Neutral Citation Number: [2024] EWHC 825 (Admin)

Case No: AC-2022-LON-002530

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2024

Before :

MR. JUSTICE SHELDON

- -

Between :

ALISTAIR TROTMAN	**Appellant**
- and -	
THE ENVIRONMENT AGENCY	**Respondent**

- -
- -

Alistair Trotman (**represented himself**) for the **Claimant**
Nicholas Ostrowski (instructed by **The Environment Agency**) for the **Defendant**

Hearing dates: 12 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR. JUSTICE SHELDON

Mr. Justice Sheldon :

1. This is an appeal brought by Mr Alistair Trotman by way of case stated relating to a judgment handed down by District Judge Cooper ("the Judge") at Staines Magistrates' Court in October 2021, and a subsequent decision made by the Judge as to costs. After a trial lasting 3 days, the Judge found that Mr Trotman was guilty of two charges under byelaw 49(a) of the Thames Navigation Licensing and General Byelaws 1993 ("the Byelaws") and two charges under section 84 of the Thames Conservancy Act 1932 ("the 1932 Act"). Mr Trotman was fined £800 (£200 for each offence), and ordered to pay the Environment Agency's costs summarily assessed in the sum of £20,591.40.

Factual Background

2. This case concerns two vessels which are owned, controlled and managed by Mr Trotman: Rhythm of River (ROR) and KUPE. These vessels are houseboats. They are not propelled and require assistance to be moved either by tug boats or by towing by hand from the bank. The two vessels were moored by Mr Trotman in the downstream layby of the Molesey Lock on the River Thames. The Molesey Lock is situated in Surrey and is one of the locks owned and operated by the Environment Agency. The Environment Agency is the navigation agency for the non-tidal Thames upstream of Teddington Lock to the river's source at Crickdale.

3. The Molesey Lock was closed for repairs between October 2018 and March 2019. The Environment Agency wrote to Mr Trotman on 28 February 2019, notifying him that he was in breach of a byelaw preventing his vessels from remaining in a lock, cut or channel leading to or from Molesey Lock for longer than necessary for the convenient passage thereof, and in any event for longer than 24 hours. Mr Trotman was told that he was required to leave within 24 hours of the opening of the Molesey Lock. The Molesey Lock was reopened on 1 March 2019. Mr Trotman had not moved his vessels within 24 hours of the opening of the Molesey Lock and, on 6 March 2019, two notices were issued by the harbourmaster Nick McKie-Smith. The notices required Mr Trotman to move his vessels from the layby and any part of the lock or channels leading to and from the lock by midday on 7 March 2019. Mr Trotman did not move his vessels in accordance with the notices by midday on 8 March 2019, and as a result the Environment Agency towed the vessels upstream by tug.

4. The harbourmaster's direction with respect to ROR contained the following wording:

> "To: Alistair Trotman, Registered Owner and Master of the vessel "Rhythm of River".
>
> Under section 83 of the Thames Conservancy Act 1932 I have the power to, amongst other matters, give directions to regulate the manner in which any vessel lies in the River Thames and in relation to the position, mooring or unmooring, placing or removing of any vessel in the River Thames and the position, mooring or unmooring of any vessel lying at any public draw dock or landing-place in the River Thames (as defined in section 4 of that Act).

> Under section 84 of that Act I can have served on any master (which term is defined in section 5 of the Act) of a vessel within the Thames a notice giving my directions made under section 83 and any master who "shall not forthwith regulate such vessel according to such direction" shall be liable to a penalty, which currently stands at £1000.00.
>
> **I hereby direct you to unmoor "Rhythm of River" from the current mooring in the downstream lay-by of, and in the channel leading to, the Molesey Lock, in the County of Surrey, and remove the vessel from the mooring and any other part of Molesey Lock or the channels leading to and from Molesey Lock, by 12 midday on Thursday March 7th 2019, and not thereafter to moor the vessel within the River Thames at its present position or at any other place in the river, except a lawful mooring with the permission of the riparian owner, other than for a maximum period of 24 hours during the course of pleasure navigation.**
>
> **Date: Tuesday 6th March 2019**

(emphasis in original). The directions were signed by Mr McKie-Smith. The notice of the directions were handed to Mr Trotman by Elliot Beagles, the waterways team leader.

5. Four charges were brought against Mr Trotman by the Environment Agency:

    1. That Alistair Trotman between the 1st day of March 2019 and the 8th day of March 2019, being the person in charge of the vessel KUPE, on the River Thames at Molesey, in the County of Surrey, did cause that vessel to remain in the Molesey Lock or a channel or cut leading to Molesey Lock for longer than was necessary for the convenient passage thereof, not having the permission of the Environment Agency to do so, contrary to Byelaw 49(a) of The Thames Navigation Licensing and General Byelaws 1993 (which byelaws were made under section 233 of the Thames Conservancy Act 1932), offending against the said byelaw being declared, by Byelaw 85(a), to be an offence punishable by a fine at level 3 on the Standard Scale.

    2. That Alistair Trotman between the 1st day of March 2019 and the 8th day of March, being the person in charge of the vessel RYTHM OF RIVER (also known as ROR), on the River Thames at Molesey, in the County of Surrey, did, … cause that vessel to remain in the Molesey Lock or a channel or cut leading to Molesey Lock tor longer than was necessary for the convenient passage thereof, not having the permission of the Environment Agency to do so, contrary to Byelaw 49(a) of The Thames Navigation Licensing and General Byelaws 1993 (which byelaws were made under section 233 of the Thames Conservancy Act 1932), offending against the said byelaw being declared, by Byelaw 85(a), to be an offence punishable by a fine at level 3 on the Standard Scale.

    3. That Alistair Trotman on the 7th day of March 2019, being the master of the vessel KUPE then on the River Thames at Molesey in the County of Surrey, did ·fail to

regulate the vessel in accordance with the directions, made under powers given to a harbour-master by section 83 of the Thames Conservancy Act 1932 and contained in a notice in writing signed by Harbour-master McKie-Smith, served upon him under section 84 of the Thames Conservancy Act 1932, which directions required him to unmoor from the downstream lay-by of the Molesey Lock and to remove the vessel from any other part of Molesey Lock or the channels leading to and from Molesey Lock by 12 midday on Thursday March 7th 2019, in that the vessel KUPE was moored in the upstream channel leading to and from the lock after 12 midday on the 7th of March, 2019, such failure being an offence under section 84 of the Thames Conservancy Act 1932.

4. That Alistair Trotman on the 7th day of March 2019, being the master of the vessel RHYTHM OF RIVER (also known as ROR) then on the River Thames at Molesey in the County of Surrey, did fail to regulate the vessel in accordance with the directions, made under powers ·given to a harbourmaster by section 83 of the Thames Conservancy Act 1932 and contained in a notice in writing signed by Harbour-master McKie-Smith, served upon him under section 84 of the Thames Conservancy Act 1932, which directions required him to unmoor from the downstream lay-by of the Molesey Lock and to remove the vessel from any other part of Molesey Lock or the channels leading to and from Molesey Lock by 12 midday on Thursday March 7th 2019, in that the vessel RHYTHM OF RIVER was moored in the upstream channel leading to and from the lock after 12 midday on the 7th March 2019, such failure being an offence under the said section 84 of the Thames Conservancy Act 1932.

6. Mr Trotman denied the offences and made a number of legal challenges to the legality of the prosecution. Mr Trotman gave evidence at the Magistrates' Court, as did a number of witnesses for the Environment Agency. The Judge found Mr Trotman guilty on each of the four charges, and handed down a written judgment. At a subsequent sentencing hearing, the Judge imposed a penalty of £200 for each offence, and awarded the Environment Agency costs in the sum of £20,591.40.

7. Mr Trotman has appealed the Judge's decisions. The appeal is brought by way of case stated. Various drafts of the case stated were presented to the Judge. The version that is before the Court contains 7 questions, one of which is broken down into 2 parts. The Environment Agency, represented before me (and before the Judge) by Nicholas Ostrowski of Counsel, and Mr Trotman (who appeared before me and before the Judge in person) agree that 3 further questions should be considered by the Court. They have told me that it was their understanding that the Judge had agreed to add these further questions to the stated case, albeit a further version of the case stated containing these questions was not produced by the Judge. It seems to me that as these further questions arise out of the facts stated by the Judge and do not require any further evidence, and the further questions are essentially additional points of law that are clearly related to those already in issue, I should consider them in this appeal.

<u>The stated case</u>

8. In the stated case, the Judge set out a number of findings of fact:

> "a) The applicant owned controlled and managed two vessels ROR and KUPE

b) The vessels are used as houseboats and are homes of multiple occupancy

c) I heard evidence, photographs were produced and the Applicant accepts the vessels are three stories high.

d) The Applicant accepts the vessels are used as houseboats

e) The Applicant moored the two vessels in the downstream layby of the Molesey lock between October 2018 and March 2019

f) Molesey Lock and the tow path along the stretch of river leading to and from the lock is owned by the Environment Agency

g) The Environment Agency were at liberty to and did direct that the Applicant move his vessels

h) The Applicant was notified by email,1st class recorded delivery and notices were hand delivered to him requiring him to move his vessels

i) The vessels were moored variously in the layby to the lock, the cut or channel.

j) The channel cuts close to the river bank at Molesey lock

k) The Respondent did not take action in relation to the Applicant mooring between October 2018 and February 2019, the lock was being repaired at this time and therefore the vessels did not present a danger to pleasure boat users

l) Molesey lock was subject to repair between October 2018 and March 2019. The vessels disrupted the repair works

m) The Respondent wrote to the Applicant on 28th of February 2019 identifying that the Applicant was in breach of a Byelaw preventing vessels from remaining in the lock cut or channel leading to and from a lock for longer than necessary for the convenient passage thereof and in any event no longer than 24 hours

n) The Applicant received correspondence from the Environment Agency on February 27th 2019 apologising for the delay in opening the lock. The correspondence did not amount to consent to remain in the layby following the opening of the lock.

o) The Respondent required the Applicant to move the vessels, the Applicant was required to leave within 24 hours of the lock opening

p) The lock opened on 1st March 2019

q) the Applicants vessels remained in situ and on sixth of March 2019 two harbour-masters notices were issued by harbour-master McKie-Smith (one for each vessel) pursuant to his powers under the Thames Conservancy Act 1932 section 83 and s84

r) The notices required the applicant to move the vessels from the layby and any part of the lock or channels leading to and from the lock by midday 7th March 2019

s) The Applicant failed to remove the vessels in accordance with the notices and in consequence of this he was sent a letter by the Environment Agency notifying him that if he had not moved the vessels by midday 8th March 2019 the vessels would be towed upstream to a 24-hour mooring

t) The vessels were not moved and in consequence the Respondent towed the vessels by tug upstream

u) The Applicant consented to ROR being towed but did not consent to the towing of KUPE

v) At all times the Applicant was master of the vessels and was, at all times in charge of the vessels, notwithstanding that on occasion the Applicant was a number of metres away from one or other of the vessels

w) Upon the opening of the Molesey lock the Applicant's vessels presented a danger to other boaters.

x) The lock is close to the Weir and the positioning of the Applicant's vessels had the potential to force smaller boats into or towards the weir

y) The harbour-master and those acting under the direction of the harbour-master were at all times acting reasonably

z) The foliage along the tow path leading to and from the lock did not prevent the Applicant moving his vessels as was contended by the Applicant. The Applicant had access to a tug and had been offered assistance by the harbour-master.

aa) The Applicant was not impeded by storm Freya

bb) The Applicants vessels were moored in a layby which was part of the channel or cut leading to the lock, the vessels were moored to the towpath but their position on the water placed the Applicant in breach of Byelaw 49

cc) The Applicant was moored for longer than was necessary,

> dd) the Applicant was required to move, he did not move.
>
> ee) The Applicant was notified in writing and was given a harbour-masters notice in respect of each vessel

9. In the stated case, the Judge explained her opinion on a number of matters, including that:

   1) Byelaw 85 did not prohibit a prosecution. It was not necessary for the Environment Agency to issue a penalty notice, before pursuing a prosecution.

   2) Section 242 of the 1932 Act enabled the Environment Agency to prosecute for offences against the Byelaws.

   3) The Applicant was in breach of byelaw 49 by being in the layby, channel or cut leading to the lock.

   4) Under the 1932 Act the Environment Agency has the power to regulate the fresh water river and therefore the authority to direct a vessel to move.

   5) The charges against Mr Trotman were not invalid for encompassing a six-day period.

   6) The harbour-master's direction for the vessels to be moved was not *ultra vires*.

10. The Judge set out her findings of law as follows:

> "Byelaw 43 does not preclude Mr Trotman from being the master of a vessel whilst towing it.
>
> The harbourmasters directions were not *ultra vires*.
>
> The Conservancy Act 1932 does not give all boaters a statutory right to moor by virtue of identifying charges for mooring.
>
> The harbourmaster was entitled to give indefinite directions.
>
> The Environment Agency has the power to require moored boats to move from their moorings. The Port of London Act 1968 Section 112 does not prevent the harbourmaster requiring a moored vessel to move.
>
> The Port of London Act 1968 Section 118 does not prohibit the harbourmaster requiring the master of lighter to move where such vessel is moored in a channel cut or layby.
>
> Byelaw 93 does not prevent an individual being a master of a vessel if they are not on board.
>
> Byelaw 49 is not void by virtue of fixing a penalty.

> The Thames Conservancy Act 1932 does not grant mooring rights by virtue of setting mooring charges.
>
> The Stanford map could be relied upon in evidence to show the channel of the River Thames.
>
> The Environment Agency were entitled to require Mr Trotman's to move his vessels.
>
> The Thames Conservancy Act 1932 does not prevent courts of summary jurisdiction making determinations in respect of the byelaws.
>
> The Environment Agency are entitled to prohibit Mr Trotman mooring without the leave of the owner of land. The Environment Agency are entitled to place limits on the mooring by individuals.
>
> The Environment Agency have the power to regulate mooring and its duration.
>
> The harbourmasters directions were reasonabl[e] and lawful."

11. The questions that the Judge stated for the Court were as follows:

> 1. Is the environment agency entitled to prosecute without first issuing a fixed penalty in the following circumstances;
>
> a) Breach of Byelaw 49(a) which prohibits a vessel remaining in a lock channel or cut leading to or from the same longer than is necessary for the convenient passage thereof
>
> b) For failing to comply with directions given by a harbourmaster
>
> 2. Are charges in respect of a breach of Byelaw 49 invalid if they encompass a six day period
>
> 3. Are the charges invalid for failing to specify whether the vessels were in a lock channel or cut given that the vessels could move a short distance backwards and forwards which would mean the Environment Agency would be inhibited from prosecuting by the vessel moving a short distance
>
> 4. Does section 79 of the 1932 Act negate Byelaw 49
>
> 5. Does section 83 of the 1932 Act permit the harbour-master to compel someone to unmoor or move their boat notwithstanding their unwillingness to do so
>
> 6. Was I right to allow the Environment Agency to claim prosecution costs pursuant to section 18 Prosecution of Offences Act 1985
>
> 7. Was the award of costs in favour of the prosecution in the [sum] of £20,591 disproportionate in all the circumstances of the case.

12. The additional questions that I will consider are:

8. Was the Judge right to find that the harbourmaster's directions were not *ultra vires* despite:

a. The directions lasting indefinitely;

b. The directions requiring the Applicant to seek permission from the riparian owner before mooring; and

c. The directions permitting the Applicant to moor without permission only up to 24 hours during the course of pleasure navigation.

The Statutory Framework

13. Section 79 of the 1932 Act contains a public right of navigation on the River Thames. The provision states that:

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

14. It is clear on the face of the 1932 Act, therefore, that the public right of navigation on the River Thames is not absolute. It is subject to "the provisions of this Act". Further,

the right of navigation includes "the right to anchor moor or remain stationary for a reasonable time in the ordinary course of pleasure navigation", but this is subject to restrictions set out in byelaws made by the Conservators (whose shoes are now filled by the Environment Agency[1]), as well as any rights of riparian owners in the soil or bed of the Thames.

15. Section 233 of the 1932 Act empowers the Conservators to make byelaws for a number of purposes, including:

> "For the regulation management and improvement of the Thames and the navigation;
>
> For the prevention of obstructions in the Thames;
>
> For compelling vessels on the Thames to exhibit lights from sunset to sunrise;
>
> For the regulation of vessels on the Thames;
>
> …
>
> For compelling and regulating the measuring of lighters navigated on the Thames and the conspicuous and correct marking thereon by the owners thereof of the names and addresses of such owners and the burthen tonnage of such lighters;
>
> …
>
> For regulating the passage of vessels through locks on the Thames;
>
> For regulating the extent manner and times of the drawing down of Thames water by owners or occupiers of mills for repair thereof or of any floodgates or waterworks belonging thereto or for cleansing mill streams;
>
> …
>
> For regulating the navigation with a view to the safety and amenity of the Thames in relation to the purposes of this Act;"

16. Section 234 of the 1932 Act empowers the Conservators to impose reasonable penalties on offenders against the byelaws. Section 242 of the 1932 Act provides that:

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[1] The Conservators of the River Thames were a body originally incorporated by the Thames Conservancy Act 1857. They ceased to exist on 1 April 1974, and title passed to the Thames Water Authority, and subsequently to the National Rivers Authority on 1 September 1989. The Environment Agency was established by the Environment Act 1995 and the National Rivers Authority's functions were transferred to the Environment Agency by virtue of section 2 Environment Act 1995 and article 2 of The Environment Agency (Transfer Date) Order 1996, SI 1996/234.

> "Save as otherwise by this Act expressly provided all offences against this Act or any byelaw made under this Act for the time being in force and all penalties forfeitures costs and expenses imposed or recoverable under this Act or any such byelaw may be prosecuted and recovered in a summary manner Provided that costs or expenses except such as are recoverable along with a penalty shall not be recovered as penalties but may be recovered summarily as civil debts."

17. Section 83 of the 1932 Act sets out the powers of harbourmasters:

> "Any harbour-master may give directions for all or any of the following purposes (namely):—
>
> For regulating the time and manner in which any vessel shall enter into go out of or lie in the Thames and the position mooring or unmooring placing or removing of any vessel within the Thames;
>
> For regulating the manner in which any vessel within the Thames or lying at any public draw dock or landing-place in the Thames shall take in or discharge its cargo or any part thereof or shall take in or deliver ballast;
>
> For regulating the time and manner in which any vessel shall lie at any public draw dock or landing-place in the Thames and the position mooring or unmooring placing or removing of any vessel lying thereat . ."

18. In *Richard Hughes and Company v Fowey Harbour Commissioners* [1927] P 1, the Court of Appeal considered analogous powers of harbourmasters under section 52 of the Harbours, Docks and Piers Act 1847 (which contained the same language as in section 83 of the 1932 Act) and held that there might be circumstances under which a harbourmaster could give directions under section 52 which were operative for more than one occasion. Nevertheless, directions which were in the nature of general directions (in that case, imposing compulsory pilotage on a variety of vessels) could only be made through the byelaws regime. In my judgment, the same would apply to the harbourmaster's directions under section 83 the 1932 Act. The harbourmaster cannot give general directions; these would need to be effected via the Byelaw regime.

19. Section 82 provides for assistance that can be provided to harbourmasters, as follows:

> "The Conservators may from time to time by resolution under common seal authorise any one or more of their officers to assist any harbour-master in the execution of his duties or may authorise any such officer to exercise alone all or any of the powers contained in the provisions of this Act relating to harbour-masters and those provisions shall be read as if the expression " harbour-master " wherever therein appearing included any officer so authorised."

20. Section 84 provides for a penalty for failing to comply with the directions of the harbourmaster:

> "The master of every vessel within the Thames or lying at any public draw dock or landing-place in the Thames shall regulate such vessel according to the directions of any harbour-master made in conformity with this Act and any master of any vessel who after notice in writing signed by such harbour-master of any such direction served upon him shall not forthwith regulate such vessel according to such direction shall be liable to a penalty not exceeding five pounds."

21. Section 85 empowers the harbourmaster to remove vessels:

> "If the master of any vessel within the Thames or lying at any public draw dock or landing-place in the Thames shall not moor unmoor place or remove such vessel according to the directions in writing of any harbour-master given to such master such harbourmaster may cause such vessel to be moored unmoored placed or removed according to the directions aforesaid and employ a sufficient number of persons for that purpose and the expenses thereby incurred shall be paid by such master and may be recovered summarily as a civil debt or as a debt in any court of competent jurisdiction."

22. The Byelaws were stated to have been made under section 233 of the 1932 Act. They came into operation on 1 November 1994. Byelaw 49 provides for the "Operation of locks weirs and sluices", stating that:

> "a) No person shall:
>
> i. open or close or attempt to open or close the gate of any lock except by the means provided for that purpose or before the water is level on both sides of the gate;
>
> ii. draw or operate any sluice until the lock-gates are closed;
>
> iii. operate or leave open any sluice so as to waste water;
>
> iv. operate or leave open any lock-gate so as to risk causing any hazard or unreasonable hindrance to other users of the river or its banks towpaths or footpaths;
>
> v. operate any sluice otherwise than by means of the handle or other device normally used for that purpose;
>
> vi. cause or allow any vessel in their charge to remain in a lock or channel or cut leading to and from the same longer than is necessary for the convenient passage thereof except when permitted by the authority.

> vii. No person shall without having previously obtained the consent of an officer of the authority or having been expressly requested by such officer to do so, use or meddle with the gear at any lock or weir or with any sluice belonging to the authority.
>
> b) Provided that byelaw 49 (b) shall not apply to persons directly involved in the navigation of a vessel operating lock gear only when passing such vessel through by or over any lock belonging to or under the control of the authority at such times as a notice is being displayed which indicates that the lock is not attended at the time by an employee of the authority"

23. Byelaw 58 deals with the obligations of masters of vessels to officers of the Environment Agency:

> "The master of every vessel shall obey and conform to the directions of any officer of the authority relating to the use navigation mooring or unmooring of such vessel."

24. Byelaw 85 deals with penalties:

> "a) Any person who shall offend against any of these byelaws shall for every offence be liable to a penalty not exceeding: "
>
> (i) in the case of offences against byelaws numbered 5 to 23, 25 to 27, 29 to 60, 62 to 75, 84 and 85, level 3 on the Standard Scale;
>
> (ii) in any other cases, level 2 on the Standard Scale and in the case of a continuing offence to a further daily penalty not exceeding £10 (ten pounds) which said penalties shall be recoverable enforced and applied according to the provisions of the acts."

25. Outside of the 1932 Act, but relevant to the matters that this Court needs to consider is section 18 of the Prosecution of Offences Act 1985, which provides that:

> "(1) Where—
>
> (a) any person is convicted of an offence before a magistrates' court;
>
> (b) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
>
> (c) any person is convicted of an offence before the Crown Court;
>
> the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable."

Discussion

26. I shall take each of the questions stated by the Judge in turn.

Question 1: *Is the environment agency entitled to prosecute without first issuing a fixed penalty in the following circumstances:*

a) Breach of Byelaw 49(a) which prohibits a vessel remaining in a lock channel or cut leading to or from the same longer than is necessary for the convenient passage thereof

b) For failing to comply with directions given by a harbourmaster

27. Mr Trotman contends that the scheme of the 1932 Act requires the Environment Agency to issue a fixed penalty notice first if there is a contravention of a byelaw or a failure to comply with a lawful direction of the harbourmaster. Only if that fixed penalty notice is not complied with – by making payment of the stated fine – can the Environment Agency initiate a summary prosecution. Mr Trotman seeks to draw an analogy in this regard with certain motoring offences, whereby prosecution only takes place if a fixed penalty notice is not complied with. As a matter of statutory construction, Mr Trotman contends that section 242 of the 1932 Act assumes that a penalty has already been imposed or exists, before a prosecution takes place. In the instant case, no penalty notice was issued to him, and so Mr Trotman contends that the summary prosecution in the Magistrates' Court was *ultra vires*.

28. I accept that section 242 of the 1932 is not easy to read, given that it contains no punctuation. Nevertheless, it can be broken down into a number of different parts: (i) "all offences against this Act or any byelaw made under this Act . . . may be prosecuted and recovered in a summary manner"; and (ii) "all penalties forfeitures costs and expenses imposed or recoverable under this Act or any such byelaw may be prosecuted and recovered in a summary manner".

29. Where, therefore, the Environment Agency is dealing specifically with an offence against a byelaw (or the Act), it is empowered by the 1932 Act to prosecute in a summary manner. Where the Environment Agency is dealing with a penalty, this can also be prosecuted and recovered in a summary manner. There is no mention of a regime whereby prosecution and recovery can only be initiated in a summary manner after a penalty has been imposed and yet remains unpaid. Accordingly, Mr Trotman's argument is misconceived.

30. Mr Trotman was charged with a breach of byelaw 49 (allowing his vessel to remain in a lock, channel or cut leading to and from a lock for longer than is necessary for the convenient passage thereof), and byelaw 58 (failing to obey and conform to the directions of the harbourmaster). These are "offences" within the meaning of the byelaws, and so could be prosecuted summarily, and any penalties for these offences if successfully proved could also be recovered summarily.

31. The answer to this question, therefore, is yes: the Environment Agency is entitled to prosecute without first issuing a fixed penalty in the following circumstances: (a) breach of byelaw 49(a) which prohibits a vessel remaining in a lock channel or cut

leading to or from the same longer than is necessary for the convenient passage thereof; and (b) for failing to comply with directions given by a harbourmaster.

Question 2: *Are charges in respect of a breach of Byelaw 49 invalid if they encompass a six day period*

32. Mr Trotman contends that the penalty regime set out in the Byelaws requires there to be daily fines for breaches that take place over more than one day. As the charge for the breach of byelaw 49 covered a period of six days when it was alleged that he remained within the area of the lock, Mr Trotman argues this had to be subject to separate charges for each day that he remained within the lock's area. It could not, Mr Trotman argued, be subject to one composite charge.

33. This argument is totally misconceived. It is based on a misreading of byelaw 85. Byelaw 85 provides for two sets of circumstances. First, where there is a breach of certain byelaws, including byelaws 49 and 58 (as these fall within the numbering of "29 to 60"), the offender can be liable to a penalty not exceeding "level 3 on the Standard Scale". Second, "in any other cases" – in other words, in cases of offences that do not fall within the preceding clause of the byelaw – e.g. byelaw 24, 28, and 76 – the offender is liable for a penalty at "level 2 on the Standard Scale" or a further daily penalty where the offence is continuing.

34. As the byelaws that Mr Trotman was charged with offending against – 49 and 58 – fell within the first set of circumstances, there is no daily rate for a continuing breach. Rather, only one penalty is liable to be paid irrespective of the length of the breach. It is only byelaws that fall within the second set of circumstances (that is, the "other cases") where daily rates of penalty are payable.

35. The answer to this question, therefore, is no: charges in respect of a breach of byelaw 49 are not invalid if they encompass a six day period.

Question 3: *Are the charges invalid for failing to specify whether the vessels were in a lock channel or cut given that the vessels could move a short distance backwards and forwards which would mean the Environment Agency would be inhibited from prosecuting by the vessel moving a short distance*

36. Mr Trotman contends that the charges were impermissibly vague. In particular, they did not identify whether it was alleged that his vessels were in the lock, or whether his vessels were in the channel, or whether his vessels were in the cut. This contention is misconceived. The language of the charges reflected the wording in the relevant byelaw (49), which is written in the disjunctive. It is appropriate for the Environment Agency to use the disjunctive, especially as vessels may move around in the lock area at different points in time. I do not accept, as Mr Trotman argued, that he did not know what he was being accused of.

37. In argument before the Court, Mr Trotman suggested that his vessels were not kept in the "channel". This is not part of the question that this Court is required to consider and, in any event, refers to a finding of fact that the Judge made. It seems to me that the Judge was entitled to reach that finding on the evidence presented to her: that although the "channel" will generally be in the middle of the river, that was not the case at the location in question. The Judge was provided with a copy of a Standford map which

showed the location of the particular channel near the Molesey Lock and how it deviates from the central third of the river.

38. The answer to question 3, therefore, is no: the charges were not invalid for failing to specify whether the vessels were in a lock, channel or cut.

Question 4: *Does section 79 of the 1932 Act negate Byelaw 49*

39. Mr Trotman told the Court that he was not suggesting that section 79 of the 1932 Act negated Byelaw 49. He accepted that section 79 of the 1932 Act could sit comfortably with Byelaw 49. I agree. The public right of navigation – as set out in section 79 of the 1932 Act – is not unbounded. It is subject to certain constraints, including being limited by any byelaws that had been properly made by the Environment Agency: that would include byelaw 49.

40. The answer to this question, therefore, is no: section 79 of the 1932 Act does not negate byelaw 49.

41. During the course of argument, Mr Trotman suggested that byelaw 49 had been applied wrongly. His vessels were not, he contended, in the lock area for a period longer than was "necessary for the convenient passage thereof, and it is a matter for him to say what period was "necessary". This argument was not part of the stated case. In any event, it is misplaced. The question of what is "necessary for the convenient passage thereof" is not a matter for the vessel-owner to decide; it must be measured by something more objective. In any event, it refers to the period of "passage", which implies moving through, and does not apply to vessels (as here) which remained in the lock area.

Question 5: *Does section 83 of the 1932 Act permit the harbour-master to compel someone to unmoor or move their boat notwithstanding their unwillingness to do so*

42. Mr Trotman contended that, as a matter of statutory construction, section 83 of the 1932 Act did not permit the harbourmaster to compel someone to unmoor or move their boat contrary to their wishes. Mr Trotman focused his argument on the fact that section 83 refers to the term "regulating" which, he contended, had a different meaning to "compel", a term that is used elsewhere in the statute.

43. Mr Trotman is correct that the 1932 Act does refer both to the terms "regulating" and "compelling". Thus, section 233(1) of the 1932 Act, which concerns the power to make byelaws, includes many references to "regulating", but also a number of references to "compelling", with the latter term being used on its own and also with the former term. For instance, the power to make byelaws includes doing so for the purposes of "compelling vessels on the Thames to exhibit lights from sunset to sunrise", and also for "compelling and regulating the measuring of lighters navigated on the Thames and the conspicuous and correct marking thereon by the owners thereof of the names and addresses of such owners and the burthen tonnage of such lighters".

44. It seems to me that the reference to "compelling" involves a specific direction as to what a vessel owner must do. The reference to "regulating" will involve the setting of rules more generally, but can also include a specific direction by rule as to what a vessel owner must do, which is akin to compelling. The word "regulate" derives from the Latin root "regula", which means rules. In the New Zealand case of *Strachan v Marriott*

[1995] 3 NZLR 272, Blanchard J observed at p291 that "To "regulate" is defined in The Oxford English Dictionary as "to control, govern or direct by rule or regulation"" (emphasis added). Thus, the term "regulating" can include a direction which amounts to "compelling", but also includes more general rule making. The term "compelling" will not include the more general rule making.

45. Turning to section 83 of the 1932 Act, therefore, which provides that a harbourmaster "may give directions . . . [f]or regulating . . . the position mooring or unmooring placing or removing of any vessel within the Thames", this would include a direction by rule that the vessels owned by Mr Trotman could not be moored within the Molesey Lock or in the cut or channel leading thereto or therefrom, and this direction is akin to "compelling" Mr Trotman that he must move his vessels from the lock area.

46. Mr Trotman had also sought to argue that a direction under section 83 could not have been made by the harbourmaster in any event as there was another power open to him to use: section 86 of the 1932 Act. The latter provision empowers the harbourmaster to "unloose or slacken the rope of chain by which such vessel is moored or fastened" where the demand of the master of a vessel to do so is not complied with. It does not seem to me that this provision precludes a direction under section 83 of the 1932 Act. In the present case, the harbourmaster did not simply wish for Mr Trotman to unloosen the ropes to his vessels, or even to unmoor his vessels, the harbourmaster wished for Mr Trotman to move his vessels out of the lock area. Exercising the power under section 86 of the 1932 Act would not achieve that outcome on its own.

47. The answer to question 5, therefore, is yes: section 83 of the 1932 Act does permit the harbour-master to compel someone to unmoor or move their boat notwithstanding their unwillingness to do so

48. During the course of argument, Mr Trotman referred to the fact that the Judge had erroneously referred to Mr Beagles as the harbourmaster, when that was not his role. Mr Trotman contended that Mr Beagles was not entitled to serve the notice of directions from the harbourmaster as that could only be done by the harbourmaster or someone to whom the functions of the harbourmaster have been delegated, evidenced by application of the common seal, referring to section 82 of the 1932 Act. This was not one of the questions contained in the stated case, and so strictly speaking I do not need to address it. However, given that both parties referred to the point during the course of the hearing, and it may be of wider application than the present appeal, it may assist the parties if I set out my view as to the proper meaning of section 82.

49. It is clear to me that the service of the harbourmaster's directions does not constitute the "execution" of the harbourmaster's duties within the meaning of section 82 of the 1932 Act. That term applies to the actual carrying out of the harbourmaster's duties – that would include the making of the directions – but not the procedural or mechanical steps required to bring those directions to a vessel owner's attention. If Mr Trotman was correct, then it would not be possible for an administrative officer to post out any directions: that would be the function of the harbourmaster himself. That would be an absurd result, and the legislation could not have been intended to produce absurdity.

50. I shall address question 8 before considering questions 6 and 7: the latter two questions concern the costs that Mr Trotman was required to pay.

Question 8: *Was the Judge right to find that the harbourmaster's directions were not ultra vires despite:*

a. The directions lasting indefinitely;

b. The directions requiring the Applicant to seek permission from the riparian owner before mooring; and

c. The directions permitting the Applicant to moor without permission only up to 24 hours during the course of pleasure navigation

51. Mr Trotman contends that the harbourmaster's directions were *ultra vires* because they contained a number of elements: (a) they apply indefinitely; (b) they require him to seek permission from the riparian owner before mooring; and (c) they permit him to moor without permission for only up to 24 hours during the course of pleasure navigation.

52. I do not consider that the directions were *ultra vires*. They essentially set out in direction form the constraints that Mr Trotman would be under, in any event, in accordance with section 79 of the 1932 Act. Section 79 of the 1932 Act imposes a constraint on the public right of navigation on the River Thames by limiting the "right to anchor moor or remain stationary for a reasonable time in the ordinary course of pleasure navigation", and this period is ordinarily set at 24 hours. The public right of navigation in section 79 of the 1932 Act is also subject to the rights that riparian owners will have. Consent is needed from the riparian owner to moor a vessel to their land. Accordingly, a direction which states that permission is required from the riparian owner before mooring is simply restating the position that exists under statute.

53. It might be queried why this direction was made if it only codifies the law. The answer lies in the fact that, as explained to the Judge, there was a long history of disputes between Mr Trotman and the Environment Agency, and the Environment Agency wanted to remind Mr Trotman of his obligations or the limitations of his right to navigate the Thames. It seems to me that, in these circumstances, the making of the direction to Mr Trotman was a reasonable exercise by the Environment Agency of its powers.

54. The answer to question 8, therefore, is yes. The Judge was right to find that the harbourmaster's directions were not *ultra vires* despite: (a) the directions lasting indefinitely; (b) the directions requiring Mr Trotman to seek permission from the riparian owner before mooring; and (c) the directions permitting Mr Trotman to moor without permission only up to 24 hours during the course of pleasure navigation.

Question 6: *Was I right to allow the Environment Agency to claim prosecution costs pursuant to section 18 Prosecution of Offences Act 1985*

55. Mr Trotman contends that there is no power for the Environment Agency to claim its prosecution costs. He argues that the Environment Agency's powers with respect to regulating the usage of the River Thames is confined to the powers set out in the 1932 Act. The 1932 Act makes no mention of being able to recover prosecution costs.

56. This argument is misconceived. Whilst it is correct that the Environment Agency can only act within the powers conferred on it by Parliament, those powers are not only

found in the 1932 Act. Other legislation may also provide for the rights and responsibilities of the Environment Agency.

57. The 1932 Act affords the Environment Agency the right to prosecute offenders. The rules that apply to the Environment Agency as a "prosecutor" will be governed by rules that are set outside of the 1932 Act: the Criminal Procedure Rules. As a "prosecutor", the Environment Agency will fall within the ambit of section 18 of the Prosecution of Offences Act 1985, which enables the magistrates' court to order "costs to be paid by the accused to the prosecutor as it considers just and reasonable".

58. With respect to question 6, therefore, the Judge was right to allow the Environment Agency to claim prosecution costs pursuant to section 18 of the Prosecution of Offences Act 1985.

Question 7: *Was the award of costs in favour of the prosecution in the sum of £20,591 disproportionate in all the circumstances of the case*

59. Mr Trotman contended that the award of costs was disproportionate. The fines which he is liable to pay amount to £800 (£200 for each offence). The prosecution costs that he has been awarded to pay are more than 25 times that amount. The costs that were sought by the Environment Agency included the investigation costs, as well as costs of counsel and solicitor in preparing for and attending the hearing at the Magistrates' Court.

60. The prosecution costs that can be awarded under section 18 of the Prosecution of Offences Act 1985 can include the costs of the investigation that preceded the prosecution: see *R v Associated Octel Co Ltd* [1995] Cr App R (S) 435. The sentencing court must have regard to the means of the offender when imposing fines, compensation and costs to ensure that "the overall outcome is just and proportionate": see *London Borough of Barking and Dagenham v Argos Ltd* [2022] EWHC 2466 (Admin) at §18.

61. The relevant legal principles governing the relationship between the size of the fines or penalties and the prosecution costs awarded to be made by the offender were considered by the Divisional Court in *Ashgrove (Swansea) Ltd v Welsh Ministers* [2016] EWHC 3786 (Admin). That case concerned a prosecution by the Welsh Ministers for breach of regulations governing the operation of care homes. The relevant company and director were each fined £2,250. This was reduced by the Crown Court on appeal to £2,050 for the company and £1,350 for the director. The prosecution sought its costs under section 18 of the Prosecution of Offences Act 1985 in the sum of £101,080.90. The judge found that the reasonable costs incurred were in the sum of £79,511.62, and decided that the appellants should pay the whole of the costs apportioning them between the company in the sum of £67,571.62, and the balance of £12,000 to the director.

62. It was contended that the costs were disproportionate to the fine. The Divisional Court referred to a previous judgment of Bingham LCJ in *R v Northallerton Magistrates' Court* [2001] 1 Cr App R(S) 136, where the applicable principles included the following:

> "While there is no requirement that any sum ordered by justices to be paid to a prosecutor by way of costs should stand in any arithmetical relationship to any fine imposed, the costs ordered

> to be paid should not in the ordinary way be grossly disproportionate to the fine. Justices should ordinarily begin by deciding on the appropriate fine to reflect the criminality of the defendant's offence, always bearing in mind his means and his ability to pay, and then consider what, if any, costs he should be ordered to pay to the prosecutor."

In *Ashgrove*, the Divisional Court went on to say at §§27-28 that:

> "In our judgment, it is clear that when looking at the question of proportionality cases will be rare that consideration of the lack of proportionality between the amount of the fine and the amount of the costs will arise where, as in the present case, the offender has the means to pay. Parliament may have set out a fine at a low level but once a judge has determined, as the judge did in this case, on an unchallenged basis, that the costs had been reasonably and properly incurred in the prosecution, it is unlikely to be the case that simply because the fine is small that the amount will be disproportionate to the costs.
>
> That is because there is the strongest possible public interest in ensuring that cases are conducted proportionately. It is very important, as the Court of Appeal (Criminal Division) has said on many occasions, as has this court, that the parties must endeavour to agree as much as possible to ensure that the charges that are made are narrowed to the proper extent, and that the evidence is confined and dealt with within an appropriate time."

63. It is clear from these cases that the amount of costs and the size of the fine payable may be relevant to the proportionality analysis, especially in circumstances where there is a stark difference between the two, and where the defendant's ability to pay costs is somewhat limited.

64. In the instant case, I have been provided with a note of the Judge's sentencing remarks prepared by Mr Ostrowski. He has informed the Court that it was not a verbatim note. Mr Trotman has had an opportunity to review the note, and he did not take issue with any of its contents. It seems to me, therefore, that although I do not have a transcript of the actual judgment of the Judge, I have as close an approximation to it as is possible. It would not be proportionate for me to adjourn proceedings so as to obtain a transcript, especially where the parties are in general agreement as to what was said by the Judge.

65. Based on the note, it can be seen that the Judge first looked at the investigatory costs for the officers of the Environment Agency. These were reduced by her to a sum of £6,194. With respect to legal costs, the Judge found that it was not necessary to instruct counsel and a senior solicitor, so she made a reduction for the duplication. The Judge also deducted conferences and meetings with the disclosure officer, as well as consideration of admissions made by Mr Trotman. The total legal fees that the Judge allowed for the solicitor was in the sum of £7,147, in addition to counsel's fees of £12,250.40. In all, the Judge allowed £25,591.40 for the prosecution costs.

66. The Judge went on to consider Mr Trotman's ability to pay. Based on the income that he had put forward, the Judge noted that even at the reduced rate the costs would be 1.5 times Mr Trotman's income.

67. The Judge stated that she needed to take into account proportionality. In doing so, the Judge stated that Mr Trotman had elongated the proceedings by adducing evidence that was not relevant, and serving information that was late on the Environment Agency and the court, which meant that time had to be set aside to consider further documents. The Judge decided to reduce the costs against Mr Trotman to £20,591.40. The Judge then went on to order the fines that needed to be paid on top of the costs: in the sum of £800; and a further victim surcharge in the sum of £80.

68. In my judgment, the Judge erred in her approach to proportionality, as she does not appear to have considered at all the relationship between the fines and the prosecution costs as part of the proportionality analysis, even though there is clearly a gross differential between the two and it was known to the Judge that Mr Trotman had limited income.

69. There is no specific mention of the relationship between the size of the costs and the size of the fine in the notes of the Judge's sentencing remarks produced by Mr Ostrowski. Furthermore, the Judge made her decision as to the proportionality of the costs award before she even referred to the level of the fines. This strongly suggests that the size of the fines was not seen by the Judge to be relevant to the proportionality analysis at all.

70. If the Judge had been mindful of the relationship between the size of the fines and the amount of the prosecution costs, it is likely that she would have expressly said so as the disparity is very stark: the final award of costs was more than 25 times the size of the fines.

71. In light of this error, it is open to this Court to determine the matter, and it seems to me that it would serve the overriding objective if I did so, rather than remit the matter for a further hearing before the Judge.

72. I will not second guess the reduction that was made for proportionality other than the issue of the disparity, as the Judge was obviously familiar with the detail of the proceedings and Mr Trotman's responsibility for elongating those proceedings and it does not seem to me that she erred in her general approach. The error concerned the Judge's approach to disparity.

73. It seems to me that applying a measure of 15 -- that is, an award of costs which is 15 times the size of the fines – would be about right on the facts of this particular case: a sum of £12,000. It would allow the Environment Agency to recover more than 60% of their reasonable legal costs (the sum of £19,397.40). The measure of 15 is also materially less than the ratio of costs to the fines in the *Ashgrove* case itself (there the ratio was just over 23). A lower ratio is justified here given that Mr Trotman's ability to pay is less than that of the defendants in *Ashgrove*.

74. The answer to question 7, therefore, is yes: the award of costs in favour of the prosecution in the sum of £20,591 was disproportionate in all the circumstances of the case. A proportionate sum would be £12,000.

Conclusion

75. In my judgment, therefore, this appeal succeeds on question 7, but fails on each of the other questions.