Case No: A2/2015/1197

Neutral Citation Number: [2017] EWCA Civ 135
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
QB/2014/0640

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2017

Before:

LORD JUSTICE JACKSON
LORD JUSTICE McCOMBE
and
LORD JUSTICE SALES

- -

Between:

	MATTHEW JONES	**Appellant**
	- and -	
	CANAL & RIVER TRUST	**Respondent**

- -
- -

James Stark (instructed by The Community Law Partnership Ltd.) for the Appellant
Christopher Stoner QC (instructed by Shoosmiths LLP) for the Respondent

Hearing date: 14 February 2017

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Judgment **Lord Justice McCombe:**

(A) Introduction

1. This is an appeal, brought with permission granted by Lewison LJ, from the order of 6 March 2015 dismissing an appeal from the order of 24 September 2014 of the Bristol County Court striking out paragraphs 10 to 12 inclusive of the Appellant's defence in the proceedings.

2. The Respondent's claim in the action is for a declaration that it is entitled to remove the Appellant's boat, "The Mrs T", from its property, identified as part of the canal known as the Kennet & Avon Canal ("the K & A Canal") near Bradford-on-Avon, pursuant to statutory powers under s.8 of the British Waterways Act 1983 and s.13 of the British Waterways Act 1971. It also applies for injunctions restraining the Appellant from mooring his vessel on the K & A Canal and from

mooring, navigating or securing the boat on any of its canals or waterways. The relevant paragraphs of the Defence raised a number of points in resistance to the claim, including a defence based upon Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR").

(B) Background Facts

3. The background facts are helpfully set out in the judgment of the learned judge in the County Court and counsels' helpful skeleton arguments from which much of the following is gratefully derived.

4. The inland waterways of England and Wales are to a significant extent vested in, and are managed and controlled by, the Respondent, the statutory successor from July 2012 to the British Waterways Board ("the BWB"). Anyone wishing to navigate or moor on such waterways requires one or more of a number of licences or consents from the Respondent. The various licences or consents to navigate are identified in section 17 of the British Waterways Act 1995. As in the present instance the Respondent may issue a consent to the user of the vessel on such a waterway on the basis that its operator satisfies the Respondent that it will be used bona fide for navigation on the waterways without remaining in any static position for more than 14 days or such longer period as is reasonable in the circumstances or on the basis the Respondent is satisfied that a mooring or other place where the vessel can reasonably be kept and may lawfully be left will be available: see s.17 of the British Waterways Act (below). There are also powers conferred upon the Respondent to remove vessels in certain circumstances under s13 of the 1971 Act and s.8 of the 1983 Act, where a boat operator has failed to comply with the terms of his licence.

5. From about 2011, the Appellant has had his boat, "The Mrs T", on the K & A Canal. He has had a licence (originally granted) by the BWB, based upon a declaration by him that the vessel would be used for genuine navigation during the licence period. The Respondent took the view that the Appellant was not using the vessel in the manner permitted and, based on observations made, it considered that the boat had been confined to the same 5 km section of the canal from October 2011 to January 2013. It based its view on guidance that BWB had previously published (as to the correct operation of s.17 of the 1995 Act) in October 2011 and revised in May 2012 to reflect the transfer of functions to itself. The correct application of s.17 to the facts of this case is very much in issue between the parties in the action and it is common ground that the issues arising under the section will have to go to trial.

6. As a result of its view that the Respondent had contravened the terms of his licence, in January 2013 the Respondent notified the Appellant that it was treating the licence as terminated and gave the Appellant 28 days in which to remove the vessel from the Respondent's owned and managed waters. The Appellant failed to comply with this demand.

(C) The Proceedings

7. On 8 January 2014 these proceedings were commenced by a Claim Form under Part 8 of the Civil Procedure Rules ("CPR"). By Defence dated 14 March 2014 the Appellant took issue with the Respondent's contention that he had failed to comply with his licence conditions and with the Respondent's reliance on the Guidelines in its interpretation of s.17 of the 1995 Act. A failure by the Respondent to have regard to the duties under the Equality Act 2010 is asserted and then in paragraphs 10 to 12 the Appellant made the following averments, invoking Article 8 of the ECHR:

> "10. The Claimants have failed to consider the Article 8 rights of the Defendant adequately or at all, they have failed to consider:
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> a. the Defendant has a disability which impedes his progress around the Kennet and Avon;
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> b. the Defendant's physical difficulties;
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> c. whether the Defendant would be able to comply with the continuous cruising requirement within a reasonable period;
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> e. [sic: d] the Defendant would be rendered homeless;
>
> e. the interests of waterways users who rejected the Claimants consultation for a distance to be specified during continuous cruising in London (and it is averred this is applicable nationally);
>
> f. whether the Defendant should be entitled to apply for a residential mooring where he currently resides;
>
> g. whether the Defendant has used his best endeavours to find a residential mooring, but has been unable to find one;
>
> h. that there is national shortage of available residential moorings suitable for the Defendant.
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> In the premises it is submitted that the Claimants' decision to seek an injunction and deprive the Defendant of his home is disproportionate and amounts to a breach of his Article 8 rights in breach of Schedule 2 of the Human Rights Act 1998.
>
> 11. Further, it is submitted that the Claimants have failed to consider the Defendant's Article 8 rights when taking proceedings against the Defendant and failed to consider whether their process accorded due deference to the Defendant's Article 8 rights.
>
> 12. In the premises the Claimants at no time appear to have considered the defendant's Article 8 rights, and /or his personal circumstances and/or the hardship which he would suffer if required to move from his mooring. It is submitted

> that the hardship to the Defendant would be profound. There are no alternative moorings. It is submitted that it would not be proportionate to require the Defendant to be evicted. In the premises it is submitted that an injunction should not be granted at this stage and/or that the declaration should be refused."

8. In its Reply of 27 March 2014, the Respondent took issue with the Appellant's claims under Article 8 in a number of respects. In paragraph 18 it admitted that "The Mrs T" was the Appellant's home, but denied that he had a "sufficient and continuous link" with the K & A Canal to call it home for the purposes of Article 8. It was further denied that the primary purpose of the relief sought or any element of the enforcement process was to remove the Appellant from his home, as distinct from requiring "The Mrs T" to move off the Appellant's waterways onto other waterways where the Appellant could continue to live aboard her.

9. In paragraph 19 of the Reply the Respondent averred that it was to be presumed that the decision to begin enforcement was in compliance with its duties as owner and manager of the waterways and was proportionate. It was denied that any of the matters raised by the Appellant was sufficient to displace the presumption or to meet the "high threshold" of a seriously arguable case that the decision to terminate the Appellant's licence and to require the vessel to be removed was disproportionate for the purposes of Article 8.

10. In the remaining paragraphs of the Reply the Respondent pleaded materials to meet the Appellant's case if, contrary to its primary assertion, there was to be found that a seriously arguable case under Article 8 had been made out.

11. By Application Notice of 16 April 2014 the Respondent asked for an order dismissing summarily the Appellant's Article 8 defence.

12. The basis of the application was that the present case should be judged according to the same broad criteria applicable to public housing authorities who apply for possession of residential premises and are met by Article 8 defences, as considered in three cases: *Manchester City Council v Pinnock* [2010] UKSC 45 ("*Pinnock*"); *Hounslow LBC v Powell* [2011] UKSC 8 ("*Powell*") and *Thurrock BC v West* [2012] EWCA Civ 1435. It will be recalled that it was said in *Pinnock* that in such cases,

> "…if an article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed. Only if the court is satisfied that it could affect the order that the court might make should the point be further entertained…" (per Lord Neuberger of Abbotsbury, giving the judgment of the court, at [61])

13. Thus, in this case, the Respondent presented its argument on the basis that its position as the statutory body, entrusted with management of the waterways, was broadly analogous for present purposes to that of housing authorities bringing possession proceedings in respect of residential premises. Accordingly, the assumption should be that its decision to bring enforcement proceedings here was proportionate and that the Article 8 case made by the Appellant could be summarily dismissed.

14. For the Appellant, it was argued that the analogy sought to be drawn by the Respondent was not a good one. The role of the Respondent was different from that of a housing authority managing a public housing stock. Reliance was placed upon the judgment of Lord Sumption in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39 emphasising the "exacting analysis" of the factual case underlying any attempt to justify interference with qualified convention rights. It was submitted that a trial process was required in order for the Respondent to make out, if it could, the proportionality of the decision taken.

15. The County Court judge said in his judgment that he considered the issue on the application to be a finely balanced one. He said that while the Respondent is not a housing authority, it has important duties and obligations in respect of the management of the waterways which have to be exercised in the interests of boat-users and of the general public. There would, he considered, be a significant burden on the Respondent in having to consider Article 8 rights in every case involving alleged breaches of licence conditions. With these matters in mind, the judge reached these conclusions:

> "19. In my view, I am doubtful whether it is reasonable to impose that burden on the trust, either in this case but, more to the point, in every case where they seek to enforce their rights in connection with alleged non-compliance with the terms of the licence. Particularly in the context of this case, I do not believe that that is being unfair to the defendant because the substantive issue which the trial court will have to grapple with, and to which the evidence will have to be devoted, is whether or not at the material time, or material times, prior to January 2013 he had been involved in continuous navigation or continuous cruising, as he says, or whether the claimants can establish (and clearly the burden would be on them) that he has not; that effectively he has been occupying this section of the Kennet and Avon Canal as a home mooring
>
> 20. I do not, therefore, regard it as either irrational or disproportionate to take the view that (a) it is appropriate to deal with the matter summarily in this way as I have done; or (b) that the matters raised in the defence – the paragraphs to which I have referred – raise such a compelling argument that clearly the matter is not capable of disposal in this summary way but would require, and does require, a hearing on the substantive merits of that which is set out. Accordingly, I am prepared to make the order that the claimant seeks; namely, paragraphs (10) to

(12) of the defence proposing to raise the Article 8 defence can be struck out."

16. The judge then added this in his final paragraph:

> "21. For the avoidance of doubt, and I am expressing no view here really either way, save that, on the face of it, this ruling of mine (assuming it stands) does not necessarily mean that, assuming the claimants succeed at trial on what I will call the main issue, there could be no question of the court, in considering what the appropriate and proportionate remedy would be, in casting Article 8 from its mind at that stage simply because I have made the ruling which I have at this stage, if that is clear."

17. The judge refused permission to appeal. By order of 1 December 2014 in the High Court, the applications for an extension of time and permission to appeal were directed to be listed for hearing, with the appeal to follow if the antecedent applications were granted. On 6 March 2015, at that hearing, the High Court judge gave permission to appeal, but dismissed the appeal.

18. The judgment was very short and, after setting out the background and the issues raised, the conclusions were these:

> "The Decision
>
> 9. As a public body which is not a housing authority, the trust cannot owe any duty to the Appellant in relation to his housing needs under Article 8. Accordingly any test to be applied to a local authority housing department would not apply and no proportionality argument, however it is to be determined, can arise.
>
> 10. Nonetheless the learned Judge went on to consider whether the Article 8 point might raise a triable issue. In an ex tempore judgment the learned Judge determined that the trust could not be expected to investigate or deal with the Appellant's Article 8 rights as the burden imposed would be too great. In argument, in the original hearing and in this court the series of authorities distilled in the decision of the Supreme Court in Pinnock [2010] UKSC 45 were cited.
>
> 11. I have considered those authorities and it will not assist the parties for them to be recited here. Of greatest guidance to local authority landlords in Article 8 cases is the series of seven principles laid down by Etherton LJ, as he then was, in Thurrock Borough Council v West [2012] EWCA Civ 1435.
>
> 12. The reasoning of the Judge in the County Court in considering whether there was a need for a more structured

> approach cannot be faulted, even if it is based on a generously wide view. In concluding that the point could not be sustained he applied a correct interpretation of the authorities and principles. It may be that he encouraged false hope by suggesting that the competing arguments were "finely balanced". They are not. The appeal is dismissed."

(D) The Appeal

19. Lewison LJ, on 21 May 2015 on consideration of the papers, granted permission for a second appeal to this court. He said,

> "1.The appeal raises an important point: viz whether the Canal and River Trust is to be treated in the same way as a local housing authority for the purposes of art 8 of the ECHR.
>
> 2. The judge's reasoning is very sparse and in itself provides a compelling reason for a second appeal. "

20. Ground 1 in the Grounds of Appeal challenged paragraph 9 of the High Court judge's judgment. The respondent in correspondence immediately conceded this Ground. In his skeleton argument for the Respondent Mr Stoner QC states that the Respondent accepts and has always accepted that as a public authority it must consider Article 8 issues when seeking to deal with a vessel which is someone's home. However, it is then submitted that, while the Respondent does not seek to uphold paragraph 9 of the judgment in the High Court that does not equate to the order below being wrong.

21. It can be seen that the High Court judge effectively adopted, without more, the reasoning of the County Court judge, apart from rejecting his view that the decision was a finely balanced one.

22. Ground 5 of the Grounds of Appeal addressed the point as to the sufficiency of the reasons given in the High Court for dismissing the appeal to that court. Mr Stark for the Appellant accepted that this ground was now of limited importance in view of the grant of permission to appeal and in the light of the court's powers under CPR 52.20 (formerly 52.10)

23. Three further grounds of appeal were advanced by Mr Stark, which were the focus of the argument before us, as follows:

    i) The judges below were wrong to apply the "exception" given to housing authorities and other social housing landlords from the requirement of a "structured approach" to the proportionality question under Article 8, derived from *Pinnock* and related cases. (Ground 2)

ii) It was wrong to apply the exception derived from *Pinnock* on the basis of the "burden" otherwise imposed upon the Respondent in discharging its functions. (Ground 3)

iii) Even if the *Pinnock* exception might otherwise apply, the county court judge erred in not allowing the Appellant's case under Article 8 to proceed to trial. (Ground 4)

24. Before proceeding further I should set out the principal provisions of the waterways legislation upon which the Respondent's claims in the action are based, since the nature of the underlying statutory regime is of importance in cases where a public authority's rights and duties may cut across Convention rights of individuals. It is common ground that without a licence issued by the Respondent no one is entitled to operate or keep a vessel on the waterways owned or controlled by the Respondent.

25. Section 17 of the 1995 Act sets out the basis on which the Respondent may refuse a licence. (It was assumed before us that, subject those criteria, the Respondent is obliged to grant the relevant licence.) The section in its material parts provides as follows:

> "17. – (1) In this section –
>
> "houseboat certificate" means a houseboat certificate issued under the Act of 1971;
>
> "insurance policy" means an insurance policy complying with Part I of Schedule 2 to this Act;
>
> "licence" means a licence issued by the Board in respect of any vessel allowing the use of the vessel on any inland waterways;
>
> "pleasure boat certificate" means a pleasure boat certificate issued under the Act of 1971;
>
> "relevant consent" means a houseboat certificate, a licence or a pleasure boat certificate; and
>
> "standards" means standards for the construction and equipment of vessels prescribed under this section and Part II of the said Schedule 2.
>
> …
>
> (3) Notwithstanding anything in any enactment but subject to subsection (7) below, the Board [now, the Respondent] may refuse a relevant consent in respect of any vessel unless –
>
> (a) the applicant for the relevant consent satisfies the Board

that the vessel complies with the standards applicable to that vessel;

(b) an insurance policy is in force in respect to the vessel and a copy of the policy, or evidence that it exists and is in force, has been produced to the Board; and

(c) either –

(i) the Board are satisfied that a mooring or other place where the vessel can reasonably be kept and may lawfully be left will be available for the vessel, whether on an inland waterway or elsewhere; or

(ii) the applicant for the relevant consent satisfies the Board that the vessel to which the application relates will be used bona fide for navigation throughout the period for which the consent is valid without remaining continuously in one place for more than 14 days or such longer period as is reasonable in the circumstances.

…"

26. The Respondent contends that the Appellant's licence has been properly determined and that, therefore, he no longer has authority to have his vessel on any of the Respondent's canals. Accordingly, the Respondent says that it is entitled, upon giving the relevant notice, to remove the boat from the canal pursuant to s.8 of the 1983 Act which provides as follows:

"8. – (1) In this section –

"owner" in relation to any relevant craft means the owner of the relevant craft at the time of sinking, stranding or abandonment and includes a person letting a vessel for hire, whether or not that person owns the vessel;

"relevant craft" means any vessel which is sunk, stranded or abandoned in any inland waterway or in any reservoir owned or managed by the Board or which is left or moored therein without lawful authority and includes any part of such vessel.

(2) The Board may remove any relevant craft after giving not less than 28 days' notice to the owner of the relevant craft, stating the effect of this section."

Having removed a vessel in this way the Respondent is entitled to recover consequential costs from the owner under s.8(3).

27. Mr Stoner for the Respondent submitted that the judges below had been entitled to determine the Article 8 issues summarily against the Appellant because the law

concerning the operation of Article 8 in cases where landlords of social housing seek possession of residential properties is applicable, by analogy, to the Respondent's rights to terminate licences to keep vessels on the waterways.

28. In *Pinnock* the Supreme Court drew the following conclusions on the question whether a domestic court should be able to consider the proportionality of evicting a person from his home. Lord Neuberger said this:

> "45 … [T]he following propositions are now well established in the jurisprudence of the European court: (a) Any person at risk of being disposed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end: *McCann v United Kingdom* 47 EHRR 913, para 50; *Ćosić v Crotia* 52 EHRR 1098, para 22; *Zehentner v Austria* 52 EHRR 739, para 59; *Paulić v Croatia* given 22 October 2009, para 43; and *Kay v United Kingdom* [2011] HLR 13, paras 73-74. (b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i e, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues: *Connors v United Kingdom* 40 EHRR 189, para 92; *McCann v United Kingdom* 47 EHRR 913, para 53; *Kay v United Kingdom* [2011] HLR 13, paras 72-73. (c) Where the measure includes proceedings involving more than once stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with: *Zehentner v Austria* 52 EHRR 739, para 54. (d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains – for example, for a specified period, or until a specified event occurs, or a particular condition is satisfied. Although it cannot be described as a point of principle, it seems that the European court has also franked the view that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain: *McCann v United Kingdom* 47 EHRR 913, para 54; *Kay v United Kingdom*, para 73."

Mr Stoner for the Respondent relied heavily on the last sentence of this passage.

29. Lord Neuberger proceeded to examine the "Exceptionality" issue and said this at [51] – [54] of the judgment:

"51. It is necessary to address the proposition that it will only be in "very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument…

52. … The question is always whether the eviction is a proportionate means of achieving a legitimate aim. Where a person has no right in domestic law to remain in occupation of his home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers.

53. In this connection, it is right to refer to a point raised by the Secretary of State. He submitted that a local authority's aim in wanting possession should be a "given", which does not have to be explained or justified in court, so that the court will only be concerned with the occupiers' personal circumstances. In our view, there is indeed force in the point, which finds support in Lord Bingham's comment in Kay v Lambeth London Borough Council [2006] 2 AC 465, 491, para 29, that to require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile. In other words, the fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties, will be a strong factor in support of the proportionality of making an order for possession…

54. Unencumbered property rights, even where they are enjoyed by a public body such as local authority, are of real weight when it comes to proportionality. So, too, is the right – indeed the obligation – of a local authority to decide who should occupy its residential property. As Lord Bingham said in Harrow London Borough Council v Qazi [2004] 1 AC 983, 997, para 25:

> "the administration of public housing under various statutory schemes is entrusted to local housing authorities. It is not for the court to second-guess

> allocation decisions. The Strasbourg authorities have adopted a very pragmatic and realistic approach to the issue of justification."
>
> Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way."

30. It was said by Lord Neuberger that the issue of proportionality causes no difficulties in respect of secure tenancies where a possession order can only be made if it is reasonable to do so. In such cases the issue of "proportionality" under Article 8.2 largely overlaps with the "reasonableness" question under s.84 of the Housing Act 1985: see [55] and [56]. The position was different where no question of reasonableness arises. Lord Neuberger said:

> "57. The implications of article 8 being potentially in play are much more significant where a local authority is seeking possession of a person's home in circumstances in which domestic law imposes no requirement of reasonableness and gives an unqualified right to an order for possession. In such a case the court's obligation under article 8(2), to consider the proportionality of making the order sought, does represent a potential new obstacle to the making of an order for possession. The wide implications of this obligation will have to be worked out. As in many situations, that is best left to the good sense and experience of judges sitting in the county court."

31. His Lordship concluded this section of the *Pinnock* judgment by making six general points of which five are potentially relevant here: (to summarise) 1) it is only where a person's home is under threat that Article 8 comes into play; 2) Article 8 only generally need be considered if raised by the occupier in proceedings; 3) (as already stated) the court should consider the matter summarily first; 4) if domestic law justifies an outright order, article 8 may exceptionally justify qualifying the possession order by extending or suspending it or even refusing it altogether; 5) (not material here); and 6) in respect of occupants who are vulnerable by reason of mental illness, physical or learning disability, poor health or frailty, the matter may require a local authority to explain why alternative accommodation is not being secured.

32. We were also referred to the decision in the Supreme Court in *Powell* and in particular to the judgment of Lord Hope of Craighead DPSC, dealing with homelessness cases, at [35]-[36], where his Lordship said this, referring to the submissions of Mr Luba QC (as he then was) for one of the defendants in that case:

> "35. Mr Luba accepted that the threshold for raising an

> arguable case on proportionality was a high one which would succeed in only a small proportion of cases. I think that he was right to do so: see also *Pinnock* [2011] 2 AC 104, para 54. Practical considerations indicate that it would be demanding far too much of the judge in the county court, faced with a heavy list of individual cases, to require him to weigh up the personal circumstances of each individual occupier against the landlord's public responsibilities. Local authorities hold their housing stock, as do other social landlords, for the benefit of the whole community. It is in the interest of the community as a whole that decisions are taken as to how it should best be 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.
>
> 36. If the threshold is crossed, the next question is what legitimate aims within the scope of article 8.2 may the claimant authority rely on for the purposes of the determination of proportionality and what types of factual issues will be relevant to its determination. The aims were identified in *Pinnock*, para 52. The proportionality of making the order for possession at the suit of the local authority will be supported by the fact that making the order would (a) serve to vindicate the authority's ownership rights; and (b) enable the authority to comply with its public duties in relation to the allocation and management of its housing stock. Various examples were given of the scope of the duties that the second legitimate aim encompasses- the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the needs and the need to move vulnerable people into sheltered or warden-assisted housing. In *Kryvitska and Kryvitskyy v Ukraine* (Application No 30856/03) (unreported) given 2 December 2010, para. 46 the Strasbourg court indicated that the first aim on its own will not suffice where the owner is the state itself. But, taken together, the twin aims will satisfy the legitimate aim requirement."

33. Mr Stoner argued that the Respondent's claims to enforce its rights under the Waterways Acts should be treated in a similar manner to the claims of local authorities in these cases. He said that, like the local authorities, the Respondent in enforcing the legislation is seeking (a) to vindicate its ownership rights and (b) enabling it to comply with its public duties relating to waterways.

34. Mr Stark for the Appellant submitted that the housing cases were truly exceptional and that even in the most important public interest contexts, the proportionality of interference with rights under the ECHR has to be considered in the customarily

structured manner, as illustrated by *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 38 and 39. The context in the cited case was, of course, the public interest in the non-proliferation of nuclear weapons. We were referred to the passage in the judgment of Lord Sumption at [20]-[21]. Lord Sumption summarised the effects of the cases upon the questions of rationality and proportionality as follows at [20]:

> "Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, 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. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

35. Mr Stark submitted further that this was not a case where it can be clearly stated that the Respondent is seeking to vindicate its property rights since the primary question, still to be resolved in the proceedings and which it is accepted must go to trial, is whether the interference with the Appellant's Article 8 rights is "in accordance with the law" in accordance with s.17 of the 1995 Act and whether, accordingly, s.8 of the 1983 Act can be relied upon. The breach of licence conditions and the Respondent's application of s.17 in the present case are, he submitted, very much in issue. The Appellant also alleges that the Respondent has not had proper regard to the public sector equality duty under the Equality Act 2010 and has discriminated against the Appellant, a matter not determined by the order striking out the Article 8 defence.

36. Both the court and counsel, prior to the hearing, had been alerted to the recent decision of the Divisional Court (Beatson LJ and Nicol J) in *Akerman v LB Richmond* [2017] EWHC 84 (Admin). In that case, the appellant appealed against his conviction in the Magistrates Court for four breaches of by-laws in keeping his vessel moored against specified land for periods longer than permitted under those by-laws. The relevant period was one hour in any period of 24 hours. The appellant challenged the lawfulness of the by-laws on rationality grounds and contended that the making of them was a disproportionate interference with his rights under Article 8 of the ECHR in respect of his boat which was his home.

37. The by-laws in that case had been made under s.235 of the Local Government Act 1972. The power was conferred "for the good rule and government of the whole or any part of the district…or borough, as the case may be and for the prevention and suppression of nuisances therein". The by-laws had been made following consultation and had been confirmed by the relevant Minister.

38. On the facts, it seemed that the appellant had lived on the boat at the relevant mooring for some 9 years and the boat could not be moved because of faults in the engines which the appellant said he could not afford to fix.

39. On the Article 8 issue the District Judge had found that the by-laws had been made, not to deprive the boat operator of a home, but to prevent them treating the site in issue as a permanent mooring. They did not have the consequence of rendering the occupier homeless; the boats were moveable and there were other permanent moorings available in the borough. She held that Article 8 was not engaged, but even if it was the interference was proportionate.

40. The Divisional Court considered that "in principle" Article 8 could be engaged in this type of case. On the proportionality issue, the court's conclusion (in the main judgment given by Beatson LJ) was this:

> "43. The authorities show that a trespasser will only be able to trump the rights of an owner or property by invoking article 8 in an exceptional case: see *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 6, and *London Borough of Hounslow v Powell* [2011] UKSC 8, [2011] 2 AC 186 and summary by Etherton LJ, as he then was, in *Thurrock BC v West* [2012] EWCA Civ. 1435 at [22] – [31]. This is particularly so where the owner is a public authority which holds the land for the general public such as the respondent in this case. It follows that in my judgment an interference with article 8 rights such as that by the byelaws restricting the mooring of boats in certain places was not, in the circumstances of this case, disproportionate where the boats subject to the restriction were homes. There was no evidence that the effect of the byelaw would preclude the appellant from living on a boat in the borough. The judge found (case stated at [12(b)] that other permanent moorings were available in the borough and on the river. Moreover, in the present case the article 8 defence cannot be said to have been pleaded in a sufficiently particularised way to meet the high threshold required to make it seriously arguable: *London Borough of Hounslow v Powell* at [33] and [34] *per* Lord Hope. Accordingly, while it may be possible to envisage a situation in which byelaws concerning waterways are so restrictive that it becomes impossible to live on a houseboat in the local authority's area, that is not the position in the circumstances of these byelaws and this local authority."

The appeal was dismissed and the convictions were upheld.

(E) Further Discussion

41. The difficulty that I perceive in cases of the present type is that the balance

between public interests and requirements of hard pushed local authority landlords on the one hand and the relative claims of individual tenants wishing to assert and to preserve rights under Article 8 on the other are well tried and tested before the courts. It was possible in *Pinnock* and related cases for the courts readily to assess the relative weight of these considerations in relation to the limited housing stock to be shared between applicants for housing in austerity conditions. That may not be so straightforward in cases involving other types of public authority.

42. In the housing cases, particularly where the statutory scheme imports a requirement of reasonableness before an order for possession can be made, the courts are treading familiar ground. In making the assessment of reasonableness required by s.84 of the Housing Act 1985 they are largely covering the same territory as that of proportionality under Article 8.

43. The Supreme Court was clearly more hesitant, however, in gauging the likely results in cases where statute did not impose a "reasonableness" test. In these latter cases, the court said that "…the proportionality of making the order sought, does represent a potential new obstacle to the making of an order for possession". The wide implications would have to be worked out and "…that is best left to the good sense and experience of judges sitting in the county court": see again *Pinnock* at [57]. In these cases, if the authority is truly exercising its ownership rights, there is no statutory test of reasonableness to be applied, but still Article 8 considerations may represent "a new potential obstacle" to recovering the property from the occupier

44. I am deeply conscious that, in this case, we are being invited to interfere with the exercise of the "good sense" of an experienced county court judge. However, neither he, we nor other judges (with whatever good sense we may have respectively) do have the same experience of balancing the competing weight of the public management rights and duties of an authority such as this Respondent in a context such as this. We are not dealing with a case where the relative weight of the boat operator's Article 8 rights can be so readily assessed against the authority's obvious public responsibilities. Nor is this a case like *Akerman* (supra) where the boat owner could not assert prior licence rights and a dispute as to lawful restriction of them.

45. 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 licensing regime, without such reasons being distinctly pleaded and proved. As in the housing cases, the court cannot make the judgment of how best it is for the Respondent to manage the waterways: c.f. Lord Hope in *Powell* at [35]-[37], in part quoted above. 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 the 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 Respondent was entitled to act as it did in terminating a licence.

46. For my part, I can imagine cases where the County Court would be able to determine, in a *Pinnock*–style summary assessment before trial, that the boat operator's right under the Convention cannot prevail to the extent of requiring the authority to accommodate his home on the authority's waterways or on a particular part or parts of them. However, in some cases, the "personal circumstances and any factual objections" raised may give rise to a seriously arguable case.

47. Doing the best that I can, but without wishing to be prescriptive for the future, I can see (on the one hand) that the Respondent's right to obtain removal of a vessel, used as a home, from a waterway may be more easily vindicated by summary process where, for example, it can be shown that the vessel operator has failed to establish that the requisite statutory standards of construction and equipment are met or that the operator has failed persistently to produce evidence of the necessary insurance policy as required by s.17. Equally, summary determination of Article 8 rights against the boat occupier may be possible where there has been flagrant and/or persistent breach of licence conditions which have not been remedied.

48. On the other hand, I see more difficulty in summary dismissal, on a preliminary application at the beginning of the proceedings, of a boat occupier's Article 8 rights as being outweighed by the management requirements of the Respondent, in a case where there are continuing genuine disputes as to whether licence conditions have been satisfied or where there are other issues in play, such as questions under the Equality Act 2010. In this latter context, I would mention Lord Neuberger's comment in his judgment in *Aster Communities Ltd. v Akerman-Livingstone* [2015] 2 AC 1399 at [56], in the context of a claim of discrimination under s.35(1)(b) of the 2010 Act, as follows:

> "Thus, the protection afforded by section 35(1)(b) is an extra, and a more specific, stronger, right afforded to disabled occupiers over and above the article 8 right. It is also worth mentoring that this conclusion ties in with what was said in the in the *Pinnock* case [2011] 2 AC 104, para 64, namely that as suggested by
>
> > "the Equality and Human Rights Commission … Proportionality is more likely to be a relevant issue 'in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty', and that 'the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases' ".
>
> In other words, where the occupier is disabled, it is significantly less unlikely than in the normal run of cases that an article 8 defence might succeed."

(See also the judgment of Baroness Hale of Richmond in the same case at [21]).

49. This case is also to be distinguished from *Akerman's* case (supra) where the local authority was acting in support of its own property rights in respect of a particular stretch of land and there were no disputes (as here) as to whether or not licence conditions had been broken. Equally, the local authority was not seeking to remove the vessel in question from the whole river or even from the whole of that part of the river that passed through its area.

(F) The Grounds of Appeal

50. With these points expressed, I turn to the specific grounds of appeal in this case.

51. Ground 2 poses the question whether the judges below were correct in applying the "exception" to the requirement of a structured approach to proportionality afforded to public authority landlords to cases of the present type.

52. It does not seem to me that the *Pinnock* line of cases demonstrate a true exception to the requirement of a structured approach to the proportionality assessment. Rather, I think, the position is that in public authority housing cases the Article 8 issues are more amenable to a pre-trial summary assessment and determination in the authority's favour than in other cases in which such issues of proportionality arise. In the *Pinnock*-type of case, the court is capable of deciding on such a summary application whether or not the Article 8 considerations afford seriously arguable grounds for resisting the authority's claims in whole or in part. As Lord Neuberger said at the very outset of the section of his judgment in *Pinnock* headed "Exceptionality", "The question is always whether the eviction is a proportionate means of achieving a legitimate aim". The issue is whether that question can be determined at an early stage of the proceedings in a relatively straightforward manner that might not be possible in other types of case involving Article 8.

53. It is possible that in some waterways cases the court will be able similarly to take a robust approach to claims to assert the public interest considerations in the exercise of the Respondent's powers over rights arising under Article 8. I have given some examples of possible cases of this type above.

54. In the circumstances facing the learned County Court judge in this case, however, I do not consider that the overall context of the proceedings allowed the judge summarily to dismiss the Article 8 defences as he did. This may be apparent from what I have said above. However, I will shortly summarise why I have reached this conclusion here

55. First, while I agree that the Respondent's property rights in the canal and the public interest in the management functions exercised by the Respondent can usually be taken as read, I am not satisfied that the judge could properly dispose of the Article 8 considerations before deciding whether the licence conditions had truly been broken and that property rights and management rights under s.8 of the 1983, therefore, could be invoked unquestioningly, subject only to Convention

rights. Second, it was not sought to argue that the Appellant's defence under the Equality Act 2010 could be summarily determined; it survives on the pleadings. Third, the Respondent seeks extensive relief, including injunctions restraining any mooring of any duration on the K & A canal, restraining navigation upon any of the extensive waterways controlled by it and an order for immediate removal of the Appellant's home, viz. the boat, from the K & A canal. With regard to this third consideration, I do not quite see how the judge could properly say, as he did in paragraph 21 of his judgment, that Article 8 was not "cast from [the court's] mind" on questions of relief when the relevant paragraphs of the Defence had already been struck out.

56. I do not accept Mr Stoner's submission, made in the course of a helpful argument, that the extent of the relief to be granted at the end of a trial could be re-visited in the context of Article 8. That was no doubt an intentionally helpful concession, but a difficult one to maintain in the face of the extensive relief sought by his client after all Article 8 considerations had been struck out of the Defence.

57. Ground 3 is directed to the County Court judge's view that it would "impose a quite significant burden" on the respondent by requiring it to deal in every enforcement case with any possible Article 8 points raised on behalf of a defendant. The judge doubted whether it was reasonable to impose that burden on the Respondent.

58. In support of the judge's reasoning in this respect, Mr Stoner took us back to Lord Neuberger's judgment in *Pinnock* at [53] stating that, in the overwhelming majority of cases of the type being considered, it would be "burdensome and futile" for the local authority to prove that the possession order sought is justified. This was said, however, in the context of the submission (seemingly accepted by his Lordship) that the local authority's aim in wanting possession should be a "given" which does not have to be explained or justified in court but yet with the corollary that "…the court will only be concerned with the occupier's personal circumstances", i.e. the circumstances giving rise to his claims under Article 8. As appears above, I consider that in these cases also the Respondent's aim in enforcing licence conditions should usually also be a "given". Accordingly, the burden envisaged by Lord Neuberger would not arise in the normal run of cases of the present type.

59. In my view, therefore, the burden of dealing with an Article 8 defence is one that will from time to time, however, have to be shouldered by the court in assessing a defendant's personal circumstances and in the balancing exercise in weighing those circumstances against the "given" represented by the Respondent's aims in the proceedings. I have made suggestions as to areas in which summary disposal of such defences may be possible. However, I do not consider that the judge was correct in identifying the "burden" of dealing with Article 8 defences as a reason for striking them out summarily.

60. Ground 4 is that "If the Pinnock exception applies did the judge err in not allowing the case to go to trial". In support of this Ground, Mr Stark summarised the Appellant's case in paragraph 53 of his skeleton argument in these terms:

> "The learned judge did not give detailed reasons as to why he did not regard the Defendant's pleaded case on Article 8 as not [sic?] being seriously arguable. In any event, his findings cannot stand as in this case he was in no position to carry out the assessment of whether the proportionality defence was arguable without the Claimant having set out why it was proportionate to its legitimate aims to remove the Defendant and his boat from the canal."

61. It will be seen from what I have said above that I accept Mr Stark's point in so far as it goes to the ability of the judge, on the summary application before him, to assess the Appellant's personal circumstances in the balance against the Respondent's interest in enforcing licence conditions in the exercise of its public functions. It will equally be seen that I do not accept that it was necessary in this case for the Respondent to set out in its original claim why it asserts that its enforcement action is proportionate to its legitimate aims. However, since the Appellant has pleaded a defence based on Article 8 which in my view survives the application to strike it out, it may well be in the Respondent's interest in the litigation to plead more fully in reply what aspects of the public interest are relied upon, and Mr Stoner indicated that this would be its intention. Such matters may also be a relevant consideration in assessment of the relief to be granted, if the Respondent is otherwise successful in the proceedings.

(G) Result

62. For these reasons, I would allow this appeal and would reverse the order striking out paragraphs 10 to 12 of the Defence.

Lord Justice Sales:

63. I agree

Lord Justice Jackson:

64. I also agree.