Case No: HQ17X03911

Neutral Citation Number: [2018] EWHC 1304 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2018

Before :

MRS JUSTICE WHIPPLE DBE

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Between :

	CAMBRIDGE CITY COUNCIL		**Claimant**
	- and -		
	(1) TRADITIONAL CAMBRIDGE TOURS LIMITED **(2) THOMAS ARNOLD** **(3) MILAN KOVAKEVICH** **(4) GEORGE SUGDEN** **(5) JOHAN DEBUSCHA** **(6) MATT MEACHER** **(7) GEORGE ELLIOT** **(8) SPENCER GOODWIN** **(9) TOM BROWN** **(10) GIOVANNI LOPEZ** **(11) JAKOB SUBERLAK** **&** **(12) PERSONS UNKNOWN**		**Respondents**

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Lisa Busch QC (instructed by **William Rose, Sharpe Pritchard LLP**) for the **Claimant**
Simon Butler (instructed by **Direct Public Access**) for the **Respondents (1) to (4)**

Hearing dates: 9th/11th May 2018

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Judgment **Mrs Justice Whipple :**

1. This is a case about punting on the River Cam. The Claimant is Cambridge City Council (the "Council"). The Council seeks an interim injunction against various named Defendants as well as persons unknown to prevent unauthorised commercial punt operations being undertaken from the Council's land. The First Defendant is a company which carries on commercial punt operations on the River Cam. Its punts currently depart from and return to a slipway on Garrett Hostel Lane. It has no authorisation or licence to conduct punt operations from that site or from any other land belonging to the Council, nor is it authorised by the Cam Conservators, the body with authority over the River Cam, to conduct its punt business on the river. The Second to Fourth Defendants are individuals and directors of the First Defendant. The Fifth to Eleventh Defendants are individuals who are alleged to have been involved in the First Defendant's punt operations. The Twelfth Defendant is "Persons Unknown", to cater for the possibility that there are others involved or likely to become involved in the First Defendant's punt operations or other unauthorised commercial punt operations being conducted from the Council's land.

2. The Council was represented before me by Ms Lisa Busch QC. The First to Fourth Defendants were represented before me by Mr Simon Butler and Mr Jake Richards. The Fifth to Eleventh Defendants were unrepresented as was, obviously, the Twelfth Defendant. I am very grateful to all counsel involved in this case, and their legal teams, for their clear and thoughtful submissions.

3. In summary, the Council argues that the Defendants have trespassed by conducting unauthorised commercial punt operations on its land and they seek an interim injunction to prevent that trespass. The Defendants take various points, procedural and substantive, by way of resistance to the Council's application. The main thrust of the Defendants' case is that the Council is not entitled to an injunction at all, as a matter of law; but that in any event, the Court should not grant discretionary relief on an interim basis, in the circumstances of this case.

Procedural History

4.On 27 July 2017, the Council issued a Claim Form against the Defendants in the Chancery Division of the High Court. That Claim Form asserted the Council's title as freehold owner of various parcels of land within the city of Cambridge (later referred to as the "Claim Locations"). It asserted that the Defendants were persons who are and at all material times were persons who own, operate or are otherwise involved in unlicensed and unlawful punting activities on the River Cam involving trespass on the Council's land from the Claim Locations; the activities were undertaken without the Council's consent and were in breach of the byelaws of the Cam Conservators. The relief claimed in the Claim Form was an Order prohibiting the Defendants from operating punt tours or punt hire, mooring their boats or other vessels, embarking or disembarking passengers, and touting from the Council's land at any of the Claim Locations.

5.Particulars of Claim accompanied the Claim Form. Those Particulars asserted the Council's freehold ownership of the Claim Locations. The Claim Locations were listed as: Garrett Hostel Lane, Jesus Green, Thompson's Lane, Jubilee Gardens, Sheep's Green, Granta Mill Pond, Quayside and Silver Street (each parcel of land was described in accompanying witness evidence). The Particulars alleged trespass on the Claim Locations by the Defendants. That trespass took the form of activities being undertaken without the Council's consent, which activities amounted to criminal offences under the byelaws of the Conservators of the River Cam ("Conservators"). The Particulars described the efforts by the Council to stop the Defendants' activities, and asserted that the Defendants had "consistently and flagrantly defied the [Council's] attempt to prevent them from using its land without its consent to engage in their unlawful punting and touting operations" (see [8]). The Council relied on the conviction of the Second, Third and Fourth Defendants as well as other individuals for breach of the Conservators' byelaws, referring to a judgment of District Judge (Magistrates' Court) Kenneth Sheraton sitting in the Cambridge Magistrates' Court on 3 June 2015.

6.The claim was transferred from the Chancery to the Queen's Bench Division. On 7 February 2018, the First to Fourth Defendants entered their defence to the claim. The Second to Fourth Defendants denied any involvement in unauthorised punting activities ([6]); all Defendants denied trespass on the Council's land ([7]); they asserted a failure to comply with CPR 55.1(b) ([8]); they asserted a right of easement over the land through usage over a considerable period of time ([9]); they asserted that the Conservators were empowered to enforce breaches of the byelaws, not the Council, alternatively that the Court lacked jurisdiction because enforcement was for the Conservators ([10] and [11])); alternatively, the Court should not grant an injunction which would be more onerous than any penalty which might be imposed for breach of the byelaws as a matter of criminal law ([12]); the Defendants denied that they had been using the Claim Locations in the manner alleged and the Council was put to proof of its allegations ([13]); there was an alternative route open to the Council, namely to bring proceedings against a person for touting in a public space pursuant to s 59 of the Anti-social Behaviour, Crime

and Policing Act 1984 ([14]). It was admitted that the Second, Third and Fourth Defendants had been convicted of offences under the Conservators' byelaws ([16]). The Council's claim for injunctive relief was denied ([17]).

7.On 22 February 2018, the Council issued an application for an interim injunction against the Defendants. That was accompanied by witness statements in support of the Council's case and a draft order (an amended draft was produced shortly before the hearing and I have worked from that later draft).

8.Laing J gave directions for the hearing of the Council's application and directed the matter to be listed for 2 days. The Defendants filed witness evidence in response to the Council's evidence. The Council filed evidence in response to that. Both parties filed skeleton arguments. And so it came before me.

Facts

Cam Conservators

9.The Conservators are the navigation authority for the stretch of the River Cam between the Mill Pool and Bottisham Lock. The Claim Locations are all adjacent to this stretch of river. Punts and other vessels cannot lawfully navigate that stretch of the river without being registered with the Conservators. On 29 April 2011, the Conservators decided that as of 1 April 2012, owners and operators of commercial punts would have to be able to satisfy two criteria in order to obtain registration: (a) that the punt to be used was operated from an officially recognised punt station; and (b) that the applicant for registration could demonstrate evidence that they had the permission of the landowner or occupier to use that operating station. They imposed these criteria under Byelaw 8.4 of the Byelaws of the Conservators of the River Cam, which Byelaws were made by the Conservators pursuant to their powers under the River Cam Conservancy Act 1922 (the "Byelaws").

10.In 2015, the Conservators took enforcement action in the magistrates' court against five individuals, including the Second, Third and Fourth Defendants. The other named individuals were Samuel Matthews and Oliver Prevett. Those five individuals were prosecuted for breach of the Byelaws in failing to register their punts, and/or by failing to comply with the criteria for registration outlined above. In his detailed written judgment, DJ Sheraton recorded that:

> "[7] It was not in dispute that at the relevant times and dates that the punts were indeed on the River Cam and that none were licensed save a punt called 'Flip Flop' but that only a private fee was paid for registration and not a commercial fee.

> [8] It was further not in dispute that on the relevant dates the punts had been seen carrying passengers.
>
> [9] A summary of the background to these allegations is that the defendants had all at times been involved with providing tours of Cambridge by means of chauffeured punting. All defendants with the exception of Mr Prevett set up a limited company called Traditional Cambridge Tours Ltd, (TCT) which was incorporated on 4th July 2013. Mr Prevett joined the others as director on 3rd April 2014."

11. DJ Sheraton heard oral evidence from Dr Noon, then the River Manager for the Conservators, Mr Sugden (Fourth Defendant) and Mr Prevett. The five defendants to that enforcement action argued that the punts in question were being used in an individual, not a commercial, capacity. Of the Fourth Defendant's evidence, DJ Sheraton concluded this:

> "[54] I found Mr Sugden to be evasive, hesitant and unclear in his evidence. There was no reason that I can accept as reasonable put forward why he applied to register Flip Flop in his own name making no reference to TCT. He could offer no credible explanation why his co accused had all completed forms in the same manner. I do not find it all credible that there was no collusion."

12. As to the nature of the activity in question, DJ Sheraton concluded that this was a commercial enterprise, see [53] "this is my view remained a commercial enterprise" and [59]:

> "It was not in dispute that the vessels were on the river on the relevant dates and taking on passengers from a station which was not officially recognised. I find that the manner in which the punts were used was indeed part of a commercial enterprise."

13. Given that it was accepted evidence that the punts were not operating from a recognised punt station ([53] again) it followed that there was a breach of the Byelaws (see conclusion at [60]).

14. As to the capacity in which each of the five defendants was involved with that commercial operation, the District Judge found:

> "[57] It is clear to me that at times the defendants refer to themselves as a company and on other occasions as individuals. They vacillate as to their

> status. This is true both with respect to the applications for registration and their e mail correspondence wherein some mails are sent from a punting tours email account and one dated 19th July is from a different address and simply signed Sam Matthews, Milan Kovacevich, Tersoo Sugden and Tom Arnold with no reference to a company.
>
> …
>
> [66] I find that the vacillation from partnership to individual, and in particular the planned and orchestrated completion of application forms for registration stating themselves as owners individually removes any prospect of them attempting to claim any personal protection that they only acted as directors of a company. They have taken a large step away from that role in completing those application forms and cannot step back at their whim.
>
> [67] If I am wrong in relation to that, the defendants who were directors at the time, that is all save Mr Prevett, made a fraudulent misrepresentation on behalf of the company and should be held personally liable because of their consent and connivance which I also find clear from the circumstances."

15. He held, in relation to the behaviour of the defendants generally:

> "[63] … I find that the behaviour of these defendants as a group towards the Conservators to be coercive and bullying. They have attempted to use fraudulent means to obtain the registration of punts on a private basis when they knew full well they would be used to promote a commercial activity. …
>
> [64] The arrogance of the defendants towards the Conservators is evident in that the punts remain on the river, unregistered and it seems still working on providing tours. Meanwhile, the Company in 2013/4 declared a turnover of £337,418. Their motivation is clear."

16. Mr Butler accepts, as he must, that the Second to Fourth Defendants have all been convicted, in a personal capacity as well as in their capacity as directors of the First Defendant, of criminal conduct by operating an unregistered commercial punt operation on the River Cam in breach of the Conservators' Byelaws.

Council's previous initiatives to stop unlicensed punting

17. The Council relies on several witness statements, including the first witness statement of David Prinsep, the Council's head of property services, dated 21 July 2017. The following summary sets out the background and is taken from his statement.

18. The Council leases or licences the use of its land as a punt station at various places along the River Cam. Punt operators who are licenced to use these "official" punt stations pay licence fees or rents to the Council. They also pay business rates and cover their operating expenses either by payments made directly to the Council or through their rent or licence fees. Where possible, the Council controls touting through restrictions in the leases or licences. There are 6 official punt stations along the River Cam in Cambridge: Granta Mill Pond, Mill Pit West, Mill Pit East, Trinity College frontage, Quayside and La Mimosa. The use of any other part of the river bank for commercial punting activity is not permitted by the Council.

19. The Council does not make, and does not wish to make, further spaces available for commercial punting, as that use is not considered compatible or desirable in other locations alongside the River Cam where open spaces exist for the use of the public. Specifically, the Council does not wish to establish a punt station at Garrett Hostel Lane. That issue was considered by the Strategy and Resources Scrutiny Committee on 4 July 2016. That committee considered the views of elected members and local residents, as well as considering issues of congestion, and likely environment and planning issues. It concluded that a punt station would not be suitable at that site.

20. The Council has taken action in the past to control unlicensed commercial punt operators who use the Council's land. In and around 2008, the main area of land being used without consent in this way was at Jesus Green. In order to regularise the position, the Council took enforcement action to prevent this unauthorised use of its land. The Council then provided a new official punt station beside Jesus Green and invited applications for licences to operate from that punt station. Twelve applications were made, from which seven operators were awarded licences. This was known as the "La Mimosa scheme". The First Defendant was not one of the operators awarded a licence within that scheme.

21. Some of the unsuccessful applicants continued to operate without licenses from other land along the River Cam, including the Claim Locations. The Council's experience in relation to those other operators, who are unlicensed, is this:

> "[14] Several operators who either did not apply to join the La Mimosa scheme, were unsuccessful or new entrants to punting have continued to operate commercially from the Claimant's other land along the river. These locations have included: the

> middle steps at Quayside, Jesus Green, GHL, Granta Mill Pond, Laundress Green and Sheep's Green. The Defendant's actions reflect what has generally happened since 2008, with Operators moving from place to place, on the Claimants land, to continue their business.
>
> [15] GHL has been the main focus for their activities over the past few years but when this has been unavailable, Jesus Green, Sheep's Green and Laundress Green have generally been used. In August 2015 works commenced at GHL which prevented tour operators working from that location. They immediately moved their tours to Laundress Green. When Laundress Green was then closed by the police due to a body being found in the river, the punt operators moved their operations to Jesus Green. This effectively repeated what happened in 2014 when the adjoining College to GHL closed off the slipway to undertake works to their property."

22. The Council introduced a voluntary "tout code" in 2013 to try to control the touting in parts of central Cambridge, which was reaching levels which the Council considered amounted to harassment. The Council was able to control some of the operators' touting activities via the licences or leases in place; that means of control was obviously not available in relation to those operators who were unlicensed.

23. The Council also introduced a byelaw to prevent touting in public places where that would cause obstruction or give reasonable grounds for annoyance.

24. The Council continued to receive complaints about touting. In 2016, following public consultation, the Council introduced the Public Spaces Protection Order (Touting) 2016, pursuant to s 59 of the Anti-Social Behaviour, Crime and Policing Act 2014. The PSPO sought to control the touting activity related to punt tours.

25. The Council handed out leaflets to the public indicating where they should go for punting, directing them to the official punt stations. In August 2013, March 2014 and August 2015 it served notices on touts and pushers (who are people who "push" punts) and posted notices at the Claim Locations that they should stop unlicensed activity or face enforcement proceedings.

26. In 2015, the Council erected a fence at Garrett Hostel Lane to improve safety and to prevent access to punts from the stone walkway alongside the slipway leading to the river. Since that fence was installed, passengers have embarked and disembarked on the narrow ledge on the wrong side of the fence.

27. In March 2017, the Council wrote to "Commercial Punt Owners and Pushers using Council

Land" requiring them to stop using its land and threatening legal action if the unauthorised activity continued.

28. None of these strategies was successful in moving the unauthorised commercial punt activities away from the Council's land or curbing the touting activities which went on at these sites and at other places in Cambridge.

Current situation

29. In his second witness statement dated 6 February 2018, Mr Prinsep confirms that the Council's land continues to be used for unauthorised commercial punting operations. Mr Prinsep passes the Garret Hostel Lane slipway morning and evening on most workdays and often at the weekends and gives first hand evidence that this activity is ongoing. He is not alone: other witnesses for the Council attest to the same thing. I was shown a letter dated 7 February 2018 from Trinity College, which adjoins Garrett Hostel Lane, supporting the Council's application for an injunction and explaining the adverse impact of this unauthorised activity on the College's enjoyment of its own land. That letter refers to the "sheer volume of traffic" on Garrett Hostel Lane which it describes as a busy connection, with the unauthorised commercial punt operations adding significantly to the number of people present at peak times.

30. I was shown a number of photographs, taken in recent months. They show people getting onto punts, getting off punts, queuing on the slipway and up the lane beyond at Garrett Hostel Lane. Punts can be seen pushing off into the Cam and circulating on the Cam alongside other punts. Some of the photographs show individuals wearing red jackets with "TCT" written on them.

31. In March 2018, a new floating pontoon was placed in situ at Garrett Hostel Lane to facilitate access to punts. Neither the Council nor the Conservators gave permission for this to be put in place. It blocks access for other users of the slipway. This is used by the First Defendant to board passengers onto its punts. The Council says that this pontoon belongs to the First Defendant and was formerly situated at Jesus Green, before the First Defendant moved on from there (this suggestion was not denied by the Defendants).

32. Mr Butler confirms that the red jackets belong to the First Defendant; he accepts that the individuals seen guiding members of the public onto and off punts at Garrett Hostel Lane, and the pushers seen on the punts, are working for the First Defendant. He accepts that there are 12 punts belonging to the First Defendant which operate from Garrett Hostel Lane. In short, he accepts that the First Defendant operates a commercial punt operation from Garrett Hostel Lane. He further accepts that that activity has not been authorised by the Council and is not licensed by the Conservators. It follows, as he accepts, that so far as the punting activity takes place on the river, it is unlawful, being in breach of the Conservators' byelaws.

Defendants' evidence of fact

33. The Second, Third and Fourth Defendants submitted witness statements to support their opposition to this application. They also provided a witness statement from Jed Ramsay, the River Manager for the Conservators from 2013 until 2016.

34. The picture which emerges from this evidence is that the Second, Third and Fourth Defendants have long been involved in punting on the Cam and the First Defendant is the business established by them to conduct this activity. They describe fierce competition in the commercial punting market in Cambridge, and they suspect that the Council's current application is motivated by a desire to put them out of business, which would be to the advantage of their market competitors. The Second, Third and Fourth Defendants would like the Council to provide more official punt stations, so that they could continue their business. There is a long standing dispute between them and the Council, and indeed with the Conservators as well. Each of them denies that they have trespassed on private land belonging to the Council.

Council's case

35. The Council's case is, quite simply, that this unauthorised commercial punting activity constitutes a trespass on its land. The Council seeks an injunction to prevent further trespass. In support of that central proposition, the Council asserts that the punting activity is unlawful so far as it takes place on the river, and points to previous efforts to stop this activity which have failed, meaning that the Council has no realistic choice but to seek an injunction. The Council says that the trespass has been going on for a long time, at Garrett Hostel Lane and at other sites before that, it is interfering with the rights of others to use the Council's land, and it must be stopped.

Defendants' case

36. The Defendants advance a series of alternative propositions in opposition to the application for an interim injunction. The Defendants' case can be summarised as follows:

i) The Council has failed to plead its case properly. Specifically, Garrett Hostel Lane is a highway, to which special rules apply. The Council has failed to plead any case of trespass to the highway and so the application fails at the outset. (This is the "pleading" issue).

ii) Alternatively, the application must fail because the Council lacks jurisdiction to regulate the use of the River Cam, which is a matter for the Conservators exclusively. (This is the "appropriate authority" issue).

iii) Alternatively, it is inappropriate for the Council to take civil proceedings against the Defendants given that there is an alternative remedy open to the Council in the criminal law. (This is the "alternative remedy" issue).

iv) Alternatively, there is no evidence linking the Second, Third and Fourth Defendants to the trespass. (This is the "factual" issue.)

v) Finally, on the *American Cyanamid* test, it is inappropriate to make an interim order. The balance of convenience favours no order at this stage, allowing the matter to progress to substantive hearing. (This is the "balance of convenience" issue.)

37. Mr Butler agreed that these were the issues in the case. They formed the basis of argument at the hearing, and I shall address them in turn. (The issue pleaded in the Defence relating to easement was not pressed by Mr Butler in his skeleton or at the hearing and I shall not therefore address it.)

Issue i): Pleading

38. The pleading issue breaks down into two sub-issues:

i) Was the use of the Council's land at Garrett Hostel Lane a trespass, as a matter of law?

ii) If so, was the assertion of trespass adequately pleaded?

39. <u>On the first sub-issue</u>: Mr Butler suggests that there is a critical difference between private land on the one hand, and a highway on the other. So far as private land is concerned, he accepts that access without the consent of the landowner constitutes trespass; but, so far as the highway is concerned, he says that consent is not the issue. He initially argued that trespass on the highway only occurs when there is an obstruction, because that inhibits the rights of others to come and go along the highway; but he modified his submissions during the course of the hearing, to agree the Council's central proposition that any unreasonable use of the highway (obstruction being one example of unreasonable use) amounts to trespass of the highway. Thus a measure of common ground was achieved. That common ground is reflected in the following extract from the speech of Lord Irving of Lairg in *DPP v Jones* [1999] 2 AC 240, at 254 H (emphasis added):

> "The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all

> manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. **Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass.** Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway."

40. The revised focus of Mr Butler's argument was that the Defendants were not using the highway at Garrett Hostel Lane in any manner which could be considered unreasonable. He argued that members of the public were entitled to gather at Garrett Hostel Lane for whatever reason they wished to be there; the individuals employed to work for the First Defendant were likewise entitled to be there; the activities of those who ran punt tours on behalf of the First Defendant from that slipway did not amount to an obstruction and were not unreasonable.

41. The authorities provide some guidance on where the boundary lies between reasonable use of the highway on the one hand, and unreasonable use (or trespass) on the other. Lord Irving in *Jones* held that any "reasonable and usual" mode of using the highway was lawful, provided it was not inconsistent with the general public's right of passage (at p 255 E); he held that reasonable user could not accurately be described as encompassing only those activities which were ancillary to passing along a highway because that would be to exclude such ordinary and usual activities (which were reasonable, by implication) as

> "making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book". (p 255 H)

He suggested that some activities would not amount to a reasonable user. The rule:

> "… would not permit unreasonable use of the highway, nor use which was obstructive. It would not, therefore, afford carte blanche to squatters or other uninvited visitors. Their activities would almost certainly be unreasonable or obstructive or both. Moreover the test of reasonableness would be strictly applied where narrow highways across private land are concerned, for example, narrow footpaths or bridle-paths, where even a small gathering would be likely to create an obstruction or a nuisance. (p 256 B-C)"

42. Further assistance on what might amount to unreasonable use is found in *Iveagh v Martin* [1961] 1 QB 232 at 273 where Paull J held, in a case about rights of navigation

(emphasis added):

> "…it must always be remembered that … rights of navigation are analogous to the rights of the public on a highway on land; that is to say, the right of coming and going and doing these things incidental thereto. **On a highway I may stand still for a reasonably short time, but I must not put my bed upon the highway and permanently occupy a portion of it. I may stoop to tie up my shoelace, but I may not occupy a pitch and invite people to come upon it and have their hair cut. I may let my van stand still long enough to deliver and load goods, but I must not turn my van into a permanent stall. …** As was said many years ago: "A man may not use the highway to stable his horse."

43. The activities described by the Council's witnesses and illustrated by the photographs (noting that there is no dispute of any substance on the facts) plainly amount to unreasonable use of the highway at Garrett Hostel Lane. Members of the public are gathering in that area to take punting trips on the Cam and to disembark. They can be seen in large numbers, gathering on the slipway and the lane behind. They are being organised by people working for the First Defendant. This is a commercial operation of quite some scale. There is no lawful right to set up a business on the Council's land; that is not reasonable use. It is equivalent to the occupation of a pitch for commercial purposes, which Paull J cited in the extract above as an example of unreasonable use.

44. Quite apart from the mere fact that commercial operations are being conducted on the Council's land without its consent (which is in and of itself unreasonable), there are other aspects of the First Defendant's activities which constitute unreasonable use of Garrett Hostel Lane and its slipway: at times, the crowds of people connected with the First Defendant's business inhibit the rights of others wishing to use the highway to come and go – this may be an obstruction, it is certainly an inconvenience; the pontoon prevents others from gaining access to the river from the slipway and vice versa, yet this is a public slipway and others are entitled to use it (and on occasion, do use it); the activity is unlicensed by the Council and so unregulated, giving rise to health and safety concerns for people clambering onto the punts from the wall or across the pontoon; the activity is in any event unlawful to the extent that it takes place on the river and the use of the Council's land to promote an unlawful activity is unreasonable, in and of itself.

45. Late in the argument, Mr Butler raised the argument that a company could not commit trespass. This was the First Defendant's defence to the issue of trespass, if I was to find against them on the issue of unreasonable use. However, I reject the proposition that a company cannot commit a trespass. Certainly, I was shown no authority to support that proposition. Ms Busch did show me *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2010] EWHC 1725 (Ch), which on its facts is an example of trespass by a company (in that case, by installing air conditioning units without authorisation from the leaseholder). I am satisfied that the First Defendant, as a

corporate, is capable of committing an act of trespass by unreasonable user of a highway.

46. I conclude that the commercial punting activity at Garrett Hostel Lane constitutes a trespass on the Council's land. That trespass is currently being committed by the First Defendant. There may well be others involved too, but for reasons I shall come to, I am not persuaded that it is necessary for me, at this stage, to determine whether any of the named individuals has trespassed in a personal capacity.

47. Although I accept that disputed issues of fact or difficult issues of law should in general not be resolved on an application for interim injunction (see *Pavel Suckhoruchkin and others v Marc Giebels van Bekestein and other* [2014] EWCA Civ 399 at [32]), the meaning of trespass in the current context does not raise matters of difficulty, or to be in any way dependent on findings of disputed facts. It is appropriate for that legal issue to be determined now (see *Bradford City Metropolitan Council v Brown and Ors* 84 LGR 731 at 736 per Woolf LJ: "where the issues are ones as to law the court frequently does resolve the disputes before deciding whether or not to grant an interlocutory application".

48. Before leaving this sub-issue, it is necessary to note that the only other highway is Quayside. Any future use of Quayside for commercial punting operations would also be a trespass, unless authorised by the Council. The remainder of the Claim Locations are private land and in relation to them it is accepted that any unauthorised access, of whatever sort, would amount to trespass.

49. <u>On the second sub-issue</u>: the Defendants argue that the claim for trespass of the highway is inadequately pleaded. Mr Butler complains that the Particulars fail to distinguish between public land used as a highway on the one hand (Garrett Hostel Lane and Quayside) and private land on the other; they do not assert in terms that the Defendants' use of the highway at Garrett Hostel Lane constitutes unreasonable user, as opposed to merely being use to which the Council has not consented; and they fail to give details of the alleged trespass.

50. The Claim Form asserts that the Council is the freehold owner of land over which the Defendants who are involved in unlicensed and unlawful punting activities which involve trespass on the Council's land. The Council seeks an order prohibiting the Defendants from "operating punt tours or punt hire, mooring their boats or other vessels, embarking and disembarking passengers, and touting from its land…". This is at least adequate to indicate the cause of action relied on by the Council (trespass) and the remedy sought (injunction to prevent future trespass). I can see no reason why the pleading should necessarily state that some of the freehold land is private land and some of it is highway. The central point remains the same: it is the Council's land and the Defendants are not authorised to conduct commercial punting operations from it.

51. The claim is more fully explained in the Particulars of Claim which assert (again) trespass by the Defendants by carrying out unlawful punting operations on the Claimant's land, with the various Claim Locations then identified precisely, including Garrett Hostel Lane (see [3], [5], [8] and [11] in particular). Mr Butler complained of a lack of particularity in what exactly the Council asserts to constitute the trespass, but it is difficult to follow this point given that it is accepted that the First Defendant, at least, is running an unauthorised commercial punting operation from Garrett Hostel Lane. This is the activity the Council wishes to stop. There is no lack of clarity about the Council's case.

52. I am not persuaded by Mr Butler's argument that the Particulars of Claim are defective. The Council's case is properly pleaded. That is the end of the first issue.

Issue ii): Appropriate Authority

53. Mr Butler argues that it is for the Conservators to enforce their Byelaws and to regulate the use of the River Cam, and not for the Council.

54. I agree with that proposition. But it misses the point of the Council's claim, which is for trespass on the Council's land which lies adjacent to the river. The Council is obviously entitled to take action to prevent a trespass of land belonging to it, whether or not that trespass happens to be connected with or a prelude to unlawful activity on the River Cam, which falls under the jurisdiction of a different authority. That is the end of the second issue.

Issue iii): Alternative Remedy

55. Mr Butler argues that the Council has an alternative remedy available in the form of criminal proceedings. He relies on s 137 of the Highways Act 1980 which provides that:

> "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along the highway he is guilty of an offence and liable to a fine …"

56. He argues, by analogy with the Sunday Trading cases, that s 137 envisages a criminal sentence for obstruction; and that it is inappropriate for the Council to resort to a civil action for an injunction when it could commence criminal proceedings. He relies on *Kirklees MBC v Wickes Building Supplies* [1993] AC 227 for the proposition that caution must be exercised before the Court grants an injunction to restrain an infringement of the criminal law (see Lord Goff at p 269); the same point was made by Lord Roskill in *Stoke on Trent City Council v B&Q (Retail) Ltd* [1984] AC 754 at 776:

> "The right to invoke the assistance of the civil court in aid of the criminal law is a comparatively modern development. Where Parliament imposes a penalty for an offence, Parliament must consider the penalty is adequate and Parliament can increase the penalty if it proves to be inadequate. It follows that a local authority should be reluctant to seek and the court should be reluctant to grant an injunction which if disobeyed may involve the infringer in sanctions far more onerous than the penalty imposed for the offence".

57. Mr Butler also took me to *Nottingham City Council v Zane* [2002] 1 WLR 607 at [27] and *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, both of which make similar points.

58. Ms Busch answers that

i) The Council is not in fact the highway authority for Garrett Hostel Lane. The highway authority is the County Council. If any action was to be taken under s 137, it would fall to the highways authority to do that (see s 130(1) of the Highways Act 1980). The Council only has residual powers under s 130(2) and so Mr Butler's suggestion that the Council can commence criminal proceedings is not right.

ii) In any event, both *Kirklees* and *Stoke on Trent* recognise that a civil injunction under s 37 Senior Courts Act 1981 may still be appropriate in those cases where the offender has been deliberately or flagrantly flouting the law (see Lord Goff at p 269 of *Kirklees*), where the offender intends to persist in offending regardless (see Lord Goff at p 270 of *Kirklees*) or where the defendants would not be deterred from offending by the fines which might be imposed as part of the criminal law (Lord Roskill at 776 of *Stoke on Trent*). The Defendants are deliberately and flagrantly flouting the law, they plainly do intend to persist in so doing, and they plainly have not been and will not be deterred by any fines imposed in the magistrates' court. So even if there was a criminal alternative, this is one of those cases where the Council would still be entitled to pursue an injunction in civil law.

iii) Further, the Council does not complain of obstruction of the highway, at least not as the focus for its action. It complains about the unreasonable use of its land to facilitate commercial punting operations. Section 137 only relates to obstruction of highways and is inapposite to prevent the Defendants' activity.

59. I agree with Ms Busch. I have no reason to doubt her submission that the County Council is the relevant highways authority for Garrett Hostel Lane (although Mr Butler suggested that the Council would have delegated powers – this was neither pursued nor resolved).

But more specifically, s 137 does not provide a suitable alternative remedy, because it permits an action to be taken to prevent a wilful obstruction of the highway. That is not what is at issue in this case. Further and in any event, even if s 137 did fit the facts, this is plainly a case where the Council would be entitled to take civil action, given that the Council's previous efforts to stop this unauthorised activity in the past have failed, as have the Conservators' efforts to end it by prosecuting some of the Defendants in the Crown Court. The last resort is to take a civil action for an injunction; that stage has been reached.

60. Therefore, it was open to the Council to take civil action of this sort. The Council is empowered to institute civil proceedings by s 222 of the Local Government Act 1972 (I reject Mr Butler's suggestion that the failure to refer in terms to s 222 in the Claim Form or Particulars constitutes a fatal defect; it does not).

61. That is the end of the third issue.

Issue iv): factual

62. Ms Busch seeks an injunction against *all* the named Defendants. Her case is that:

i) It is common ground that the First Defendant is currently conducting unlicensed commercial punting activity from Garrett Hostel Lane.

ii) She invites me to make an order against the Second, Third and Fourth Defendants also, on the basis that I can infer from all the evidence before me, and from the facts as found by DJ Sheraton, that those Defendants participate in this unauthorised commercial punting activity both in their personal capacity and as directors of the First Defendant – flipping from one to the other as it suits them.

iii) The Fifth to Eleventh Defendants have played no part in these proceedings and do not resist this application. She says I can infer that their part is admitted. She relies on witness evidence from the Council's officers identifying some of those individuals as present and participating in the First Defendant's commercial operations run from Garrett Hostel Lane.

63. Ultimately, Ms Busch accepts that it is not important to the Council or to the outcome of this application whether none, some or all of the First to Eleventh Defendants are named on the injunction. The important point is to have an injunction in place to protect the Council's property rights for the future and to prevent this commercial activity being conducted on its land in the future. Such an injunction would be effective if made against "Persons Unknown". That would still protect the Council against future trespass by anyone at all, corporate or individual, whether named in this action or not. The

language of the proposed order is broad, extending to any individual or corporate, and to anyone who assists in a breach or acts as agent of an individual ordered not to do something.

64. The Second, Third and Fourth Defendants deny any involvement in a personal capacity in the punting activity undertaken by the First Defendant at Garrett Hostel Lane. (I record that they are of course directors of the First Defendant, and so in that capacity they are plainly responsible for the First Defendant's activities.) Each of the Second, Third and Fourth Defendants denies trespass at any of the other Claim Locations.

65. Ms Busch suggests that this evidence is carefully worded, to deny trespass in the sense that the Defendants understand it (going back to Mr Butler's earlier point about the difference between private land on the one hand and public land used as a highway on the other, which point I have already addressed above); she says I should not be beguiled by the clever drafting and weasel words used in their statements, and that I should be satisfied that the Second, Third and Fourth Defendants have been present as trespassers in their individual capacity at Garrett House Lane, and do intend to trespass at the other Claim Locations if they cannot run the business from Garrett House Lane. She says I should likewise be satisfied that each of the other named Defendants (Fifth to Eleventh) has similarly been present, in a personal capacity, and has trespassed.

66. I understand why Ms Busch advances these submissions. She has a ready springboard for them in the findings of DJ Sheraton which were not flattering to the Second, Third and Fourth Defendants. She can also point to newspaper and similar articles where those Defendants have spoken about their activities and demonstrated their involvement.

67. But I do not need to take a view as to the merits of the factual issues regarding the Second, Third and Fourth Defendants – or indeed the Fifth to Eleventh Defendants - in order to determine the Council's application. My finding that the First Defendant has trespassed at Garrett Hostel Lane is sufficient for present purposes. I do not wish to be drawn into an analysis of disputed facts unless it is necessary, at this stage. It is not. I therefore leave the fourth issue to one side, undecided.

Issue v): Balance of Convenience

68. Mr Butler argues that the balance of convenience lies in favour of refusing an injunction at this interim stage and permitting the matter to proceed to a substantive hearing when full evidence and argument can be heard. He suggests that it would be inappropriate for me to exercise my discretion at this stage. He says that the Council has delayed bringing this application before the Court, and it is obvious that there is no real urgency because the problem of which the Council complains is of long standing. In connection with the last point he relies on *Graham v Delderfield* [1992] FSR 313.

69. Ms Busch resists those arguments. She accepts that the problem is of long standing, but argues that is hardly a reason to allow it to continue; rather, the fact the trespass has gone on for so long, persisted in despite the various measures taken by the Council and the Conservators, demonstrates the determination of the unauthorised operators including the Defendants to continue this activity unless the Court orders them to stop. She says that there has been no culpable delay at all: the Council has accorded appropriate priority to this case and has brought the matter to Court timeously, and in any event, *Graham v Delderfield* is a different case on different facts entirely, specifically it arises in a commercial context between two competitors which is not the case here where the application is brought by a public authority in the public interest.

70. In summary, I prefer Ms Busch's arguments. I can see no impediment to my making an order prohibiting unauthorised commercial punting operations on the Council's land. I am not persuaded that there has been any undue delay in bringing this matter to Court (the Claim Form was issued less than a year ago in July 2017; the current application was issued in February 2018, very shortly after the defence was entered; it was reasonable for the Council to wait to see what the Defendants said before deciding its next move). I am satisfied that it is just and convenient to exercise discretion under s 37 of the Senior Courts Act 1981 to grant such an injunction.

71. There are differences, however, in my approach to the different Defendants at the various Claim Locations.

First Defendant, Garrett Hostel Lane

72. The focus of argument at the hearing was on the use of Garrett Hostel Lane as an unauthorised punt station by the First Defendant and those connected with the First Defendant.

73. I have already decided that the First Defendant's activities at Garrett Hostel Lane amount to a trespass (see issue i) above). That means that the balance of convenience does not really arise, at least so far as this application relates to that Defendant's operations at Garrett Hostel Lane, because the Council is entitled to an injunction to protect its proprietary rights. That principle was described by Lord Hoffman in *Pride of Derby and Others v British Selanese LD and others* [1953] Ch 149 at 181:

> "It is, I think, well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered."

74.In this case, I can readily infer from the evidence before me that absent an injunction, the First Defendant is very likely indeed to continue to run its business from Garrett Hostel Lane. The fact that the First Defendant disputes this application, and positively asserts a right to operate from Garrett Hostel Lane as part of its case, demonstrates that intention.

75. I am also satisfied that damages would not be an adequate remedy. The Council does not seek any money recompense for what has occurred; rather it wants the First Defendant to stop its activities at Garrett Hostel Lane for reasons summarised already. This action is not about money; it is about regulating the use of the Council's land.

76.I can see no reason to defer making an order until the substantive hearing. The First Defendant is trespassing on the Claimant's land and that should not be permitted to continue. Accordingly, I will grant the Council an injunction against the First Defendant in relation to Garrett Hostel Lane.

Other Claim Locations, Other Defendants

77.However, Ms Busch argues that an injunction against the First Defendant alone would be insufficient to safeguard the Council's proprietary interests at Garrett House Lane. It would be possible for other operators, or individuals, to commence operations at that site, even if (and particularly if) the First Defendant was no longer able to conduct its business there. Further, she argues that an injunction in relation to Garret Hostel Lane alone would be insufficient, because it would be possible for the First Defendant or other operators to commence operations on any one of the other Claim Locations. The Council therefore invites me to grant a wider injunction which prevents trespass in the form of unauthorised commercial punting by any person at any one of its Claim Locations.

78.Mr Butler maintains his objection to the wider injunction on grounds already outlined above.

79.A wider injunction extending to other operators at Garrett Hostel Lane, and to other Claim Locations beyond Garrett Hostel Lane, would be on a *quia timet* basis, to prevent future trespass. The approach to such injunctions was summarised by Chadwick LJ in *Lloyd v Symonds* [1998] EWCA Civ 511, a case about nuisance but useful as a general guide, as follows:

> "Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm — that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a

> probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. "Preventing justice excelleth punishing justice" — see *Graigola Merthyr Co Ltd v Swansea Corporation [1928] Ch 235* at page 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see *Attorney-General v Nottingham Corporation [1904] 1 Ch 673* at page 677).

80.

That passage was considered by the Court in *Islington LBC v Elliott* [2012] EWCA Civ 56, where Patten LJ emphasised the need for caution in making such orders which were appropriate only where there was a risk of damage which was both "imminent and real" (see [29]).

81. I consider that the threat of future trespass by the First Defendant at other Claim Locations beyond Garrett Hostel Lane, and/or by other operators at any Claim Location (including Garrett Hostel Lane) by means of unauthorised commercial punt operations to be both imminent and real. For the Council to have to wait for such trespass to occur before applying for an appropriate order to restrain it, would not amount to "complete justice" (to borrow the phrase from Chadwick LJ). I so conclude for the following reasons:

i) The Council has experience, since 2008, of unauthorised operators moving from place to place on the Council's land to continue their business (Mr Prinsep, first witness statement, at [14], and see above). This shows that, unless restrained, the operators will try to find alternative access to the river from the Council's land.

ii) The Council has tried many different strategies in the past to prevent this unauthorised activity. None of those strategies has succeeded. It is reasonable to infer that the activities will continue unless and until they are restrained by court order.

iii) The Second to Fourth Defendants, specifically, have demonstrated their disregard for the law by continuing their unlawful punting business (at least in their capacity as directors of the First Defendant) even after conviction in the magistrates' court. The criminal law has been shown to be inadequate as a means by which to control these Defendants. Hence, other measures are required.

iv) Although the Council suspects the First Defendant is the main entity responsible

for the trespass on its land to date (with the involvement or collusion of the Second to Eleventh Defendants), it would be easy for any unscrupulous operator to get around an injunction which named the First Defendant only, by conducting operations in the name of a different person or entity. Thus, the injunction must extend to any person, individual or corporate (ie, "persons unknown") if it is to be effective.

v) The Council is a public authority which acts for and on behalf of the community it serves. It is entitled to take action in the name of the public, for the protection of the public and in the public interest.

vi) It is in the public interest that the Claim Locations should be free of unauthorised commercial punt activity, so that the public, that is, other users, can enjoy the ordinary amenity of those Locations without interference or obstruction.

vii) The Council is funded by the public purse. It should not be required to make a succession of expensive applications to Court, as and when a fresh trespass occurs, depleting limited resources which are better spent elsewhere.

82. Accordingly, the balance of convenience favours the grant of an injunction against the First Defendant and persons unknown, in relation to all Claim Locations.

Consequential matters

83. I invite the parties to agree an order which reflects this judgment.

84. I am broadly content with the Council's proposed order, noting that its terms prohibit any commercial punting activity on any of the Claim Locations, by any individual, acting by themselves or through others, whether in a corporate or individual capacity. It would therefore extend to the Second to Eleventh Defendants, even though they will not be named in it.

85. I am further satisfied that it is appropriate for the Council not to give a cross-undertaking in damages. It is a public authority acting in the public interest, seeking to enforce its own legal and proprietary rights.

86. Such an injunction will be granted on an interim basis pending trial or further order of the Court, subject to a long stop date which is yet to be determined. I doubt that there is anything further for the Court to adjudicate at trial. But the Defendants may take a different view. Either way, the parties will have to manage this litigation to a conclusion in such manner as they see fit.

Conclusion

87.I grant the Council's application for an interim injunction to prohibit trespass by means of unauthorised commercial punting operations at any of the Claim Locations, by the First Defendant or persons unknown.

88.Any breach of that injunction will amount to a contempt of Court which is punishable with imprisonment or a fine.