



Pamela Smith
NBTA
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26 October 2015

Dear Pamela

Level 1 Complaint – Enforcement Policy for Boats Without Home Moorings

Introduction

I refer to your email dated 6 October 2015 in which you made a complaint regarding the Trust's enforcement policy in respect of boats without a home mooring since 1 May 2015.

In summary, I understand your complaint relates to the following:

- The retrospective application of the Trust's policy;
- Alleged breach of boaters' rights under Article 6 and Article 8 of the European Convention of Human Rights
- Breach of Legitimate Expectation of renewal and provision of 'CC' letters.
- Lack of reasoning as to why the Trust considers boat movements do not meet its requirements;
- Refusal of the Trust to take boaters evidence of movements into account, especially movement in the last 6 weeks of the licence period;
- Lack of evidence as to why the Trust considers boat movements do not meet its requirements and alleged breach of the Consumer Protection from Unfair Trading Regulations 2008;
- Alleged unlawfulness of the Trust's approach in applying minimum cruising distances;
- Contradictory statements from the Trust on cruising distance and enforcement.

As you have made a number of technical legal points, I have consulted members of our Legal Department before responding to your complaint.

Background

I think it will be useful, before addressing the points made in your letter, to firstly explain that in the face of an increasing problem nationally with boats which do not have a home mooring and which are not complying with the Trust's guidance for such boats (the "Trust's Guidance"), allied to the increased number of boats on the waterway, it is now a management priority for the Trust to deal with the issues this presents.

Under section 17(3) of the British Waterways Act 1995 (the '1995 Act'), the Trust may refuse to re-issue a licence for a boat without a home mooring if it is not satisfied that the vessel will be used bona fide for navigation throughout the period of the licence period applied for. Therefore, the Trust could have decided that, on the basis of past movement, and in the absence of specific and explained circumstances, that it was not satisfied a particular boat would be used in this way and refused to issue a new licence.

However, rather than simply refusing to re-issue a licence on this basis, the Trust gave notice of a modified approach to be adopted by the Trust initially by way of a press release on 13 February and subsequently in the letter to all boaters without a home mooring dated 2 March 2015. This letter provided a minimum of 2 months' notice (and, as at today's date in excess of 7 months' notice) that if a vessel was not complying with the Trust's guidance, a shorter period of licence would be offered on renewal, either for 3 months or 6 months (depending on the Trust's degree of concern over the lack of movement).

Retrospective Application

You complain that the Trust's policy has been applied retrospectively, which is inextricably linked to your complaint that there was a lack of notice about the change of policy and that this is unjust because it is not possible to remedy any past defect in a continuous cruiser's boat movement.

We do not agree. In seeking a new licence, the 1995 Act is quite clear that the obligation is on the boater to satisfy the Trust that the vessel will be used bona fide for navigation throughout the period of the licence sought. It is (and always has been) quite permissible for the Trust to consider previous boat movements in determining whether to issue or re-issue a new licence of this kind.

Further, all boats previously licensed on the basis of being a boat without a home mooring should have been used in compliance with the Trust's Guidance.

It was made clear in the meeting between the Trust and boating organisations that you refer to on 19 January that, from 1 May, movement patterns in the previous licence period would be considered when determining the next licence renewal. This approach was also made clear in the press release on 13 February and the letter of 2 March.

In any event, no boater is deprived of the opportunity to remedy non-compliance as, in every case, they have been offered a further licence (for a 3 or 6 month period) in which to demonstrate compliance and thereby secure a subsequent licence after the expiry of this further licence period.

Article 6 Rights

In your complaint you allege that boaters have been unfairly deprived of the opportunity to renew their boat licences for the full 12 months without a fair trial and that this violates their rights under Article 6 of the European Convention of Human Rights.

We do not accept this assertion, as all boaters have been offered the grant of a new licence (even if that licence was only a 3 or 6 month licence), and we do not, therefore, see how any relevant "dispute" can have arisen to which Article 6 can apply. If a boater satisfies the Trust that their boat's movement over this further licence period complies with the Trust's Guidance, the Trust will offer a

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further licence and, again, no relevant "dispute" will arise. We cannot, therefore, see how Article 6 will ever be engaged in these circumstances.

If, however, the Trust is still not satisfied with a boat's movement over this period, a new licence will not be issued and the boat will have to be removed from the water. If that boat is also someone's home, it is the Trust's standard practice to apply for a court order before removing the boat from the water and this provides for an independent evaluation of the lawfulness and proportionality of the Trust's actions for the purposes of Article 6.

Article 8 Rights

You also allege that the Trust has failed to respect boaters' homes in threatening that boats may be unlicensed at the end of the restricted licence period and may subsequently be removed from the water and that this has violated boaters' rights under Article 8 of the European Convention of Human Rights.

We do not agree. The process that is being followed with respect to considering and processing the renewal of licences for boats without a home mooring has been designed to avoid enforcement action being taken wherever possible and to encourage communication between the boater in question and the Trust. However, if that boater ultimately does not satisfy the Trust that the boat is being moved sufficiently in accordance with the Trust's Guidance (and the legislation) the boater will not be re-issued with a licence. Again, it is the Trust's standard practice in cases where a boat is also someone's home to apply for a court order before removing the boat from the water and this provides for an independent evaluation of the lawfulness and proportionality of the Trust's action's for the purpose of Article 8.

Legitimate Expectations

You also allege that the Trust has breached boaters' substantive legitimate expectations by failing to renew licences for boats without a home mooring on the same basis as previous years.

As a general point, we do not accept that there can be any legitimate expectation that a licence for a boat without a home mooring will be renewed when that boat has failed to meet the requirements of section 17(3) of the 1995 Act and the Trust's Guidance in the previous licence period.

Neither do we accept that a boater can have any legitimate expectation by virtue of previous renewals. Any licence granted in the past was only for the period of that licence and was subject to the terms and conditions at that time which make specific reference to this point (for example, at Condition 8.5 in the current version dated May 2015) and cannot have given rise to any expectation that the licence would be perpetually renewable on the same basis.

Your letter complains that the Trust's letter dated 2 March did not make it clear that boat movements before 1 May 2015 would be taken into account. We consider that it did. It clearly said "*From 1 May 2015, when the licence for a boat that doesn't have a home mooring comes up for renewal, we'll look back at its cruising pattern to determine whether it's appropriate to re-licence the boat again as a continuous cruiser. If, at the time of renewal, we're generally happy with a boat's cruising pattern over the course of the previous licence period, then we'll issue another continuous cruiser licence straight away ... If we've any concerns about a boater's past cruising pattern, we will get in touch about six weeks before the licence renewal date ...*"

We do not agree that these statements do not make it plain that as from 1 May 2015 the Trust would look at previous cruising patterns, which, necessarily would cover periods prior to 1 May 2015.

We also do not accept that you have any procedural legitimate expectation of further warning letters being sent. The "CC" letters to which you refer relate to the revocation of a licence on the grounds of insufficient movement. They therefore cover an entirely different situation and are not appropriate in the case of licence renewal.

In any event, the “CC” letters provide a period of time for a boater to engage with the Trust, under the process of which you complain even where a boater does not satisfy the Trust by their licence renewal date, rather than a new licence being simply refused they are still given an additional period (either 3 or 6 months) in which to comply. It is only if the boater has still not satisfied the Trust at the expiry of this *additional* period that a licence might be refused and the boater may be subject to statutory notices being served, after which the boater would be required to either obtain a home mooring, remove the boat from the waterway or face enforcement action.

Therefore, all the substantive elements of the “CC” warning letters that you refer to are met in the process that is the subject of your complaint and this clearly constitutes “fair warning” for the purposes of Note 7 of the Trust’s Guidance which you refer to in your complaint.

Lack of Reasoning as to Non-Compliance

You complain that boaters who have not had their licences renewed for 12 months have not been provided with a reason as to why the Trust considers that their movement does not meet its requirements. You also complain that the Trust has not provided boaters with any information regarding what cruising pattern is sufficient to meet its requirements.

The Trust’s Guidance is referred to in the terms and conditions of the licence and is available on the Trusts’ website. It is clear and contains a detailed explanation of the Trust’s approach to the requirements of ‘cruising’ in compliance with the 1995 Act. The letter of 2 March specifically referred to the Trust’s Guidance and directed boaters who were unsure of the meaning of it to contact local Enforcement Officers or our Customer Services team.

Boater’s Evidence

You also complain that the Trust has refused to accept the boater’s evidence of movement.

We do not agree as the letters sent offering a 3 or 6 month restricted licence on renewal invite the boater to get in touch with the relevant local enforcement officer if they wish to query the decision on the basis that they feel they have been cruising in line with the Trust’s Guidance. The letters make clear that we do expect the boater to tell us their reasons and that we will ask for evidence.

A further letter is sent to every boater on a restricted licence at the half-way point of this licence period (i.e. either at 6 weeks or 3 months), confirming that the Trust has continued to monitor the boat’s cruising pattern and noting whether the boat’s movement has improved or not. Again, this letter invites boaters with any questions to contact their local enforcement officer.

Therefore, boaters are always free to submit their records of boat movements. The Trust will take these into account if they are corroborated by some form of evidence, particularly where these records do not match our own sightings.

Movements in Last 6 Weeks

You refer to boaters who have travelled considerable distances in the last few weeks of their licence and implicitly suggest this should be sufficient to secure a licence renewal for 12 months.

However both section 17 of the 1995 Act and the Trust’s Guidance make clear that the requirement to use the boat bona fide for navigation is applicable *throughout* the licence period.

Every case will depend on its own facts. However, if the only significant movement was within the last few weeks of the licence that would be unlikely to satisfy the Trust, in the absence of a cogent reason for sufficient movement only being in that period, that the terms of section 17 of the 1995 Act will be complied with in the following 12 months. However, rather than simply refusing to grant the

boat a licence on the basis of being a boat without a home mooring, the process adopted by the Trust means that a boater is given the opportunity over a 3 or 6 month period to establish that the movement pattern over the last few weeks of the expired 12 month licence is properly reflective of the boats movement and that a 12 month licence is appropriate.

Lack of Evidence and Alleged Breach of Consumer Protection from Unfair Trading Regulations 2008

You also complain that a boater is not given any evidence of why the Trust considers their boat movements do not comply with the Trust's Guidance.

The decision is plainly based on the Trust's own data. Every boater has a right, at any time, to be provided with the information held by the Trust on their boat movements, in accordance within the 40 day time limit specified in the Data Protection Act 1998 and I am not aware of any instance where this time scale has not been met by the Trust. Indeed I understand the information is usually provided well within this period.

A boater wishing to be provided with this information could, therefore, have requested this information at any point after the letter of 2 March or after subsequent letters in line with the process set out above and had more than sufficient time to be provided with this information and query any alleged errors or omissions in the Trust's data prior to the final refusal of a further licence renewal at the end of the restricted licence period.

This is in addition to the encouragement given to boaters to engage with the Trust on the issue of movement, as identified above, once offered a 3 or 6 month licence and throughout the duration of any restricted licence.

Further, whilst we do not accept that the Consumer Protection from Unfair Trading Regulations 2008 have any application to the licence renewal process, even if they do we do not accept there has been any breach of those Regulations (and we note that you have not specified any particular breach).

Unlawfulness of Specifying Distances

We agree that it is not possible for the Trust to specify a specific distance that must be travelled in order to comply with section 17 of the 1995 Act. The Trusts' Guidance does not do so.

You allege that applying a minimum distance is unlawful, however, the sole reference to distance that we have made, purely as guidance and at the request of boaters represented at the 19 January meeting to which you refer, was simply to clarify our current enforcement priorities on the basis that if a boater's range of movement is less than 15-20 miles over the whole of the previous licence period, it is very unlikely that they will be able to satisfy us they have met the requirement to use the boat bona fide for navigation throughout the licence period.

Contradictory Statements from the Trust on Cruising Distances and Enforcement

You refer to a presentation made to boating groups at the meeting on 19 January but your references are, unfortunately, inaccurate.

The presentation identified (in the context of the proposals then formulated – which as identified below were not actually adopted) there would be 3 categories of boat, namely:

- (1) Those where there was firm evidence that the range of movement has been insignificant;
- (2) Those with some range of movement, but not sufficient to meet the Trust's requirements; and

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(3) Those whose range and frequency of movement was of no concern to the Trust.

Potential renewal options based on the categories were identified as:

- (1) A refusal to renew without a home mooring being declared
- (2) Outlining our concerns and possibly restricting renewal periods to provide a limited time to establish increased movement; and
- (3) Renew Without Restrictions.

By the time of the press release of 13 February, however, the Trust's proposals had evolved and it was stated that all non-compliant boaters would, for the first few months, be offered a short duration licence as a further opportunity to establish an acceptable range of movement. This approach was confirmed in the letter of 2 March.

Returning to the 19 January meeting it was also separately identified that there were approximately 5,400 boats licenced on the basis of being boats without a home mooring (to which the proposals would therefore potentially apply) and of those boats:

- 16% had moved less than 5km in 12 months
- 50% had moved between 5km and 20km in 12 months; and
- 34% had moved over 20km in 12 months.

In your letter you have conflated this information and linked the percentages given to the three categories of boats and possible renewal options mentioned above. This was not the Trust's intention and was not the way the Trust presented the information on 19 January.

We are not aware that any statement was made on 19 January in relation to boats moving less than 20km not generally attracting enforcement, although at that meeting it was agreed that the Trust should develop a clear response to the question on how far a boater should travel to comply.

Therefore, we subsequently published on our website, guidance on "How far is far enough?" which set out the range of movement of less than 15-20 miles as being very unlikely to satisfy us, which is the statement to which you have referred.

Of course that does not mean that the Trust will automatically be satisfied that a boat moving more than 20 miles will satisfy the Trust's Guidance. Instead the statement, in providing guidance, is in the negative and identifies what will almost certainly not comply.

In the circumstances we do not agree that contradictory statements have been made.

You also refer to the Trust's Guidance and its reference to the Davies case. We agree that in that case the Judge found that Mr Davies' movement over a 10 mile stretch of the Kennet & Avon Canal was not sufficient to comply with the 1995 Act. However, we disagree that any statement has been made which is contradictory to this case or the Trust's Guidance.

In terms of the remedies you have requested:

1. For the reasons set out above, we are not willing to abandon our enforcement policy.
2. Our current process provides adequate warning of non-compliance prior to any refusal to renew and we are not prepared to amend this approach.
3. For the reasons explained above, we are not willing to extend 3 and 6 month licences to 12 months or provide the 12 months' notice of our enforcement policies.
4. We are not willing to withdraw our statement of 6 March 2015 for the reasons explained above.

5. I have explained above how the proposals set on 19 January have evolved to relax the initial approach to non-compliant boaters.

I hope that the above addresses the issues that you have raised. Should you feel that I have not properly considered your concerns or you remain dissatisfied with us over this matter, you can ask for your complaint to be considered at the second level of our Complaints Procedure. In this case you should write to Sarina Young, Customer Services Co-Ordinator at The Kiln, Mather Road, Newark, NG24 1FB or by email to sarina.young@canalrivertrust.org.uk

Yours sincerely

Ian Rogers

Head of Customer Services