IN THE MATTER OF
DR DOUGLAS CAFFYN
AND IN THE MATTER OF
THE MEDIEVAL RIGHT OF NAVIGATION ON NON-TIDAL RIVERS

ADVICE

INTRODUCTION AND SUMMARY

1. My advice is sought on a number of questions arising in connection with the putative public right of navigation ("PRN") on non-tidal rivers in England during the medieval period (ie the period between 1189 and 1500), in the light of the differing views concerning this matter propounded by Dr Douglas Caffyn, on the one hand, and by leading Counsel, David Hart QC, who, it would appear, has been instructed by the Angling Trust, on the other. The general background to the question concerned is provided by on-going, and seemingly intractable, disputes concerning the use of non-tidal rivers by small leisure craft (in particular, canoes) and anglers respectively.

2. The specific questions which I am asked to address are as follows:

(1) Was there a PRN on all physically useable rivers in the medieval period in England?

(2) If the answer to the above question is "yes", has that right been extinguished?

(3) If the answer to question (2) is "no", does this imply that on sections of rivers which were physically useable in medieval times and are physically useable today, possibly only between obstructions, (Simpson v A-G [1904] AC 476), there is now a PRN for craft physically able to use the relevant section of the river?

3. In my view, for the reasons set out below, the answers to the above questions are as follows:

(1) On balance, probably, yes: there was a common law PRN on all physically useable rivers in the medieval period in England.

(2) Clearly, on the assumption that the answer to question (1) is "yes", the answer to question (2) is "no". On this point, Dr Caffyn and Mr Hart QC are agreed.

(3) Equally clearly, the answer to this question is "yes".

4. For a more detailed summary of my advice, see my concluding paragraphs below.

BACKGROUND

5. There is no relevant factual background to this matter, above and beyond the disputes between canoeists and anglers to which I have referred above. It may assist, however, if I summarise the respective positions of Dr Caffyn and Mr Hart QC, highlighting the considerations which, in my opinion, are especially pertinent to the above three questions.

6. I start with the document dating from October 2004 written by Dr Caffyn entitled "The

Right of Navigation on Non-Tidal Rivers and the Common Law" ("the 2004 document").[1]

7. The thesis defended in the 2004 document is that in common law there is a public right of navigation on all non-tidal rivers which are naturally physically navigable by small boats, and on those rivers which have been made physically navigable at public expense (§ 1.1). As Dr Caffyn also observes, this position contrasts with what may be denoted the orthodox stance, as set out in *Halsbury's Laws of England*, that there is no common law right of public navigation in non-tidal rivers. This stance would appear to be derived from that adopted by Humphrey W. Woolrych in his book entitled *A Treatise of the Law of Waters and of Sewers*, first published in 1830, that "there is no public right of navigation on any non-tidal river unless one has been created by statute, use or ancient use, or dedication".

8. The above proposition, in turn, reflects the common law doctrine of rights of way in its application, in particular, to the creation of highways on land. As to this, I note at the outset Dr Caffyn's comments in the 2004 document (§1.5.3) on the distinction that may, in fact, be drawn between "Rivers and Roads", and his observation that

"*Essentially roads are made by man. Rivers are made by God. In the days when this was a God fearing nation it seems likely that the roads would have been considered to belong to their creators, that is – publicly made roads would be public, privately made roads private, unless dedicated for public use. But all rivers would have been considered a gift to the nation of the eternal creator*".

9. In my opinion, this distinction is an important and telling one. First, whilst it may not come entirely naturally to the modern mind to differentiate between God-made and man-made features of the country, it may well have done so in the medieval period. Second, it is at least potentially significant, from the point of view of the common law, that rights of way over land must be created, or in any event demarcated over land which, as often as not, is itself in private ownership. The "way" comprised by a physically navigable river, by contrast, does not. In my view, this lends a prima facie plausibility, at least, to Dr Caffyn's contention that the common law principles concerning the creation of rights of way over land cannot and should not be directly transposed to the subject of rights of way over water (or rivers in particular). I comment on this further in my advice below.

10. In Chapter 2 of the 2004 document, the aim of which is to establish the law relating to the right of navigation on rivers before the introduction of pound locks and to examine how the rivers were used, Dr Caffyn cites from paragraph 13.18 of JH Bates's *Water and Drainage Law*, published in 1990, as follows:

"*It is suggested that in early medieval England, following Roman law, a permanently flowing non-tidal river was regarded as public property (res publicae) except so far as its banks were concerned. Thus, any member of the public who could navigate the river had the right to do so. By the time of Henry VI riparian owners had come to own the bed of the river but, it is submitted, those owners took their new property subject to the public right of navigation over it that had existed from time immemorial*".

[1] I note Dr Caffyn's observation, in his document entitled "The medieval right of navigation on non-tidal rivers" dated 25th July 2016 that his 2004 Kent thesis contains errors. The 2004 document with which I have been provided is stated to be based on that thesis. It is not clear to me whether the errors identified by Dr Caffyn in the thesis have been carried through into the former document. In my advice above, I have sought only to set out those points in the 2004 document which are consistent with the later materials produced by Dr Caffyn.

11. As to this, Dr Caffyn notes that the conclusion reached in Chapter 2 is that this suggestion is correct not only for the early medieval period but also, at least, for the whole of the Middle Ages. In support of this proposition, Dr Caffyn cites, inter alia, Bracton's remark in *De Legibus et Consuetudinibus Angliae*, dating from around 1260, following Roman law, that navigation in ports and perennial rivers is common to all persons, but that temporary streams may be private, and sets out the reasons why that principle may be regarded as not having been confined only to Roman law, but also as forming part of the common law of England at the time (and subsequently) (§2.4).
12. Dr Caffyn also cites (§2.5) various passages from Magna Carta (1215), including in particular Clause 23, which states that *"All kydells from henceforth shall be utterly put down by Thames and Medway, and throughout all England, except only by the Sea-coast*", and the Preamble to an Act of 1472, which refers to that Clause, and continues "… *which statute [ie Magna Carta] was made for the great Wealth of all this Land, in avoiding the Straitness of all Rivers, so that Ships and Boats might have in them their large and free Passage* …". In Dr Caffyn's view, that statement "*does seem to indicate that there was a public right of navigation on all rivers*". I observe in passing that I agree. I note, in addition, that, according to Dr Caffyn's research, in the 17th century Coke, Hale and "*a West County jury*" all took the view that Clause 23 of Magna Carta referred to the protection of navigation.

13. I also would also highlight the following points:

At §2.6 of the 2004 document, Dr Caffyn refers to further statutes passed in the 300 years after Magna Carta to authorise the retention of weirs built before the time of Edward I, to require the removal of new stone weirs and to forbid the enhancing of weirs, noting that the Acts in question "*were wider than Magna Carta in that they applied to a wider range of obstructions, but narrower in that they only applied to the great rivers of England*" (which, it would appear, include the Thames, Severn, Trent and Ouse (Great or Yorkshire), and may also include the rivers Lee and Dee).

§2.10 of the document is concerned with the issue of "Opposition to the use of rivers". Here Dr Caffyn records that there are only three cases during the medieval period in which a common law right of navigation had been disputed by a riparian owner, dating respectively from 1192, 1280 and 1385, and observes that no case prior to 1889 has been found in which a riparian owner successfully claimed that there was not a public right of navigation on a river which was physically navigable.

§2.11, entitled "The Commentators", contains an analysis of the writings of Coke, Callis, Hale and Lord Macclesfield. The conclusion of this section (set out in §2.12) is that:

"*The evidence relating to the time before the invention of the pound lock seems to indicate that Bracton and Britton correctly stated the law relating to the public right of navigation with regard to rivers that are naturally physically navigable. Callis and Hale provided the first opinions, which have been found, concerning rivers made navigable by man at public or private expense. If the river was made navigable at public expense then it would be a public navigable river, whereas if made navigable at private expense it would not become public*".

Chapter 3 of the 2004 document is concerned with the River Navigation Acts. In this Chapter, Dr Caffyn subjects a wide range of statues to a detailed examination, reaching the conclusion (§3.4) that there is no evidence from the wording of them, combined with the evidence of use, to suggest that there was no general public right of navigation on all

non-tidal rivers which were previously navigable. On the contrary, in Dr Caffyn's view, the evidence shows, on the balance of probabilities, that there was a public right on all such rivers before the passing of each of the relevant Acts.

Dr Caffyn deals with "The Commentaries" in Chapter 3 of the 2004 document, addressing the balance between private rights and public interests during the first half of the 19th century. In § 5.1 he makes an observation, which again, in my view, is telling, concerning the significance of the enclosure movement that took place (mainly) between 1750 and 1830, namely that, while the result of the enclosures was to remove rights enjoyed by commoners on land, they did not affect rights of navigation on rivers. However: "… *The apparent effect of the culture of the time seems to have been more insidious. The writers about the law just assumed that the rights had gone*". In very brief summary, the assumption that appears to have been made by the commentators in question was that adopted by Woolrych, to the effect that rights of way on rivers were subsumed within the common law concerning highways generally, and so subject to the same means of creation as rights of way over land; and the distinction referred to above, and made by Bracton, between roads and rivers was lost to legal memory.

In Chapter 6, Dr Caffyn considers "The Cases after 1830". However, these shed little if any light on the question of whether, in earlier times at least, there was a public right of navigation on non-tidal rivers at common law for the reasons given in that Chapter.

14. Dr Caffyn revisited the 2004 document in his paper "The Universal Public Right of Navigation" dated 11th April 2016, in which he sets out a "*clearer, more concise, corrected version*" of his original thesis, as well as various comments made in response to Mr Hart QC's Advice of 28th September 2015. I would again highlight the following points arising from this document:

In Dr Caffyn's view, Clause 23 of Magna Carta, read together with the Preamble to the Act for Weirs and Fishgarths of 1472, "*make it clear that the King and Parliament considered that there was in 1472 a universal public right of navigation on all useable rivers in England*".

Between 1350 and 1531 seven Acts of Parliament were passed requiring that rivers be kept clear for the passage of boats and fish and for land drainage. Thereafter, Commissions were appointed to enforce the law. Their responsibilities covered rivers in 32 counties, and 35 named individually named rivers; and there was no distinction in their functions with respect to tidal rivers on the one hand and non-tidal rivers on the other. As to this, Dr Caffyn remarks that the Commissions to preserve the navigation would not have been appointed if the rivers were private. He also notes that their existence belies Mr Hart QC's suggestion, as set out in his Advice, that "the great rivers" referred to in the statutes dating from 1350-1531 were limited to the Thames, Trent, Great Ouse and several other rivers, indicating instead that "the great rivers" were the physically useable rivers. I agree with these remarks, which, in my opinion, are self-evidently correct.

Dr Caffyn also prays in aid, inter alia, decisions of the Courts, evidence of medieval users of the rivers and the opinions of medieval authors in support of his hypothesis with respect to PRN.

As regards the suggestion that Bracton's description of the law with respect to PRN reflected the position in Roman law only, Dr Caffyn cites Getzler's remark, in *A History of Water Rights at Common Law* (published in 2004) that the "*Justininian and Bractonian*

formulations are perhaps key texts in the long history of water rights, they are cited continually in judgments and treaties [treatises?] for the next 600 years".

I also note Lord Frazer's observation, in *Wills' Trustees v Cairngorm Canoeing* (1976) SC (HL) 30, cited in Dr Caffyn's paper at paragraph 7, that "*It seems that it is most unlikely that any river in Scotland which is capable of providing a useful channel of communication for transport would not have been used by now, especially in the days before 1781 when there was no competition from railways and motor lorries*". Regard should also be had, in this connection, to Lightman J's comment (at [50]), in *Rowlands v Environment Agency* [2002] EWHC 2785 Ch (subsequently upheld by the Court of Appeal: [2003] EWCA Viv 1885) (cited at §1.4.2 of the 2004 document) that

"… *Legislation condemning locks and weirs as nuisances continued until the 17th century. But during a period when water transportation was vital and its utility and safety were matters of the foremost importance, the increasing size of barges converted mill dams and weirs from nuisances to navigation into useful and necessary adjuncts to navigation: the deeper water they ensured (except in very dry seasons) made navigation by the very large vessels practicable*".

15. Many of the above points are reiterated in Dr Caffyn's paper "The medieval right of navigation on non-tidal rivers" (25th July 2016). In this paper, Dr Caffyn states, inter alia, that there is now evidence that more than 170 rivers were used for transport in the period 1189-1600. Similar points are also made in his "Comments on 'Further Advice' from Mr Hart QC" (also dated 25th July 2016).

THE ADVICE OF MR HART QC

16. Mr Hart QC's advice is set out in two documents, namely an "Advice" dated 28th September 2015, and a "Further Advice" dated May 2016 responding to Dr Caffyn's paper of 11th April 2016. The upshot of the Advice is that, in Mr Hart's view, the existence of a PRN at common law requires to be established by evidence of "long user", as well as "factual navigability" ie the fact that a river (or part of a river) is physically navigable. Hence, according to him (see Advice, Summary, paragraph 9) "*In the absence of a PRN established by use, and assuming there is no agreed access, express dedication, or a statutory PRN, canoeists will be trespassing when they paddle in non-tidal waters*". It may be noted, however (see Advice, para 13) that, as Mr Hart himself expressly recognises, the latter conclusions emerge from cases in England and Scotland over the last 125 years, as well as text-book opinion; whereas, of course, it is precisely Dr Caffyn's point that the cases and texts in question fail to recognise or reflect the common law position as understood in the medieval period.

ADVICE
Question (1): the existence of public rights of navigation over non-tidal rivers in England
Tidal and non-tidal rivers

17. The most up to date and comprehensive description of the law regarding PRN, as currently understood, is that contained in paragraphs 48-51 of the Judgment of Lightman J in *Rowlands v Environment Agency* (upheld, as I have indicated, by the Court of Appeal).

18. At [49], Lightman J noted that, at common law, there are two distinctions between tidal

and non-tidal rivers. Only the first of these need concern us here. The distinction in question is that, in the case of tidal rivers the presumption is that the bed of the river belongs to the Crown and to establish PRN no prescriptive user is required. By contrast, in non-tidal rivers the presumption is that the bed of the river is vested in the riparian owners, and, therefore, a prescriptive user has to be established. I would make the following comments with regard to this distinction.

19. In the first place, the suggestion that the common law, from the medieval period and onwards, recognised a presumption that ownership of the river bed by riparian owners carried with it ownership of, or control over, the relevant part of the river, in my view, is implausible both from a historical point of view and in principle. As Lightman J himself recognised (at [50] of his Judgment, referred to above), the status of weirs and locks as obstructions to the navigation had long been a problem for the law; and legislation condemning locks and weirs as nuisances were passed from at least 1347 up until the 17th century. Indeed, as Dr Caffyn points out in his work on the PRN, this was a problem dealt with as far back as Magna Carta, as an issue which required to be dealt with in order to protect "*the great Wealth of all this Land*". Further, as Lightman J also recognised, in the 17th century (and no doubt into the 18th), "*water transportation was vital and its utility and safety were matters of the foremost importance*".

20. The common law has historically been (and continues to be) sensitive and responsive to commercial considerations, including especially those which have a direct bearing on the health of the economy. That being so, I consider, the suggestion that the common law, during the lengthy period in which the river-borne transportation of goods was crucial to the economic well-being of the country, would have entrenched a position in which riparian owners were possessed, in principle (and subject to any PRN acquired by, for example, prescription) with broad powers to obstruct it is one which requires to be treated with caution, to say the least. That suggestion is also inconsistent, of course, with the results of Dr Caffyn's extensive research, as summarised above, into the legislation and practices throughout the medieval period and beyond aimed at keeping "the navigation" free from obstruction. As Dr Caffyn says, there would there have been no role or purpose for such legislation (and for the Commissioners, etc) if the rivers throughout England were subject to extensive private ownership and control.

21. Second, and yet more importantly, the distinction drawn by Lightman J overlooks the principle laid down in *Carter v Murcot* (1762) 4 Burr. 2162; 98 ER 127, and cited in Best J's dissenting Judgment in *Blundell v Catterall* (1821) 5 B & Aid. 268. 106 ER 1190, a case concerning rights of way over the foreshore, that

"the soil of the locus in quo is in the plaintiff; but I say the soil must be in the plaintiff, as it was in the King; for the grantee cannot have a greater interest than the grantor had. The King had the right of soil in the shore in general; but the public had a right of way over it, and the King's grantee can only have it, subject to the same right …".

22. At the basis of English land law, that is to say, is the principle that all land in the country is vested in the Crown, such that "*all land is held of a lord*" (see *Doe d Hayne v Redfern* (1810) 12 East 96 at 103; and *A-G of Ontario v Mercer* (1883) 8 App Cas 767 at 772). Consequently, if, as this principle entails, the property comprised in the bed of a river is held by a tenant subject to a grant by the King, and if the King's ownership of it is subject to a public right of navigation, then so too must be the tenant's right in it. In my view, therefore, the presumption referred to by Lightman J applicable in respect of tidal rivers does not

support the distinction as regards rights of way over tidal and non-tidal rivers which is commonly drawn from it. In short, if there is a presumption in the case of tidal rivers that that ownership of the river bed by the King is subject to PRN, then the same presumption should apply in non-tidal rivers: and, to repeat from the quotation above, "the King's grantee can only have [the right of soil], subject to the same right".

23. The point is, of course, precisely that made by Bates, and set out at paragraph 9 of this Advice above. It is also squarely based on fundamental principles of English law. It may well explain, why, as Dr Caffyn has observed in his work on the PRN, early legal commentators (including Judges) did not distinguish between tidal and non-tidal rivers where PRN are concerned. In my opinion, for the reasons I have just given, it is strongly arguable that it is a distinction without a difference.

24. I would add, in this connection, that the focus of concern, in *Rowlands*, was not with the question of how PRN in tidal rivers are created, but with that of the means by which they may be extinguished. Moreover, the case was exclusively concerned with the river Thames, which has beyond peradventure been subject to PRN from time immemorial. The above points, therefore, were not argued. In those circumstances, it is unsurprising that Lightman J confined himself to a rehearsal of the orthodox position, deriving ultimately from the 19th century cases and textbooks, as to how PRN come into being.

Bracton

25. In the course of his work on the PRN, Dr Caffyn has cited various sources indicating that the principles with respect to PRN enunciated by Bracton form part of the English common law, as well as Roman law. Mr Hart QC, for his part, in his Advice and Further Advice, has cited authorities to the opposite effect. Clearly, whatever the position may have been historically, the current common law acceptation of the source of PRN on non-tidal rivers is incompatible with the position favoured by Dr Caffyn. Equally clearly, at least so far as the historical position is concerned, there is room for argument either way. I for one am of the view, however, that Dr Caffyn's opinion that, to put the point summarily, there is no evidence or reason in principle to support the conclusion that Bracton did *not* consider himself to be enunciating the position at common law (albeit derived from Justininan) in commenting as he did in *De Legibus et Consuetudinibus Angliae* is persuasive. I would comment further as follows.

26. First, the proposition that Bracton's statements of principle concerning PRN were intended to be statements as to the position at English common law is consistent with the considerations to which I have adverted above, namely, that there is room for doubt as to the plausibility that the Courts in the medieval period and beyond would have recognised an in-principle power on the part of riparian owners to obstruct the navigation on non-tidal rivers; and room for doubt as to the significance, where PRN are concerned, of the different ownership status of the riverbed in tidal and non-tidal rivers. By the same token, recognition that the relevant principle, that "*navigation in ports and perennial rivers is common to all persons*", was a principle of the common law, complements a position whereby, historically, the aim of the law was to maintain and protect the navigation on non-tidal rivers; and the rights of both the Crown, and those who derived proprietary rights in land from the Crown, were equally subject to PRN.

27. Second, the matter has recently taken an interesting turn in light of the decision of the Supreme Court in R (Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7. That case concerned the question as to the nature of the user by members of the public of a

beach within a harbour in East Sussex, including that of whether such use had been by permission or "by right", with the result that it could not be registered as a village green under section 15 of the *Commons Act 2006*. In the course of giving their respective Judgments, Lord Neuberger and Lord Hodge (with whom Baroness Hale of Richmond and Lord Sumption agreed), on the one hand, and Lord Carnwath, on the other, devoted some discussion to the decision in Blundell v Catterall, which I have mentioned above. In that case the majority took the view that Bracton's precept that "*By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea* …" formed a statement of Roman law only, whereas Best J differed, concluding that it represented a principle of the common law as well.

28. The majority in East Sussex observed (at [47]) that there was "*a great deal to be said*" for the view that the correct conclusion in that case was that the public had no rights to use the foreshore for bathing, on the basis that their rights were limited to access for navigation and fishing, "*given the reasoning in, and long-standing nature of, the majority judgments in Blundell"*, adding that the "*reasoning speaks for itself and the judgments have generally been followed by judges and have been assumed to be correct*". They also added, however, that the decision of the majority in *Catterral v Blundell*:

"*is not binding on this court, the dissenting judgment of Best J is not without force, and, as was reportedly stated on behalf of the unsuccessful appellant in Brinckman [1904] 2 Ch 313, 320:*
'*The decision in Blundell v Catterall has been disapproved by text-writers, eg, Hall on the Seashore, 2nd ed, pp 156 et seq. The same view is taken in Phear's Rights of Water, pp 44 et seq, Stuart Moore on the Foreshore, pp 833 et seq'*".

29. Lord Carnwath took the matter somewhat further. Citing the decision of the Court of Appeal in *Brinckman v Matley* [1904] 2 Ch 313 upholding the principle established in *Blundell v Catterall* that the "*public have no right to use the foreshore or to pass and repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or a private owner*", he expressed the view (at [115]) that, against the background of the authorities decided subsequently to the latter case, "*the unwillingness of the Court of Appeal in 1904 to reopen the issue seems both surprising and disappointing*". He also observed (at [131]) that, in the absence of argument to the contrary, the Court had no option but to proceed on the basis that the above two cases were rightly decided. It would appear to be clear from his Judgment, however, that he would have been receptive, at least, to the prospect of hearing argument on the issue and considering it afresh. This, inevitably, would have extended to argument as to the correctness of Best J's position vis a vis Bracton.

30. In my opinion the Judgment of Best J is not merely "*not without force*". It contains as powerful an argument as is available in the caselaw in support of the proposition that the precepts enunciated by Bracton were intended as statements of the English common law. Thus, having quoted Bracton, lib.1 cap. 12, sec. 6, Best J continued:

"*This passage proves all that I am attempting to establish. It shews that all persons have a common right on rivers; that the right of fishing exists only as a part of that common right, and that the banks of rivers are as much open to the use of the public as the rivers themselves. The passage has been supposed to prove too much, and therefore it has been said, that its authority cannot be relied on. Mr. Justice Buller, speaking of it, in Ball v. Herbert (3 T. R. 263), says, "That it plainly appears to have been taken from Justinian, and is only part of the civil law; and whether or not it has been adopted by the common law, is to be*

seen by looking into our books; and there it is not to be found." I admit that Bracton agrees with the civil law, and I must add, with the law of all civilized nations. Selden, who wrote his "Mare Clausum," to prove that an exclusive right might be acquired in parts of the sea, admits that the sea was originally common to all, and ***[282]*** *in lib. 1, cap. 2, he has collected from the works of the learned of all nations, as well philosophers, divines, and poets, as lawyers, that the sea and its shores were common to all men, as much so as the air that blows over them. This I think proves, that the doctrine is reasonable, and ought to be adopted into our law, unless there be something in our particular situation to exclude it; and so far from this being the case, there never was a country, the local situation of which, and the habits and interests of the inhabitants of which, so much required such a law.*
But our books shew, that this passage has been adopted into our law. Mr. Justice Buller tells us, that Callis quotes it as English law, and I have often heard Lord Kenyon speak with great respect of that writer. Bracton has not stated this as civil law, he has made it part of his book, De Legibus et Consuetudinibus Angliæ. He was Chief Justice of England in the reign of Henry the Third; and Lord Hale (Hist. of the Common Law, ch. 7) says, that in his time the common law was much improved, and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. In Fortescue, p. 408, Lord Chief Justice Parker says, "As to the authority of Bracton, to be sure many things are now altered, but there is no colour to say, that it was not law at that time, for there are many things that have never been altered, and are law now." As law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters. I do not say, ****1196*** *that the whole of the passage in Bracton is now good law: it was all good law at the time he wrote,* ***[283]*** *and all of it that is adapted to the present state of things is good law now. It is objected, that Bracton says, "That any one may, in any river, fasten vessels with ropes to the trees on the banks, and unload the cargoes on the banks." Undoubtedly the public cannot now pretend to claim this right in all navigable rivers. Many rivers have been rendered navigable since Bracton wrote, which in his time were private streams. The public have no greater right on the banks of such rivers, than the owners of the adjoining lands granted them when such rivers were made, from private streams, public rivers, and the extent of the grant must be ascertained from usage. This is the case with a new made road. If one dedicates to the public a right of way over his lands, the public must take the road with gates on such parts of it as the owner thinks proper to erect at the time he makes the dedication. But Bracton speaks not of newly made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations in the reign of Henry the Third. Those, like the sea and its shores, were then the property of the public, and the right of the public in them was not acquired by any compromise with the interest of any individual ..."*.

31. Best J went on to add:

"*My opinion is founded on these grounds. The shore of the sea is admitted to have been at one time the property of the King. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil. Our law books furnish us with little for our guidance on this subject; what is to be found seems to favour the common law right of way. But unless I felt myself bound by an authority as strong and clear as an Act of Parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance. In the first ages of all countries, not only the sea and its shores, but all perennial rivers, were left*

open to public use. In all countries, it has been matter of just complaint, that individuals have encroached on the rights of the people. In England, our ancestors put the public rights in rivers under the safe-guard of Magna Charta …".

32. These passage, plainly, are entirely concordant with the views expressed by Dr Caffyn in the light of his research. In particular, according to them, at common law there is a PRN over all navigable (ie physically useable) rivers in England, other than those which had their origin in "private streams" and were made navigable at private expense (and which were not thereafter made subject to PRN, eg by dedication).

33. As I have indicated, Best J was in the minority in *Catterrall v Blundell*. Holroyd J, in the majority, remarked as follows: "*But, further, such a general public right in all the King's subjects, to use the sea shore for all such temporary purposes as they please, would be, I think, inconsistent with the nature of permanent private property, or with the sea shore becoming such permanent private property. If, therefore, the right of bathing, and the right of passing over the sea shore on foot and with carriages, claimed as incident thereto, be claimed under the supposed general right of the public to use the sea, and the shore, for all such temporary legal purposes as they may please, such a public right of general appropriation is inconsistent with the fact of the locus in quo being private property, and of the fishing therein being also a private exclusive right, as stated in the case. And if the right of bathing, and of the incident foot and carriage way claimed for that purpose, cannot be established under such a general claim of right as I have before stated, it can only be supported under the specific claim of a public right of bathing, and of a carriage way, as incident thereto; for* ***[300]*** *to that extent it must be established, in order to entitle the defendant to the judgment of the Court. And then, I ask, where is such a right of bathing on the sea shore, where it has become private property, and may immemorially have been so, and of a carriage way for that purpose as incident thereto, when sought for, to be found as existing at the common law, independently of usage and custom; a right too which is here claimed beyond* ****1202*** *the extent of the usage actually found in the case? Where the soil remains the King's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the King, the parens patriæ. Where there is, and has hitherto been, a necessity, or even urgency, for such a right, it must, or most probably will have, usage and custom in the place to support, regulate, limit, and modify it; for, whenever there has been a necessity for it, there, as far as such necessity has existed, some usage must have prevailed*".

34. These remarks, I would venture to suggest, provide a good example of the shift in in the common law in the 19th century, remarked upon by Dr Caffyn in Chapter 3 of the 2004 document, in the balance between public and private interests. According to Holroyd J, the distinction between land which remained in the Crown's ownership and that which is in the private ownership of its subjects lies in the consideration, in essence, that the Crown may be expected to tolerate the use by the public of what is in effect public land, so long as that use does not involve mischief or injury, whereas the law would not expect private owners to tolerate such use and will instead protect their interests in their property. It may be noted that Holroyd J does not cite any authority for that proposition. It is in any event clearly in conflict with the fundamental principle of law which I have referred to above, namely the principle that "*the King's grantee*" can only have "*the right of soil*" subject to such rights as were enjoyed, in connection with the land in question, by the King.

35. In my opinion, the issues canvassed in *Catterrall v Blundell* and rehearsed above remain

eminently arguable. Further, I disagree with Mr Hart QC's remark that it is "extremely unlikely" (my emphasis) that the court would be unprepared to "modify what is now settled law" (see paragraph 14 of the Advice). It is true that the law, as summarised by Lightman J in *Rowlands*, is clear, and clearly different from the understanding of the (medieval) common law position advanced by Dr Caffyn. It is also correct that the weight of authority is inconsistent with that position. On the other hand, however, first, the law in question was largely formulated in the 19th century, in a way which was (fairly brazenly) geared towards protecting private property rights at the expense of the public interest. Second, as the discussion of *Catterall v Blundell* set out above should show, issues concerning PRN over tidal and non-tidal rivers in England give rise to fundamental questions of principle, which the courts may be willing to revisit in the 21st century. Third, the remarks of the Supreme Court, including in particular those of Lord Carnwath, serve to indicate that that Court did not regard the question of the correctness of the decision in the latter case as entirely foreclosed.

Usability and navigability

36. At various points in his work, Dr Caffyn refers to the potential ambiguity in the phrase "navigable river", pointing out that it may refer to a river which is physically navigable, or to one which is legally navigable (see eg the introduction to "The medieval right of navigation on non-tidal rivers"). In my opinion, one explanation for this ambiguity may be seen to lie in the fact that in the medieval period (and subsequently), the phrase "navigable river", and with it, the term "the navigation", was used in both senses, reflecting the fact that a river which could physically be navigated was legally navigable. Further, in my view, it is at least arguable that medieval thinkers took the view that the rivers in question were subject to PRN, not because they were, as a matter of fact being used at the time, but because they had been so used since "time immemorial". To that extent, the debate as to whether or not proof of long-user in establishing PRN is, at least arguably, misconceived.

37. In this connection, a distinction again may be drawn between rivers, on the one hand, and other forms of public rights, including those comprised by rights of way on land and also those attaching to village greens. New public rights of way on land are liable to be established periodically over time, as are actual or putative village greens. Hence there is scope for argument as to whether the right in question has been subject to the requisite period of use in the period preceding its establishment. So far as rivers are concerned, by contrast, while it may be that a new navigable river is created out of a private stream from time to time, this is a relatively rare occurrence, and the vast majority of rivers are ones which will have existed in some shape or form over a long period, including back to the medieval period. In my opinion, the weight of the evidence examined by Dr Caffyn in his research indicates that those rivers were used in that period and subsequently. Indeed, the alternative hypothesis is implausible.

38. In this connection, regard may be had to the Opinion of Lord Frazer in the *Wills' Trustees Case* (a case decided, of course, under Scottish law). Lord Frazer took the view that the mere fact of navigability is insufficient to establish a PRN on a river, and that proof of actual use was required. Thus, as he said at p 164 of the Judgment:

"*If the fact of navigability alone was decisive, without proof of actual use, the result might be intolerable for riparian heritors. It would mean that a new right of navigation might emerge suddenly, and might seriously interfere with existing rights of a riparian proprietor such as a right to withdraw water from the river for industrial purposes, subject of course to returning it fit for use by inferior heritors. And it might be open to any person to insist on attempting to navigate any river, however small, by asserting that it was capable of being navigated. I am*

aware of no authority which compels or encourages me to hold that the law of Scotland leads to such inconvenient results. In my opinion therefore it is not now possible, as a matter of law, for a public right of navigation, hitherto unsuspected, to be successfully asserted in a non-tidal river that has not been used for some form of navigation from time immemorial".

39. It was in this connection that he made the remark cited by Dr Caffyn, at paragraph 7 of "The Universal Public Right of Navigation" and in my Advice above that:

"*In all the Scottish cases that were brought to our attention where a public right of navigation was involved, the river had evidently been used for navigation (or at least for floating), for many years and there was no question of setting up a new right. That is what is to be expected in a country lake Scotland which has been inhabited and relatively settled for centuries. It seems most unlikely that any river in Scotland which is capable of providing a useful channel of communication or transport would not have been used by now, especially in the days before 1781 when there was no competition from railways and motor lorries*".

40. In my view, these remarks support the proposition that it may be assumed that a river which is "*capable of providing a useful channel of communication or transport*" was indeed used for those purposes in the "*days before 1781 when there was no competition from railways and motor lorries*", unless the contrary is proven. I also consider that that proposition holds good under English law. In my further opinion, at least arguably, that reasonable assumption, couple with the evidence as to use described in Dr Caffyn's research, is sufficient to show, on the balance of probabilities, that those rivers in England which fall under the latter descriptor were subject to PRN. In short, there is, at least arguably, a basis for a common law presumption that rivers which are capable of being navigated were – and are – subject to PRN unless the contrary is proven.

Question (2): the extinguishment of public rights of navigation

41. It is well established in English law that PRN cannot be extinguished by disuse: see the decisions of Lightman J and the Court of Appeal in Rowlands. In particular, as Lightman J stated at paragraph 50 of Rowlands:

"*At common law PRN cannot be lost by disuse, see the Wills' Trustees case 1976 SC (HL) 30. As Lord Lindley said in Simpson v Attorney General [1904] AC 476, 510: "the doctrine once a highway always a highway is, I believe, applicable to rivers as to roads." Likewise PRN could not be extinguished by physical obstruction: see e g Vooght v Winch (1819) 2 B & Ald 662. Though Lord Hailsham of St Marylebone, at p 147 in the Wills' Trustees case, reserved his opinion whether a physical obstruction by a riparian owner might extinguish PRN, the weight of authority militates against any such exception, and it is common ground in this case that the general principle which I have stated is free from any such exception. PRN may only be extinguished by legislation or exercise of statutory powers or by destruction of the subject matter of PRN e g through silting up of the watercourse. On principle for this purpose the process of silting up would have to be irreversible if it was to give rise to an extinguishment, as opposed to a suspension, of PRN …*".

42. It might be said that a person propounding the position of Dr Caffyn, having disavowed the current common law position as regards the creation of PRN, cannot at the same time rely upon the common law in connection with the question of whether or not PRN may be extinguished by disuse. However, there has never been any suggestion in English common law that the latter is a possibility. Nor would it be correct in principle. While there may be

good reasons, which I have touched on above, for distinguishing between rights of way over rivers and land in terms of the ways in which such rights may respectively be created, the same considerations in each case weigh against their loss through lack of use, namely considerations reflecting their public value, once they have come into existence. In any event, this is not an issue upon which Dr Caffyn and Mr Hart QC disagree.

Question (3): implications of the above advice

43. If the above advice is correct, then it follows that Question (3) in my Instructions falls to be answered in the affirmative, ie that sections of rivers in England which were physically useable in medieval times and are physically useable today (or, if not physically useable, not merely obstructed on a temporary basis) are subject to PRN. This is clearly the case as regards canoes, as well as other types of vessel. Thus, to revert again to Lightman J's Judgment in Rowlands (at [48]):

"PRN are rights to public use of the river: see Lord Wilberforce in *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd 1976 SC(HL) 30, 123. The river may be used by the public for purposes of exercise and recreation as well as transport and commerce: see Lord Salmon in the Wills' Trustees case, at pp 152-153. This was indeed however recognised as long ago as R v Russell (1827) 6 B & C 566 where Bayley J said, at p 594: "The right of the public [on navigable rivers] is not confined to the purpose of passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient to those ends." The right of passage in particular for trade and commerce was the principal right embraced in PRN: it was not however the sole or exclusive right*".

44. So much is also made clear in the Opinions of the House of Lords in the *Wills' Trustees* case itself.

CONCLUSION

45. For the purposes of this advice, I have not delved into the minutiae of the discussion between Dr Caffyn and Mr Hart QC. It seemed to me that it was unnecessary to do so, albeit that I would be happy to undertake that task should I be so requested. There can be no doubt that Mr Hart QC has correctly described the common law position as it currently stands. There is also, plainly, ample scope for argument as to the correct interpretation of the numerous documents, including judgments, legislation and legal commentaries, spanning a period of hundreds of years, as regards the question of the genesis of PRN on non-tidal rivers in England, from the medieval period onwards. In my opinion, however, a number of broad propositions stand out:

(1) It is at least arguable, from the materials cited by Dr Caffyn and the Judgment of Best J in *Catterrall v Blundell*, that Bracton's precepts regarding PRN, referred to above, were intended by him as comprising a description of the English common law with respect thereto, and that they were understood as such during the medieval period.

(2) Whilst it is correct that the weight of judicial opinion is to the contrary, the current common law concerning PRN derives from the 19th century, a period in which, as *Catterrall* itself demonstrates, the law was geared towards the protection of individual private interests at the expense of that of the public.

(3) It is also arguable that the 19th century formulation of the common law regarding PRN failed to take properly into account the principle adverted to by Best J in the above case, and

relied upon by Bates, that all land in England is vested in the Crown and that private land owners take their land as grantees of the Crown, such that the land in question is subject to such public rights as Crown land was subject, including PRN. This would explain why, as Dr Caffyn had noted, early commentators did not distinguish between tidal and non-tidal rivers, where PRN were concerned.

(4) There is a wealth of evidence to indicate that navigable rivers in England were in fact navigated in the medieval period, and beyond, and a dearth of evidence to suggest that such use was by the licence of riparian owners. In any event, the suggestion that rivers were not so used, or that such use was by permission, is wholly implausible. In those circumstances, again arguably, there is room for a common law presumption to the effect that navigable rivers were, in fact, subject to long-use for navigation, or for time immemorial; a presumption which the onus would lie on riparian owners to rebut.

(5) Whilst the weight of authority is clear on the point that PRN should be regarded as coming into existence in the same way as rights of way over land, ie by statute, long use or dedication, there is good grounds in principle for distinguishing between the modes of creation of each kind of right.

(6) Finally, the Judgments in the *East Sussex* case, notably that of Lord Carnwath, serve to indicate that there may be scope for revisiting the decision in *Catterrall v Blundell*, and, likewise, the various debates which I have covered in my advice.

46. In the above circumstances, I do not agree that there is any firm basis for suggesting, as Mr Hart QC would appear to do, that canoeists who paddle on rivers in England may, as a rule, be regarded as trespassing on the property of the riparian owners with respect to the rivers in question. That proposition is tendentious to say the least. On the contrary, in my opinion, there are clear arguments in principle in support of the contrary proposition, namely that canoeists have a right so to paddle, unless it is demonstrated that the relevant river has at no stage in history formed part of “the navigation”, ie the network of rivers used for communication or transport in England, and has at al material times been wholly private, in particular, by virtue of the fact that it was made navigable at private expense, and was not thereafter dedicated to public use, or subject to a subsequent period of sufficiently long use.

47. If those instructing me wish to discuss these matters further, they should not hesitate to contact me in Chambers.

LISA BUSCH QC
LANDMARK CHAMBERS
180 FLEET STREET
LONDON EC4A 2HG
26th August 2016