FURTHER ADVICE

Regarding the law of navigation on non-tidal inland waters in England and Wales

1. I am asked to address an advice from Lisa Busch QC (LBQC) of 26 August 2016, considering the respective positions of Dr Caffyn and myself as to whether there exists a universal public right of navigation (PRN) throughout England and Wales for canoeists, paddle boarders and the like. This PRN is said by Dr Caffyn to have originated between 1189 and 1500 in all usable rivers (which he defines as all rivers which could now be used by canoes).

2. I have advised at length in the past that no such PRN exists, and that the existence of PRN on non-tidal rivers depends on a sufficiently long period of 'user' being established on the stretch of river in issue. This is the principal difference between myself and Dr Caffyn. I remain of that view, having read and considered LBQC's advice. A short summary of my views can be found on the first page of my first (September 2015) advice.

3. LBQC considers that Dr Caffyn's thesis is arguable. She acknowledges that I have set out the "*orthodox stance*" at [7]; that "*the current common law acceptation of the source of PRN on non-tidal rivers is incompatible with the position favoured by Dr Caffyn*" at [25]; that "*the weight of authority is inconsistent with*" Dr Caffyn's position at [35]; and, at [45], that "*[t]here can be no doubt that Mr Hart QC has correctly described the common law position as it currently stands*."

4. But, at [45], she summarises the strands of reasoning which she says demonstrate the arguability of a different view. These strands are as follows.

    a. Bracton did describe the English common law of his time when he discussed water rights, and PRN in particular: LBQC [45], at (1).

b. The current common law on PRN derives from the 19th century and its gearing towards the protection of individual private interests. That position ignores the fact that private owners, as grantees from the Crown, take their land subject to any public rights to which the Crown was subject: LBQC [45], at (2) and (3), relying on Best J in *Blundell v. Catterall* (1821) 5 B & Ald 268, and Bates, *Water & Drainage Law*.

c. There is a wealth of evidence that navigable rivers were in fact navigated in the mediaeval period, and a dearth that the same arose by licence of riparian owners. This should give rise to a presumption of PRN which it was for riparian owners to rebut: LBQC [45] at (4).

d. There are good grounds for distinguishing the mode of creation of PRN from that applicable to rights of way on land: LBQC [45] at (5).

e. The *Newhaven/East Sussex* case indicates that there may be scope for revisiting the decision in *Blundell* and related issues: LBQC [45] at (6).

5. I now address these contentions.

(1) Bracton = the common law

6. Bracton wrote his *De Legibus et Consuetudinibus Angliae* sometime around 1250. Following the Roman Institutes, his treatise is divided into three parts, namely (1) Persons, (2) Things and (3) Actions. The passage concerning water and rivers is within the part headed Things. Pollack & Maitland, *The History of English Law,* Vol.1 p.230, give an overview of the work as follows:

"*It is to his law of actions that we must often look for substantive English law. To a high degree in his treatment of "persons," to a less, but marked, degree in his treatment of*

"things" he is dependent on Azo[1] *and Roman Law. It is only as he approaches the law of 'actions' that we begin to know that he is giving us practicable English and not speculative jurisprudence*."

See also pp.207-208 of this work, and also p.31 of Stuart Moore's exhaustive *History of the Foreshore* (1888), summarising Maitland, to similar effect to the above quotation "*when dealing with high generalities he copies from the Roman Law, but when dealing with concrete matters he draws his authorities from the records of the English courts.*"

7. Bracton's full dependence on Justinian's Institutes (a 6th century summary of Roman law by the emperor of that name) is conveniently set out at p.32 of Moore. For present purposes, it is a full copy-out. The gist is that all "perennial" (i.e. permanently flowing) rivers are public; only temporary rivers (those that do not flow all year round) are private. Use of river banks is a public right, even though those banks may be owned by riparian owners.

8. Other than its appearance in Bracton, and Best J's 19th century observations in *Blundell* to which I will turn, what evidence is there that Bracton's views on the ubiquity of water rights represented the 13th century common law on the subject? In truth there is no such evidence.

9. Moore's work is very helpful on the context of those times. The first chapter of his *Foreshore* book (summarised at its p.1) sets out a host of charters (i.e. grants of land) between the 7th century and the 13th century in which grantees were given rights over water via passing of the soil, whether in rivers or in the sea. The grant would be "*to the mid-stream of non-tidal rivers*": p.1 of Moore. The effect was to pass *"the shore of the sea and the shore and bed of tidal and non-tidal rivers. There is no suggestion of any reservation to the Crown, and it is evident that the shore was treated as parcel of the estate or manor*": pp.14-15.

10. This is inconsistent with the thesis that there were then no legal rights in respect of non-tidal waters. Bates (13.15) identifies "*the distinction between the automatic right to navigate over tidal waters and the limited right over non-tidal waters rest on the ownership of the bed of the*

[1] A 13th century lawyer from Bologna who summarised Roman law, whom Bracton studied.

waters". Apart from the charters, we see early cases in which there were fishing disputes and litigants were relying on their ownership of the soil of the river to underpin their rights. The earliest I have found is set out in Hale, p.1 of *De Jure Maris et Brachiorum eiusdem*; in a claim by Baker against Hercy before Nottingham Assizes about fishing in the River Idle (a tributary of the Trent), the jury's verdict referred expressly to the ability of riparian owners, including Baker, to fish to the mid-stream point ("*usque filum aquae"*). Hercy was found not to have a right to fish the river and thus lost the case. But note the date of decision: 1290, within 25 years of Bracton's death in 1267. It will be readily appreciated that the underlying land ownership of rivers and attendant fishing rights is inconsistent with the Justinian/Bractonian view that all perennial rivers are public, both as to navigation and fishing.

11. Now to the 19th century case of *Blundell*, and the dissenting judgment of Best J relied upon by LBQC. The case did not concern rivers at all. At issue was the asserted right of the defendant to move bathing machines across a foreshore owned by the plaintiff who was lord of the manor. The debate broadened into the question of whether there was a common law right to get to the sea for bathing purposes. The defendant based his case on Bracton's views that the sea and shore of the sea are common, and so no-one is to be forbidden access to the sea. The majority three judges said that Bracton was not part of the common law. Best J dissented, saying that the passage of Bracton relied upon reflected the common law, and that in any event bathing was a universal practice.

12. At her [30]-[31], LBQC cites a long passage from Best J's judgment, which includes consideration of the right of access to navigable rivers, as well as to the sea. The issue of access to non-tidal rivers did not directly arise, given that the claim concerned access to the sea. Best J says all of this law as to navigable rivers was good law at the time Bracton wrote it. More recent legal historical scholarship (i.e. Maitland summarised above) supports the majority view that Bracton's views on such issues should not be assumed to be the common law of the time.

13. In seeking to dismiss the objection that, contrary to Bracton, the common law at the time of the *Blundell* decision did not provide for access to riverbanks to allow vessels to moor and discharge their cargo, Best J notes (without explanation) that many rivers have been rendered

navigable since Bracton wrote, which in his (Bracton's) time had been private streams. Bracton had in fact said something different, as he stated that all perennial rivers were public, irrespective of their navigability. But the process by which public rights might arise in respect of private streams is of note, because according to Best J: "*the extent of the grant must be ascertained from usage "*

14. Even if, contrary to his three brother judges, Best J's views reflected the then common law (which in my view, they do not), there is nothing in those views which answers the current, and quite specific, difference between Dr Caffyn and myself. Take the case of a river which has not in fact been navigated in the past, for whatever reason, whether it be the size or depth of the river, obstructions within it or the lack of population or tradable resources in the area. Canoeists or paddle boarders now want to use it. Roman law as set out in Bracton (in the absence of any later developments) would answer the question in favour of the canoeists. It is far from clear that Best J would answer the question in the same way, in the absence of actual usage of the river in question. And the current view of all UK common law courts is that user is required, which LBQC accepts.

15. More generally, the *dicta* from Best J's judgment were pronounced in a very different context, namely the sea-shore. As I have noted, the status of navigation or indeed fishing in non-tidal rivers was not in issue in the case. Yet, by the time of *Blundell*, the difference in status between tidal and non-tidal rivers had been established for some time, notably in Hale speaking judicially (*Lord Fitzwalter's case* 1 Mod. 105 decided in the 1680s) and, extra-judicially, in *De Jure Maris*. This difference was not reflected in the passage of Bracton on which Best J was relying in *Blundell*. Hence my view that nothing in Best J's conclusions about rights over the sea-shore would tend to answer the present issue.

(2) The 19th century shift?

16. If the distinction between tidal and non-tidal rivers (and the different property rules applicable to them) well pre-dates the 19th century, which it does, then there is no great shift of judicial opinion between earlier times and the 19th century decisions. The courts (and the textbooks) had to devise an accommodation between the rights of the riparian owners and the interests of

river users, which they did by recognising the former, subject to proof of long user by the latter.

17. I should engage with the passage from John Bates's book (*Water and Drainage Law*) at 13.18 which is set out at [10] of LBQC's opinion, and which is summarised at her [45](3).

18. First of all, one has to read it in context. It is plain from 13.15 of Bates (to which I referred at [26] of my first advice of 28 September 2015), that he does not believe in universal PRN. Hence, with my emphasis, "*Above the flow of the tide the land beneath a river or stream is privately owned so that while the public can acquire navigational rights over such waters, they cannot have them of right. A river may be navigable in fact but the right to use it will, unless otherwise shown, remain with the riparian occupier….The public right of navigation in non-tidal waters can only by created by immemorial user, express grant or under statutory powers."* See also 13.22.

19. This last sentence, setting out the three ways in which a PRN may arise, gives Bates's view. The later passage at 13.18 cited by Dr Caffyn, and referred to by LBQC, comes in the context of Bates's discussion as to whether a PRN can arise via a fourth method, namely via an express or implied dedication. Bates doubts this, by reference to Lord Fraser in the *Wills Trustees* case, who had pointed out the differences between rights of way on land and PRN. In so doing, Lord Fraser says that the "*purpose of use by the public is not in my opinion to constitute the right but to prove that the river is navigable. The theoretical basis of the right is that the Crown has not, and could not have alienated the right to use the river for navigation but has retained it in trust for the public…*". It is in the light of this quotation that Bates introduces his contention that a right of navigation formed no part of the royal prerogative of the king (and of any grantees from the king), and that the king and his grantees took subject to any such PRN. He also says that it was in Henry VII's time that "*private owners had come to own the bed of the river*".

20. How then to square Bates at 13.15 (and his opinion that there are three methods of a PRN arising, and so by definition there is no universal PRN) with what he says at 13.18? This can

be done readily by assuming that members of the public who have "immemorially" used a river (13.15 last words) are those "*who could navigate the river*" and thus "*had the right to do so*" (13.18). On his supposition that there was a relatively late assumption (in the reign of Henry VII) of ownership of the bed of the property, this would make the text internally consistent. A later assumption of ownership of the stream bed would take subject to existing PRN established by immemorial use.

21. As will be apparent from the above, I dispute the premise that the ownership of the bed of a river first arose as late as the reign of Henry VII (1485-1509). I point to case law going back to 1290, and (thanks to Moore's late 19th century researches) grants going back into pre-1066 Saxon times. Bates cites, as authority for the change in ownership having occurred during Henry VII's reign, a passage from Callis (1622) at p.78 of the 4th edition (1824). This in turn refers to a claim for trespass (the taking of two salmon) which the defendant sought to justify by reference to his proprietary entitlement to fish "*usque ad medium aquae.*" But this case does not begin to establish that such issues did not arise before this claim.

22. For the purposes of the present debate, this dispute as to when private property was first recognised in respect of the bed of a river may not matter. Bates's opinion (and mine) is that a PRN has to be established by user, prior to the point when the grantee obtains title to the bed of a river, or indeed during the grantee's occupation – otherwise the grantee does not take subject to any PRN.

(4) Evidence of navigation

23. Here, LBQC's views tend to obscure the real differences between myself and Dr Caffyn. As I have always advised, I have no difficulty with the general proposition that there was considerable use of many rivers for commerce in mediaeval times, and insofar as that could be shown to have occurred for a considerable period, then PRN could be established for the part of the rivers so used. But Dr Caffyn seeks to establish a good deal more than that. He says that <u>any</u> river which could now be used by a canoe enjoys a universal right of PRN, irrespective of its previous use. LBQC contends that it is for riparian owners to rebut any presumption of long use or immemorial use. There is no legal basis for this contention, and it

does not follow if there is no relevant history of use or immemorial use – which is the underlying difference between us. If mediaeval commercial traffic could not have traversed, a given stretch, then it is irrelevant that a canoe could now do so.

24. I should also repeat one important point which I have made in my previous advices, and which bears on LBQC's reliance on evidence about mediaeval river-borne commerce. It proves little or nothing to show that there is a history of navigation at downstream stretch A on a river, if upstream stretch B is now in issue. This is well demonstrated by the history of the Welsh Dee. There is established navigational use to Chester to and from the sea, and some evidence of use from Overton (floating timber from nearby forests downstream to Chester). But the contentious stretches are in the region of Llangollen, well upstream of Overton. There are powerful reasons for concluding that there was no mediaeval use of these particular upstream stretches. Compare Dr Caffyn's Appendix A to his dissertation which includes the Welsh Dee as a river "made navigable" because timber was sent down to Chester. That may tend to mislead unless canoeing interests are told that this evidence only applies to certain stretches of the river over which such historical commercial use/floating can be demonstrated.

(5) Grounds for distinguishing between establishment of PRN and rights of way on land

25. I have touched on this above. *Wills Trustees* (followed by *Brotherton)* is authority for the establishment of PRN by user. It also (per Lord Fraser) tends against the proposition that a PRN may arise through dedication. But this issue about dedication is irrelevant to the current debate, which is whether a PRN arises via the theoretical usability of a river, or via its actual use. The difference between theoretical navigability and demonstrated navigation is not an academic one because canoes can use stretches of rivers which conventional commercial traffic (even mediaeval traffic) could not possibly have used.

(6) The impact of the Newhaven/East Sussex case on the Blundell case

26. LBQC contends that the decision of the Supreme Court in *Newhaven* indicates that there may be scope for revisiting (a) the decision in *Blundell* and (b) the debates covered in her advice.

27. I have no difficulty with (a) insofar as a court *might* these days recognise a right to access to the sea, but reversing the decision in *Blundell* is not a decision which would affect the answer to the current problem. Hence LBQC's contention (b) simply does not follow.

28. The Supreme Court in the *Newhaven/ East Sussex* case addressed the outcome of *Blundell* (no right to access to the sea shore) by recording that none of the parties were contending that *Blundell* was wrongly decided but that there were grounds for re-considering the result when the issue did arise. The majority thought that departing from *Blundell* would be a "strong thing" (at [47]), albeit acknowledging that the dissent of Best J was "not without force"; but the court would assume the correctness of the decision for purposes of deciding the remaining questions in the *Newhaven* case. Lord Carnwath went a little further. He acknowledged certain criticisms of the *Blundell* ruling identified by the Supreme Court, to the extent that the issue merited further airing. Comparative decisions suggested that there was consensus on the recreational use of the foreshore but differences as to how such use should be legally justified. On the arguments put to the SC, he concluded that, in the absence of any common law right to use a beach, its use would *prima facie* be impliedly permitted by the owners.

29. So the idea that there may be a presumptive right to use a beach, grounded in either a common law right to do so or an implied permission to do so, is now plainly arguable at appellate court level. But the reasons for revisiting the result of *Blundell* contemplated in *Newhaven* do not assume any reconsideration of the issues of navigation which may bear on the issues between Dr Caffyn and myself. There is no evidence in *Newhaven* that the Supreme Court may wish to revisit Bracton's views regarding non-tidal rivers, or the case law on the need for user for PRN in such rivers (*Wills Trustees, Brotherton* or *Rowlands)* none of which, unsurprisingly given the different subject matter, was cited to it.

30. Again, it is worth reflecting on the difference in context. All are agreed that the public has the right to use the sea for fishing and navigation. The power of the pro-beach access argument is that such access is merely facilitative of those acknowledged public rights. The current question is whether there are in fact public rights of navigation which take precedence over private rights of ownership.

Conclusion

31. I have considered carefully LBQC's opinion, and reconsidered Dr Caffyn's views. They do not affect my views that a court today is highly unlikely to accept Dr Caffyn's thesis and

hence reverse the established common law position that there is no universal PRN and that user is required to establish PRN. The law, despite LBQC's arguments to the contrary in her [46], *does* support the view that canoeists will be trespassing on the property of riparian owners unless they paddle by agreement or unless the stretch of river is subject to PRN established by long user.

8 January 2017 **DAVID HART Q.C.**