Thames through which Thames water flows including creeks side-channels bays and inlets connected therewith as forms parts of the said river:
Provided that …….

(2) The right of navigation in this section described shall be deemed to include a right to anchor moor or remain stationary for a reasonable time in the ordinary course of pleasure navigation subject to such restrictions as the Conservators may from time to time by byelaws determine and the Conservators shall make special regulations for the prevention of annoyance to any occupier of a riparian residence by reason of the loitering or delay of any houseboat or launch and for the prevention of the pollution of the Thames by the sewage of any house boat or launch:
Provided that nothing in this section or in any byelaw made thereunder shall be construed to deprive any riparian owner of any legal rights in the soil or bed of the Thames which he may now possess or of any legal remedies which he may now possess for the prevention of anchoring mooring loitering or delay of any vessel or to give any riparian owner any right as against the public which he did not possess before the seventeenth day of August one thousand eight hundred and ninety four to exclude any person from entering upon or navigating any backwater creek channel bay inlet or other water."

47. The Defendants rely on the argument put forward by Mr. Cottle on behalf of the 3rd Defendant. There are variations on the way in which these defences are put forward to reflect the different facts relating to each Defendant, but the 3rd Defendant's case is the high point of this argument.

48. He says that he has acquired a possessory title to the riverbank alongside his vessel by 12 years adverse possession. This, he says, gives him riparian ownership rights to moor on the river alongside that stretch of bank. I will deal with the arguments for possessory rights when looking at specific Defendants but Mr. Ostrowski meets

this point by submitting that even if the Defendants were to establish a possessory title, the common law rights that attach to it do not permit them to moor permanently, as they accept they do, over the riverbed.

49. What therefore, are the riparian rights that attach to the owner of the river bank against this stretch of the Thames and is this an issue which should go to trial? Mr. Ostrowski examined this issue in some detail and all counsel referred to authorities. In **Chasemore v Richards** (1859) 7 H.L. Cas 349 Lord Wensleydale said that riparian rights holders enjoy:

"the right of enjoyment of a natural stream on the surface ex jure naturae belongs to the proprietor of the adjoining land as a natural incident to the right of the soil itself; and that he is entitled to the benefit of it, as he is to all the other advantages belonging to the land of which he is owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction".

50. On becoming a riparian owner through ownership of the riverbank there is a presumption that the ownership includes the riverbed to the halfway point (ad medium filum). This presumption can be rebutted by sufficient contrary evidence (**Mickelthwait v Newlay Bridge Co** (1886).

51. Mr. Cottle referred to the Privy Council decision in **Tetreault v Montreal Harbour Commissioners** [1926] AC 299 which related to the non-tidal but navigable stretch of the St. Lawrence River in Quebec and concerned rights of access to the river by someone claiming ex jure naturae (as opposed to by prescription) as the owner of the riverbank. The Committee applied Lord Cairns' distinction between public rights of navigation and exclusive rights of access by the owner of a wharf in **Lyon v Fishmongers Co** (1876) 1 App.Case 662:

"When this right of navigation is connected with the exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have not access to or from the river at that particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by injunction."

52. Therefore, as Lewison LJ said in **Moore v BWB** "it is important to recognise that in some cases dealing with riparian owners the owner in question owned not merely the bank but also part of the bed".

53. The background to **Moore v BWB** is important in understanding the overall result and its relevance to this case. The Claimant owned a vessel moored alongside the bank of the Grand Union Canal of which it was common ground he was in possession or occupation. That part of the GUC was tidal and BWB was not relying on any common law right of ownership of either the bank or the riverbed. It was only relying on it regulatory powers relating to the management of the river. The provision relied on by BWB was one which applied if a vessel was present "*without lawful authority*". If the claimant had a right to moor at common law then there would not be a breach of the regulation. The Court of Appeal agreed with the trial judge that the claimant did not have a right to moor to the bank at common law. This meant that the central decision in the case was whether by mooring the vessel the claimant would be "*committing any wrong at common law or under statute, which made what he was doing unlawful*" even though he had no established right to moor there. This issue does not arise in the present case because the Claimant is claiming as owner of the riverbed.

54. At paragraph 58 in his judgment Lewison LJ recognised that where the owner of the bank also owned the riverbed to the midline, he would clearly be entitled to build structures on the river (subject to statute or interference with public rights) and to moor permanently against the sup without committing a trespass on the riverbed. Both he and Mummery LJ said that there was no authority supporting the proposition that, as against the owner of the riverbed, a riparian owner is entitled to maintain a floating structure or vessel on the water indefinitely. The right only enables his access and egress from the shore to the vessel.

55. Mr. Cottle's original skeleton argument said that **Tate & Lyle Ltd. v GLC** [1988] 2 AC 509 was authority for the proposition that "*a riparian owner is entitled to access the water passing his land for the ordinary purposes of a riparian tenement, although that right didn't extend to insisting on any depth in the water flowing past his land. The ordinary purposes of riparian tenements include mooring a boat and on the banks of the River Thames this is a matter of custom*". I agree with Mr. Ostrowski that this is not what this case says.

56. Lord Templeman gave the leading judgment. It was not in dispute that Tate and Lyle were riparian owners of the riverbank and that it unloaded vessels delivering raw sugar to its factory at that point of the Thames. It was arguing that works to construct a nearby ferry terminal were causing the river to silt up next to its wharf.

57. Lord Templeman said: "*as riparian owners Tate and Lyle are entitled to access to the water in contact with their frontage, and to have the water flow past them in its natural state of flow, quality and quantity so that they may take water for ordinary purposes in connection with their riparian tenement including the use of water power*." He went on to say in relation to Tate and Lyle's claim that the riparian rights included a right to maintenance of the depth of water existing before the terminals were built: "*It seems to me that this argument confuses private riparian rights with the public right of navigation*"…."*The distinction between private riparian rights and the public right of navigation is of great importance with regard to the river Thames because the PLA have statutory power to interfere and authorise works which interfere with the public right of navigation*".

58. Because the works interfered with the depth of the riverbed and not with the access to the river, it was a public riparian right in contrast to the situation in **Lyon v Fishmongers' Company**, which concerned the tidal reaches of the Thames, where there was an interference with a private riparian right because the works would have destroyed the Fishmongers' frontage to the river. Mr. Cottle's reliance on this as authority for the proposition that the riparian owner has unrestricted private mooring rights over the riverbed is wrong. What Lord Cairns is saying is that when a public right of navigation is connected with an exclusive access to and from a particular wharf it ceases to be enjoyed in common with the public. He is not saying that the right changes – it remains a right to navigate the river and to load and unload or moor in the ordinary course of navigation. It does not grant permanent rights to moor.

59. The House of Lords did hold in **Tate and Lyle** that the LCC was liable for public nuisance because it failed to take adequate account of the damage that the building of the terminals would have on Tate and Lyle's public rights of navigation. Lord Diplock dissented on this point but all were agreed that the public right of navigation over a navigable river (preserved by the **Port of London (Consolidation) Act** 1920) gave the public a right to pass and repass over the whole width and depth of the river Thames and the incidental rights of loading and unloading. This is a long way from recognising any right to moor for longer periods or make a permanent mooring.

60. Section 79 of the **TCA 1932** codified the rights of public navigation and I have had no authority referred to me which can be regarded as authority for any customary rights. Section 79 includes "*a right to anchor, moor or remain stationary for a reasonable period of time in the ordinary course of pleasure navigation subject to such restrictions as the Conservators may from time to time by byelaws determine*…". It has not been suggested that the Defendants' vessels are moored where they are within the meaning of section 79 and it is on their own evidence quite unarguable that they are mooring in the ordinary course of pleasure navigation.

61. I am therefore satisfied that there is no defence based on riparian rights.

Licence and other related issues

62. The Defendants argue that because they have registered their vessels with the Claimant under Article 5 of the **2010 Order** they are permitted to moor alongside the river bank. The way in which this point has been advanced is somewhat vague and unclear. In the defences it is pleaded that the licence gives a right to moor but it does not go into particulars of the nature and extent of that right. The case is based solely on the registration.

63. Mr. Cottle also advanced an argument based on the Defendants being entitled to moor as beneficiaries of an easement. What is pleaded is that "*attached to his ownership of the wharf is the right to moor a vessel alongside it that amount to an easement arising from the history of boats moored alongside the wharf and the history of the wharf ….*". There are no particulars (not even of whether it is alleged that the relevant history predates the Thames Conservancy Acts). In particular, it is not alleged that the history shows that there were permanent moorings there or residential moorings.

64. This argument is dependent on there being a "more than fanciful" claim for a Defendant to have acquired possessory title to the riverbank alongside the area where they are moored. The Third Defendant is the only one who says that his vessel has been moored in its current position for more than 12 years prior to the issue of this claim. Therefore none of the other Defendants can rely on this point.

65. I was referred to Arnold J's decision in **Couper v Albion Properties Ltd**. [2013] EWHC 2993. In that case the vessel owners did not claim to own the riverbank and therefore had to establish that they were the successors in title to franchised private mooring rights which the Crown had historically granted – relying on the doctrine of lost modern grant.

66. Arnold J was not therefore dealing with the situation that arises in this case but his *obiter dicta* about the rights of the owners of the riverbank are relevant. These are that, in principle, a riparian owner may have a permanent right to moor alongside his riparian land and that this would be an easement capable of being granted by the Crown. This would have to accommodate a dominant tenement in the ownership of the person claiming its benefit. An easement in gross does not exist at English law.

67. In **Couper** the case was put on the basis of inferences that could be made from 19th century paintings and drawings of the Thames (Battersea Bridge) prior to 1857 and some photographs described by the judge as "unhelpful", plus various OS maps. Later photographs from the 40s and 50s showed barges moored.

68. In order for this defence to succeed at this stage the Defendants would have to show a "*more than fanciful*" prospect of proving the following:

(a) That their particular vessel is moored alongside an area of riverbank in respect of which they have a more than fanciful claim to have acquired title to by adverse possession.

(b) That a predecessor in title (it doesn't matter that there has been a break in the chain of title since he acquired it) acquired it by long use (at least 20 years).

(c) That the dominant tenement was the riverbank now owned by that Defendant.

(d) That the easement gives them a right of permanent mooring.

69. At this stage the Defendants have provided no particulars at all even though this dispute has been progressing for a number of years (for example the planning inquiry went into the historic user of the wharf against which the 3rd Defendant's vessel is moored), other than to point out that this is a Victorian wharf. The Planning Appeal decision on 26th April 2022 set out what is known about the wharf.

70. The 3rd Defendant's vessel is moored against a "*formalised section of the riverbank*". The Claimant's evidence to the inquiry was that the wharf was used as a coal wharf to supply fuel to power machinery for machinery at Molesey Reservoirs where there was a steam pumping station. If that is the case, then the dominant tenement will be the pumping station and the mooring of vessels consistent with those incidental rights will be reasonably

incidental to public rights of navigation (ie loading and unloading) and wholly different to those claimed by the Defendants.

71. Mr. Cottle submits that there needs to be a trial to decide this issue because the Defendants could then obtain the relevant evidence. In my judgment this is fanciful. The Defendants aren't even at first base at the moment and it is entirely speculative whether they will find evidence to satisfacturally prove what is necessary to prove for defence to succeed.

72. The 8th Defendant says that if in fact the Claimant does own the riverbank alongside her vessel, she has an implied licence to moor as a result of "tacit acquiescence in her possession of the land for such a prolonged period of time as to amount to an implied tenancy or licence and that implied contractual relationship still exists".

73. The way that this point has been put forward is very vague and unsatisfactory. In the 8th Defendant's defence it is pleaded that the she had the Claimant's "*consent to be in possession of the riverbank in the first instance even though the Claimant did not have the right to give that consent*". Later, by amendment, the concept of "*tacit acquiescence … as to amount to an implied tenancy or licence and that implied contractual relationship still subsists*".

74. In his submissions Mr. Ostrowski referred to photographs of 2 pieces of paper printed "*Mooring Ticket*" issued by the Claimant and permitting 2 vessels owned by the 8th Defendant to be moored at Sunbury between 9th April 2016 and 9th May 2016. It strongly suggests that there was a licence for a specific period following which it would come to an end and if the licensee remained there they would be trespassing.

75. The authority cited by Mr. Cottle in support (**Flynn v S of S for Communities and Local Government** [2014] 1 WLR 3270) is of no relevance and the issue was not whether a landowner could evict someone on the land but whether, for the purposes of a planning appeal, the occupier had an interest in the land. There is no basis in the present case for any contractual relationship (let alone a tenancy) and none is properly pleaded or advanced. If it is then it is only claimed for the riverbank and if it is a licence then it can be no more than a revocable licence and this would not be a defence on the facts of this case. Even if it was necessary to go into the facts, the Claimant's evidence explains what actually happened and this Defendant has not sought to rebut them or deny them or provide adequate particulars of her case.

76. Mr. Cottle also argued that the 8th Defendant was not moored on the area of river registered in the name of the Claimant.

77. For completeness, I should add that the suggestions that the grant of licences to the Defendants in relation to their vessels (which is a requirement to have them on the Thames at all) gives the licensee a right to moor permanently is not remotely sustainable.

78. In their original defences the 1st and 10th Defendants argued that the riverbed owner has no power to stop mooring, referring to **Ipswich BC v Moore** EWCA Cov 1273(CA) and also contended that the navigation authorities are obliged to charge for a licence to create and use structures on the riverbed under section 60 of the **TCA 1932** irrespective of ownership and that this can't take away any riparian rights. The Ipswich case is not relevant to these proceedings. It concerned the construction of the **Ipswich Dock Act** 1950 and not the rights that this case is concerned with. It was held by the Court of Appeal that it would be inconsistent with the rights granted under that Act if the Borough Council could, as owners of the riverbed, override it.

79. Nor does section 60 help these Defendants because it requires the applicant for consent to build a structure to obtain the consent of the owner of the riverbed and of the riverbank before making the application.

THE PUBLIC LAW ISSUES

Issue 3 – should the Defendants' defence that the claim is disproportionate and in breach of Article 8 be allowed to proceed to trial?

80. The first question is whether Article 8 is engaged at all? This no longer arises at this stage. Mr. Ostrowski conceded that for the purposes of this hearing it is to be assumed that Article 8 does apply. It would be a significant issue if there was a trial.

81. Both Mr. Ostrowski and Mr. Stark referred me to the judgement of Lord Neuberger in **Manchester City Counsel v Pinnock** [2010] UKSC 45:

"61. First, it is only where a person's home is under threat that article 8 comes into play, and there may be cases where it is open to argument whether the premises involved are the defendant's house (….). Secondly, as a general rule, the court need only consider article 8 if it is raised in the proceedings by or on behalf of the residential occupier, Thirdly, if article 8 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."

82. The Defendants (through Mr. Cottle and Mr. Stark) relied on the points set out below as reasons why the court should decide that "*the point should be further entertained*",

83. The Third Defendant's amended defence pleads that it would be a "*gross violation*" of his Article 8 rights if he was evicted while his claim to title of the riverbank alongside his vessel is pending in the Land Registry. In the light of my decision about the effect of ownership of the riverbank being irrelevant (in this case) to his right to moor over the riverbed, this argument cannot amount to a realistic defence.

84. The remaining points raised as Article 8 points are:

a. the Claimant has not carried out an impact assessment of the pros and cons of adopting a less intrusive method of achieving its objective, which would be to allow the vessels to remain where they are until the planning authority has found a permanent mooring for them to move to.

b. the Claimant is put to strict proof that a possession order is necessary and in response to a pressing social need. It is pleaded that there is no pressing social need because other vessels move up and down the river for recreational purposes and, in effect, the mooring of the defendants' vessels doesn't interfere with this.

c. Mr. Stark's clients argue that the Claimant is in breach of a duty of candour in failing to disclose all the documents that might be relevant to their decision to bring possession proceedings.

The relevant legal principles

85. Mr. Stark referred to **Canal & River Trust v Jones** [2017] EWCA Civ 135 which he said was very similar to the present case. The judgement of McCombe LJ (with whom the other 2 Lord Justices agreed) analyses the relevant authorities and is a helpful starting point.

86. The claimant sought to remove the defendant from a section of canal under its control pursuant to statutory powers and for injunctions to prevent his mooring his vessel on that particular canal or from mooring, navigating or securing the vessel on any of the claimant's canals or waterways. This would exclude the claimant from approximately 6,000 miles of canal in the UK. At first instance the defendant's article 8 defence was dismissed

summarily and this was upheld on appeal. The Court of Appeal allowed the second appeal on the grounds that in this case there was a seriously arguable case under article 8 which needed to go to trial.

87. It was an important factor in the case that anyone wishing to moor or navigate on the canals required one or more licences from the claimant authority. The defendant originally had the relevant licences but these were terminated by the claimant as the defendant was not using the canal as authorised. The validity of the termination was disputed and the defendant also pleaded that he had a disability and that the claimant had not complied with its PSEA duty under the **Equality Act 2010**.

88. There were three main grounds of appeal: (1) that the judges below had wrongly applied the exception to the structured approach to proportionality by analogy with social housing cases; (2) the first instance judge was wrong to take the view that it would impose an unreasonable burden on the claimant authority if, in every enforcement case, it had to deal with any article 8 point raised by the defendant; and (3) the judge was wrong not to let this issue go to trial.

89. The structured approach to the requirements of rationality and proportionality is set out by Lord Sumption in **Bank Mellat v HM Treasury (No. 2**) [2014] AC 700 at paragraph 19 when he summarises the effect of the authorities:

"…the question depends on an exacting analysis of the factual case advanced in defence of the measures, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

90. In **Hounslow LBC v Powell** [2011] UKHL 8 Lord Hope agreed that the threshold for raising an arguable case on proportionality was a high one and then set out the position with regard to the requirements where the claim was in relation to social housing:

"It is in the interests of the community as a whole that decisions are taken as to how it should be best administered. The court is not equipped to make those decisions, which are concerned essentially with housing management. This is a factor to which great weight must always be given, and in the great majority of cases the court can and should proceed on the basis that the landlord has sound management reasons for seeking a possession order."

91. In **Jones**, the court allowed the appeal. Firstly, by distinguishing the claimant authority's claims from those in local authority housing cases McCombe LJ referred to the then recent case of **Akerman** (referred to above) and distinguished it on the grounds that in that case the boat owner could not assert that he had prior licence rights and a dispute as to their lawful restriction. McCombe LJ decided this point on the basis that there were significant differences between local authority housing cases and claims brought by other public authorities. This was because the courts were well experienced in carrying out the balancing exercise between hard pressed housing authorities and tenants trying to enforce their article 8 rights. He decided that this "*may not be straightforward in cases involving other types of public authority*" because the courts do not have the same experience of balancing the competing weight of the public management rights and duties of the authority in the context of that case. For example, housing possession cases usually require the court to decide whether it is reasonable to make the order as a statutory requirement. In particular, the housing authority is "*truly exercising its ownership rights*".

92. At paragraph 45 he says:

"In my judgment, in parity with the housing cases, in cases of the present type the court will usually be able to proceed on the basis that the authority has sound management reasons for wishing to enforce rigorously its licencing regime, without reasons being distinctly pleaded and proved. As in the housing cases, the court cannot make the judgment of how best it is for the claimant authority to manage the waterways ….. The management

duties and the authority's ownership rights should normally, I think, be taken as a "given" and as having strong weight in the assessment of proportionality under article 8. However, unlike housing cases, the relative weight of the competing interests of a boat operator, using his vessel as a home, may not always be as easily apparent in an individual case, at least where there are underlying disputes as to whether the claimant authority was entitled to act as it did in determining the licence".

93. The Court of Appeal did not rule out summary disposal of the article 8 where there were no continuing "genuine" disputes as to whether the licence conditions had been satisfied or where there were other issues in play, such as questionsunder the **Equality Act 2010**.

94. At paragraph 55 McCombe LJ concludes that the first ground is made out and that the judge could not properly have disposed of the article 8 considerations before deciding whether the licence conditions had been broken and also because of the **Equality Act** points. He also found that the relief sought was so extensive, excluding the defendant from all waterways under the claimant's authority, that the article 8 point could not be dealt with without a trial.

95. Mr. Ostrowski submits that the present case can be distinguished from **Jones** because (in the light of my findings that there is no private law defence and no genuine dispute) and no **Equality Act** defence properly pleaded the claim falls within the bracket of cases which McCombe LJ referred to and the Claimant's management duties and ownership should be a "given" and as having strong weight in assessing proportionality. This case is much closer to **Akerman** where Beatson LJ said:

"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 the case where the owner is a public authority which holds the land for the general public good such as the local authority in this case. It follows that in my judgment an interference with article 8 rights such as that by 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".

96. It is common ground that in order for the court to make an order for possession in this case I would need to be satisfied that such an order would be a proportionate and not in breach of article 8.

97. In my judgment this defence should be dismissed summarily. I will summarise my reasons:

a. I agree with Mr. Ostrowski that Jones can be distinguished from this case. The licence dispute in Jones does not exist in this case (not arguably at any rate) and as I have decided earlier, there is no defence to the private law claims.

b. The starting point is therefore that the Claimant's management duties and ownership are a "*given*" and carry great weight in assessing proportionality.

c. The Claimant is the lawful freeholder of the riverbed over which the vessels are moored, and sometimes touching. They have a statutory duty as successors to the conservators of the Thames to ensure that public rights of navigation over and upon every part of the Thames are maintained. Permanent mooring of vessels not only prevent other vessels from mooring in that part of the river (which they are entitled to do temporarily, but also change the character of that part of the river.

d. The planning inspector appointed by the Secretary of State for Communities and Local Government on the appeal by some of the Defendants, has decided that the mooring of vessels is an inappropriate development of the Green Belt and detrimentally affects the openness of the landscape and waterscape.

e. The TCA 1932 did not grant any rights for vessels to moor permanently on the Thames for residential reasons. Section 79(2) explicitly provides that the right to navigate the Thames includes the right to moor or remain stationary "*for a reasonable time in the ordinary course of pleasure navigation*" but does not give any permanent mooring rights.

f. I will deal with specific defence points raised by some individual Defendants later but this is not a case where the boat owners or occupiers will be made homeless. They will be prevented from long term and residential mooring on this stretch of the river but could move elsewhere. They have not pleaded that there is no alternative available merely asserting that the boats are their homes and that they will be homeless.

g. Some Defendants argued that the reason that the Claimant was bringing these proceedings was to prevent the Defendants from acquiring possessory title to the riverbank. Whether that is the case or not, I am satisfied that the Claimant is entitled, as someone arguing that it owns the riverbank, to take steps within the law (which it can do as owner of the riverbed) to protect such title as it already has from others who do not yet have title. This is a legitimate factor in exercising its rights of management of the riverbed and waterway.

h. I conclude that the Article 8 defences are not, arguable and that there is no real prospect of it being found at trial that it would be disproportionate to obtain possession. It is overwhelmingly proportionate for the Claimant to bring these proceedings and to exercise its duties of management and rights as freeholders for the wider public benefit of navigation on the Thames by stopping permanent or long term and residential mooring.

98. The Defendants' argument that an alternative less intrusive means of achieving the Claimant's objective should have been used would undermine the purpose of the **TCA 1932** and effective control by the Claimant of the Thames. It is very difficult to see what less intrusive measure there could be consistent with the Claimant's legal ownership or its duties under the **TCA 1932**. One suggestion was to let the Defendants remain where they are for a period of time but they have all had notice that the Claimant was objecting to their remaining permanently or semi-permanently where they are for a long time and done nothing yet to find alternative moorings. As Lord Reid, with whom Lord Sumption and the majority agreed, said in **Bank Mellat** in relation to legislation: "*to allow the legislation a margin of appreciation is also essential …. since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right*".

Issue 4 – is the Claimant's decision to bring these proceedings ultra vires on the basis that they have acted in breach of an applicable public law principle?

99. I have to say that the way the remaining Public Law defences have been pleaded with something of a "scattergun approach". They are divided into three main allegations of breaches by the Claimant of its public law duties which are set out in paragraph 12 (a), (b) and (e) of, for example, the Second Defendant's defence and a number of other allegations of breach set out in the remaining sub-paragraphs of paragraph 12:

a. There has been a failure to by the Claimant to have regard to relevant considerations which are set out in paragraph 12 (a) ("relevant considerations defence"); and

b. The Claimant's actions are incompatible with the relevant rights and fundamental freedoms set out in Article 1 of the 1st Protocol ("the Protocol rights").

c. There has been a breach of the duty of candour in relation to the Claimant's decision to bring these proceedings.

100. The remaining points that are pleaded either duplicate or add to the other points but they include, breaches of the **Equality Act 2010**.

101. It is not at all clear on what Mr. Cottle's contention is focussed. He argues in, for example, the 8th Defendant's skeleton, that the reason behind this claim is to facilitate the Claimant's application to register title to the riverbank at the Land Registry and that this is not within "*its statutory enforcement powers*" (see paragraphs 24 to 38 of the

skeleton). In the Third Defendant's skeleton (para 2) it is submitted that the Claimant "*may*" believe that it can bring these proceedings to defeat a claim to possessory title of the riverbank.

102. As I have explained earlier, the Claimant is entitled to bring these proceedings under its statutory authority to protect its proprietary rights of ownership of land and Mr. Cottle's intricate and lengthy argument is of no relevance to this issue. As landowner it is entitled to all the usual rights of landowners and therefore there can be no question of it being ultra vires here. Nor can I see how it can, arguably, be a breach of a public law duty by being a "*improper purpose*".

103. Whether or not the Claimant's motive for bringing these proceedings is to defeat, or prevent, any claim to adverse possessory title to the riverbank is neither here nor there. Even if that was the motive I do not think it is seriously arguable that that would not be a legitimate step for such a public landowner to take (landowner of the riverbed and claimant to ownership of the river bank) since once the vessels are moved the owners will be less likely or able to assert any rights of the bank. It would also be consistent with the advancement of its ultimate duty of managing the Thames for the benefit of the public by preserving public rights of navigation and the management of the river itself.

104. Both Mr. Cottle and Mr. Stark, in their amended defences assert that the Defendants' Protocol rights have been infringed because the possession proceedings are incompatible. The Claimant is then "*put to proof that the timing of this claim is not associated with his [ie the Defendant's] application to the Land Registry*". The burden of proving that their right has been infringed must be on the Defendant and no positive case is put forward – not even the flimsiest of circumstantial cases. It cannot be described as anything more than an assertion.

105. Whatever the motivation of the Claimant in bringing these proceedings, it is not arguable that the Defendants' Protocol rights have been infringed. Firstly, the Claimant has not appropriated or deprived the Defendants of property because they will still have their vessels. It is not arguable that the Protocol rights are engaged at all. Apart from the Third Defendant (whose case I will deal with later) no-one claims possessory title to any of the riverbank and no-one claims any proprietary rights over the riverbed. There are no rights to protect. The inference from the way the case is put is that trespassers, who may after 12 years be able to argue that they have acquired adverse possession to land have protected rights under the Protocol. I'm afraid I can't accept that proposition as arguable. As I decided above, even if they have rights over the riverbank there are no rights of which they are being deprived so as to engage the Protocol.

106. Even if they get over this hurdle, the law requires a fair balance to be struck between the demands of the general interest of the community and the requirement of the individual's fundamental rights (**Sporrong and Lonnroth v Sweden** (1983) EHRR 35 at paragraph 69). The margin of appreciation is wider where the interference with a protected right will interfere with or control the use of the Defendants' vessels rather than deprive them of the use of their vessels; "*the margin of judgment to be afforded to the executive is particularly wide in this context, because this was a "control of use" case and not a deprivation of property case*" (**R(Dolan v SoS Health and Social Care** [2020]EWCA Civ 1605).

107. The Defendants argue that Claimant has not had regard to all the relevant considerations before making the decision to bring these proceedings.

108. The public law obligation on decision makers to ask the right questions and to take reasonable steps to acquaint themselves with the relevant information was explained by Underhill LJ in R (Balajigari v SSHD [2019] 1 WLR 4647:

"subject to a Wednesbury challenge … it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken and the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of inquiries made that it possessed the information necessary for its decision".

109. It is important to keep in mind that the Claimant is not a housing authority nor a planning authority (both of which have statutory duties relating to housing and authorisation of land user). It would put a significant, if not an impossible burden, on the Claimant if it was unable to make decisions with regard to its statutory obligation to manage navigable waterways without undertaking the sort of detailed investigations which Mr. Stark and Mr. Cottle propose that they should. This does not mean that they can ignore their public law duties but that in order to put up a successful challenge to their decisions on these grounds it should not be sufficient to say that the Defendants are entitled to carry out a detailed investigation of all aspects of the decision making process as alleged in paragraph 12 and 13 of the D2, D3, D6, D8 and D9 Defences.

110. In fact there was a proportionality assessment by the Claimant in this case in relation to the Defendants carried out by Emma Hill on 3rd March 2023. This refers to a letter sent to the Defendants on 10th November 2022 which asked then to inform the Claimant of any rights which they thought might be relevant under articles 6 and 8 together with further reasons that the Claimant ought to be made aware of, as to why it should not be taking the proposed possession proceedings against them. It also asked for any personal circumstances that ought to be taken into account. A response was received from the 9th Defendant who said that he cared for his father "who lived nearby" and also claimed "*squatter's rights to the riverbank*" and that the vessel was his home. No other responses were received, although the assessment referred to previous emails from other Defendants none of which gave notice of "*any particular vulnerabilities*".

111. The assessment concluded that the possession proceedings were a proportionate means of achieving a legitimate aim of impacting the Claimant's right to access that part of the riverbed and impacting the right of other users to navigate that part of the Thames under their public rights of navigation and the impact of unlawful mooring on the environmental conditions and amenity of the riverbank.

112. . Mr. Cottle seemed to be suggesting that the Defendants had a protected characteristic because they belonged to a class of river boat dwellers. There is not a shred of a case that these Defendants are other than individuals who have decided to live in a boat moored on the Thames and to suggest that they are a protected class under the Equality Act. No Defendant has pleaded a protected characteristic or breach of the PSED which must relate to the particular Defendant and not to a member of the Defendant's family.

113. The court must of course, make its own proportionality assessment and I have to balance the reasons given by the Claimant against the consequences to the Defendants. The Claimant is entitled to be given considerable weight give its extensive experience in managing rivers and their banks and environment. These proceedings are brought to vindicate their property rights to the riverbed and their statutory duties to manage the Thames and navigation upon it. In particular, the fact that the public have rights of navigation on the Thames and a right to moor anywhere along its banks on a temporary basis but not to for an unreasonable period (which there can't be any dispute these Defendants are doing). The Claimant also has experience in protecting the amenity of the river and its environment. On the other side of the balance are the fact that those Defendants who live in their vessels will have to find new moorings and will not be able to live where they currently moor and the unparticularised suggestion that there is no-where for them to move to.

114. The balance is firmly and unarguably in favour of the Claimant. Nor will the Defendants be prevented from navigating this stretch of the Thames and mooring for reasonable periods.

115. Mr. Stark took the lead on the breach of the duty of candour point and referred to a number of authorities. He explained that the duty arises in Administrative Court cases under the Judicial Review Guide 2022 which he sets out in the supplementary skeleton for the Second and Sixth Defendants. This is because disclosure is not "*routinely ordered*" in judicial review cases. I know that in Housing Act appeals it is usual to order that the housing authority disclose the relevant parts of the housing file.

116. Mr. Stark then refers to the matters disclosed by the Claimant and criticises it as a clear breach of the duty of candour (paragraph 30 of the skeleton). He sets out Fordham J's formulation of the duty from **R (o/a) Police Superintendent's Association v Police Remuneration Review Body & SSHD** [2023] EWHC(Admin).

117. The allegation is that there has been a failure to make proper disclosure relating to the decision to bring these proceedings and in relation to the decision to withdraw the application to the Land Registry and decide to go down the route of possession proceedings of the riverbed. This, he submits, should lead to the Court "*inferring*" that the claim has an improper motive – namely to advance its claim to title of the riverbank.

118. There are two answers to this argument. Firstly, this is not a judicial review application in the Administrative Court but a possession claim in the County Court. In the Administrative Court the public authority would be defendant and would have notice of what the case was and the issues. That is not the case here and it is an unreasonable criticism of the Claimant that they haven't carried out the onerous exercise that the Defendants say they should have. That would happen in this type of case if the Defendants were given leave to defend and the case proceeded to trial. Secondly, as I have said earlier, the motive of the Claimants in seeking possession down this route does not provide a public law defence even if the Defendants' belief that there "may" have been an ulterior motive is made out. In my judgment it would be completely unreasonable to expect the Claimant to provide this kind of detailed disclosure before a "*more than fanciful*" defence had been pleaded. It would put the Claimant under an intolerable burden. In any case, the decision to bring this claim was made before the Claimant's Land Registry application was withdrawn.

119. I find that there is no arguable defence based on breach of a duty of candour.

120. I therefore conclude that there are no public law defences to go to trial.

Individual points of defence

First Defendants (Mr. and Mrs. Casey) and 10th Defendant (Mr. Thatcher)

121. These defendants acted in person throughout. Their defences only raised private law points which I have dealt with above. No **Equality Act** points are raised and they do not plead that either has any protected characteristics or that there has been a breach of the PSED.

122. They did serve skeleton arguments which also dealt solely with private law points. Mr and Mrs. Casey have only been moored in their present position since 30th November 2018 and therefore have no possessory rights over the adjoining riverbank. Mr. Thatcher has been at his current mooring since May 2017 and again, has no possessory rights.

123. There is some medical evidence in relation to both Mr. and Mrs. Casey from March 2020 and a letter from a doctor at Kingston Hospital in May 2023 relating to Mr. Thatcher. The latter does not suggest any disability or any underlying condition that might be relevant. The Claimant wrote to Mr. and Mrs. Casey and to Mr. Thatcher in October 2022 asking if there were any human rights issues and have never been told of any. If I had found that the represented Defendants had arguable defences on public law grounds then I would have allowed these Defendants to go to trial but there are no other defences advanced or which could, arguably, be available.

The Second Defendant – Mr. Sidei

124. Mr. Sidei pleads that he has been in possession of the riverbank alongside of which his two vessels are moored since May 2010. That is irrelevant since he has no arguable case that this gives him rights to moor and he does not claim title over the riverbed. Otherwise, he runs the same generic defences and public law defences that I have already ruled on earlier.

The Third Defendant – Mr. Kastrati.

125. Mr. Kastrati pleads that he moved his vessel to its current position on 18th February 2011 which would be more than 12 years before the issue of these proceedings. The claim to rights to moor are premised by his claim that he owns the riverbank with rights of a riparian owner where his vessel is moored. That does not provide him with a defence as I have set out above. No case is pleaded on any other basis. There are no other distinct points that arise on his defence. The owner of a stretch of riverbank has the same rights as any other person entitled to exercise public rights of navigation on the Thames and to access vessels from the riverbank and the right to remain stationary for a reasonable period of time only.

The Fourth Defendant – Mr. Crosland

126. Mr. Crosland was not represented. His defence was not in the hearing bundle but had been served in May 2023 and we were able to obtain a copy. It says that he has lived in his vessel for 16 years and he relies on his Protocol rights. He told me in court that he has moved around in his boat since he was 19 years old and clearly does not moor where he currently is the whole time. There were no other public law defences pleaded and his defence is therefore covered by my generic decisions.

The Fifth Defendant – Mr. Pebody.

127. Mr. Pebody also appeared in person and made submissions at the hearing. He has three vessels and told me that he lives in one of them. He put in a defence but did not serve any amended defence. He claims adverse possession but has never said when his vessels were first moored in their present positions and has not contradicted the Claimant's evidence that they were first seen less than 12 years before this claim was issued.

128. Apart from the generic issues he claims that his Article 8 rights have been infringed and that he is a "*bargee traveller*". There is no evidence or case put forward to show that the latter might, arguably, be a protected characteristic and therefore all his defence arguments are also covered by my earlier generic decisions.

The Sixth Defendant – Mr. Gjika

129. Mr. Gjika was represented by Mr. Stark. Apart from the generic defences, he pleads in his amended defence that the interests of his second son, Zeus, who was born on 30th November 2018, lived on his vessel for three years after his birth and since Mr. Gjika's separation from Zeus' mother lives on the vessel for half the week. It was for this reason that the planning inspector took the decision to recommend that the planning enforcement notice should not be enforced against him for. Otherwise Zeus lives with his mother in a home onshore.

130. Mr. Gjika's vessel was first recorded in its current position in 2019.

131. As explained earlier, the circumstances have changed and Zeus also has a home with his mother on dry land. I can see no reasonable argument that the balance of proportionality has shifted away from the Claimant's decision to bring these proceedings.

The Seventh Defendant – Mrs. Avdulaj

132. The Seventh Defendant did not attend the hearing and did not put in a defence. Her vessel was recorded as moving its mooring site between 2017 and 2019.

The Eighth Defendant – Mrs. Laugenie

133. Mrs. Laugenie's vessel was moored alongside an old wharf and she pleads that she moored there with the benefit of a licence from the Claimant for which she paid. There is no case pleaded or argued that this was a secure right beyond the term. The details are not pleaded. Subsequently, in September 2016 she pleads that she was asked to move her vessel away from the wharf, which she did. She says that she was told that this was because the Claimant could not receive payment for that mooring because it did not own that part of the riverbank.

134. Whether, as a matter of fact that is right, there is no case advanced by Mrs. Laugenie that she was entitled to anything other than a revocable licence or, at best, a contractual licence that was terminable at the end of a period of time that has long since expired. Even if, as Mr. Cottle submits, the notice period after termination of the contractual period was too short (in which case it would, at best, continue as a revocable licence) Mrs. Laugenie has now had plenty of time to move her vessel and that would not be a good defence to a possession order.

The Ninth Defendant – Mr. Cross

135. Mr. Cross was represented by Mr. Cottle. In September 2023 he made a witness statement saying that he had been moored in the same position for 8 years. He relies on the generic defences.

136. No other vessel owners have come forward to make claims to be able to remain in their current positions.

Issue 5 Can a possession order be made in these circumstances?

137. This leaves the issue of whether the court should make a possession order over this stretch of the Thames.

138. Mr. Stark and Mr. Cottle argue that it cannot because it would be too wide. They say that a possession order is *in rem* and therefore would require the removal of all boats moored anywhere along this stretch of the Thames (whether alongside the riverbank or midstream). Mr. Ostrowski submits that an order for possession is *in personam* and would only affect these Defendants and the unnamed owners of vessels which are named in these proceedings.

139. The starting point is **Secretary of State for the Environment, Food and Rural Affairs v Meier** [2009] UKSC 11. This case involved a number of travellers establishing an encampment in a woodland owned by the claimant. The claimant brought proceedings for trespass and sought possession of the encampment site but also of a number of other woodlands it owned in the area. It also sought an injunction restraining the defendants from re-entering the occupied site and the other woodlands.

140. The Supreme Court decided that a possession order should not be granted over areas of land which were separated from and unconnected with the occupied site (although an order might be appropriate over the whole of the wood of which the occupied site formed part).

141. The judgment of Lord Neuberger at paragraph 74 reveals the tension between the pragmatic approach and fundamental principle:

142. “If judges have developed the concept of an injunction which restrains a defendant from doing something that he has not yet done, but is threatening to do, it must be asked, should they not develop an order for possession which requires a defendant to deliver up possession of land it has not yet occupied but is threatening to occupy?”

143. The problem which often arose in traveller cases may also arise in the current case. Evicted defendants simply move to another area of land owned by the council and fresh possession proceedings have to be started. If I made a possession order for the eviction of the owners or occupiers of certain named vessels from the area of riverbed that they currently occupy they would be able to defeat the whole purpose by moving the vessels a boat length forward or backwards. As Lord Neuberger said, the short answer to this was that an order for possession would require the defendant to deliver up possession of land which he does not yet possess. This is clearly ludicrous.

144. Furthermore, while an order for possession is in personam because it only binds the persons against whom it is made, a warrant of possession requires the bailiffs to evict anyone found on the land to which it applies.

145. It is clear from paragraphs 64 and 65 of Lord Neuberger's judgment that while he rejected the validity of a possession order relating to land which was detached and wholly separated from the land which the defendants occupied this did not mean that the court could not make an order for possession of the whole of a wood of which they occupied only part, or the whole of a house which was not fully occupied. The was the view of the majority of the Supreme Court.

146. Mr. Ostrowski referred me to **Hackney BC v Powlesland and others** [2020] EWHC 2102 (Ch) in which a possession order was made against people who were blocking part of the public highway in protest against a development and, in particular, the felling of a particular tree. It became a focal point for environmental campaigners. Fancourt J rejected the argument that a possession order could not be made without interfering with rights of access for the general public over the highway (a point that Mr. Stark and Mr. Cottle make in this case in relation to public rights of navigation over this part of the Thames). He applied the decisions in **Wiltshire CC v Frazer** (1984) P & CR 69 which in turn applied **University of Essex v Djemel** [1980] 1WLR 1301. This disposes of the Defendants' objection to a possession order on the basis that it would or might interfere with public rights of navigation and temporary mooring.

147. It would be contrary to the Supreme Court decision in Meier for me to make an order over the whole of the stretch of river shown on the composite plan in the trial bundle at page 445. This is because substantial parts of it are not occupied by the Defendants or by any vessels identified by the Claimant as vessels it wants to move. There was also evidence of other river users who are moored along parts of this stretch whom the Claimant does not object to. While Mr. Ostrowski submitted that enforcement of a possession order over the whole stretch would not give rise to practical difficulties as each vessel to be moved would be identified, it would be wrong in principle to make a blanket order.

148. Mr. McKie Smith's evidence was that there were vessels moored at Sunbury Lock with the Claimant's consent and 30 or 40 moored to property leased to the Middle Thames Yacht Club on Sunbury Lock Island. There were also vessels moored in the lower end of Rivermead Island on the north bank and Middlesex side of the river with the Claimant's consent.

149. The possession order should cover that part of the river which comprises the blocks where the Defendants' and other vessels without permission are moored but be restricted so as to exclude those parts which are occupied by licence or consent. I will discuss the precise plan to be attached to the order when I make my final order. The order will not simply require the Defendants to move their vessels from their current "*footprints*" but to move out of the area where they are moored. It should exclude the significant parts were none are moored and the areas occupied by consent.

150. No injunction has been sought in this case, no doubt for good reasons, but if the Defendants do move their vessels or are moved then they must understand that they will face fresh proceedings for possession and the probability of an injunction if they re-moor their vessels in the area covered by the possession order without the Claimant's express consent. I am also prepared to consider making a declaration at this stage to clarify that their rights to moor on this stretch of the Thames are restricted to the rights set out in the TCA 1932.

Dated 04 March 2024