MOORING RIGHTS

1. In recent years there has been a rash of cases involving mooring boats on the River Thames:

Port of London Authority v Ashmore [2009] EWHC 954;

Couper v Albion Properties Limited [2013] EWHC 2993;

Port of London Authority v Tower Bridge Yacht and Boat Company Ltd [2013] EWHC 3084;

Moore v British Waterways Board [2013] EWCA Civ 73.

2. Mooring involves attaching a boat to the bed or to the bank of a river. So the first stage of the analysis involves establishing who owns the bed and/or the bank:

- In tidal waters the bed is owned by the Crown;
- In some cases, it is transferred by statute, in the case of the River Thames to the PLA;
- In non-tidal rivers there is a presumption that it is owned by the riparian owners ad medium filum.

3. In tidal waters there is a common law right of navigation derived from the Crown. In non-tidal navigable rivers a similar right of navigation will usually have become established by long usage and presumed dedication.

4. The right of navigation is a right to pass and repass. It carries with it a right to moor *temporarily* to wait for the tide or to load and unload but not to lay down permanent moorings. It does not include a right of landing or embarkation without the consent of the owner of the bank or foreshore.

5. A riparian owner has the following rights:

(i) Access to the watercourse;

(ii) To moor boats to the bank;

(iii) To place structures on the bank and bed of the watercourse;

provided that in doing so he does not interfere with the public right of navigation.

6. It is possible to acquire title by adverse possession to the bed of a tidal river or to the foreshore through the occupation of a vessel which floats above it and does not always rest on it, at least if it is adjacent to the bank:

PLA v Ashmore [2009] EWHC 954;

but quaere in light of dicta of Arnold J in *Couper v Albion Properties* at [611-613] to the effect that title cannot be acquired by adverse possession of a public highway.

7. A right to moor to the bank may also be acquired by licence from the riparian owner or by the grant of an easement (as long as there is a dominant tenement):

See *P & S Platt Limited v Crouch* [2004] 1 P&CR 242;

(where a right to moor boats for purposes of a nearby hotel passed under s. 62).

8. A right to moor in tidal waters could also be granted by a franchise from the Crown, and can be acquired by prescription but this is almost impossible to prove because:

(i) Evidence of past mooring to a bank or a wharf is equivocal and more plausibly ascribed to a licence or easement;

(ii) The bed of the tidal Thames has been vested in the Thames Conservators and then the PLA since 1857 and, since only the Crown could grant a franchise, the relevant user must be proved prior to 1857.

9. So a right to moor may be based on:

- Ownership of the bed;
- Ownership of the bank;
- The grant (actual or presumed) of an easement;
- A licence; or
- A franchise.

10. *Moore v BWB* [2013] Ch 488;

Mr Moore moored some vessels alongside land in his possession in part of the Grand Union Canal which was tidal and subject to public rights of navigation. The vessels were occupied permanently as homes. The BWB (which was not the owner of the bed of the canal) gave statutory notices demanding the removal of those vessels on the ground that they were moored "*without lawful authority*".

It was held that a riparian owner is not entitled as against the owner of the riverbed to place a vessel for an indefinite period over a part of the riverbed *that he does not own* but the appeal was allowed and the BWB's notice ruled invalid.

GATES

Access Points

11. Can the grantee of a right of way make openings or accesses onto it at any point where his land abuts the way?

12. That depends on the terms of the grant, which may simply be a way between two points. Whether this is so is a matter of construction. Relevant factors include:

- Is the grant "for all purposes"?
- Is there an obligation to contribute to maintenance of the way?
- Does the way extend past the existing point of access?
- Is there an apparently permanent barrier between the way and the dominant land (e.g. a wall[1]) as opposed to a transient one (e.g. a flowerbed[2]) or none at all[3]?
- Who owns the boundary structure[4]?
- Is there a ransom verge?

13. The general principle is that the servient owner may not derogate from his grant while the dominant owner may not make unreasonable demands or open an access which will unduly interfere with the rights of others[5].

14. The answer to this question will determine not only whether the dominant owner may open further access points onto the way but whether the servient owner is entitled to build a wall or install a fence along the boundary of his land.

[1] As in Mills v Blackwell (1999) 78 P&CR D 43.
[2] As in Charles v Beech [1993] EGCS 124, considered in detail in Perlman v Rayden [2004] EWHC 2192 (Ch).
[3] Emmett v Sisson [2014] 2 P&CR 3.
[4] Page v Convoy [2015] EWCA Civ 1061; Carder v Davies (1998) 76 P&CR D 33.

Servient Owner's Gate

15. Can the servient owner erect a gate on his land, thereby to some extent obstructing the dominant owner's right of way?

16. The test is simply the B&Q test: "Can the right of way be substantially and practically exercised as conveniently as before?". Usually a single unlocked gate will not be held to be a substantial interference but anything more probably will be, especially if locked[6].

17. Often the justification for the gate will be security, in which case the gate may have an electronic fob/keypad operated lock and be connected to the servient house by an intercom system. Even if the grantee of the way is provided with a fob, this is likely to be held to be a substantial interference because it does not accommodate deliveries, visitors, emergency services etc[7].

18. What if the servient owner installs CCTV cameras along the route of the way?

19. Whether the erection of a gate is an actionable nuisance may depend upon the motive of the party erecting it. It has been suggested that the test is "*convenience or cussedness*"[8]. The party being "cussed" is likely to lose.

Dominant Owner's Gate

20. Can the dominant owner, i.e. the grantee of the right of way, erect a gate across the servient owner's land?

[5] See Gale at para 9-104.
[6] Siggery v Bell [2007] EWHC 2167; Forestry Commission v Omega Pacific Limited – see Gale at para 13-16.
[7] See Page v Convoy [2015] EWCA Civ 1061; Brown v Jackson [2015] QSC 355.
[8] Bramwell v Robinson [2016] EWHC B26 (Ch)

21. To do so would be a trespass but the right to erect/close a gate across another's land could be an easement which could be acquired by prescription if there has been 20 years of regular gate shutting[9].

Duty to Close a Gate

22. The Australian cases (see Gale) suggest that it is an actionable nuisance not to close a gate across your way if you know that the gate is necessary to keep stock in, but only if it causes loss. I know of no English case on the duty to close a gate but it seems to me that the Australian cases can be analysed in terms of the law of negligence, rather than nuisance: there is a duty not to do something which it is reasonably foreseeable will injure your neighbour, which will sound in damages if loss is caused.

JONATHAN GAUNT QC
Falcon Chambers
October 2016

[9] Bradley v Heslin [2014] EWHC 3267 (Ch).