PROTECTOR

Gulliksen Remains Alive and Relevant in Relation to Estate Roads and Paths

Introduction

We are being asked by some local authority and housing clients if the case of Gulliksen v Pembrokeshire County Council (2002) has reduced in relevance since the Barlow v Wigan MBC (2021) case in the Court of Appeal last year. The issue is whether roads or paths (in housing estates) are highways maintainable at public expense or not. In this article Siobhan Hardy of Forbes Solicitors explores the issues and explains the impact of the case for both Highways Authorities and Housing Associations

For a road or path to be maintainable at public expense it must first be a highway, (often called a public right of way). Once that is established then the relevant Highways Acts need to be looked at to ascertain if it has become more than a simple highway or right of way and has been caught by the definition of a highway maintainable at public expense.

Creation of a highway

A highway is created either formally by statue, or by dedication and acceptance. Dedication can be express dedication by the landowner; deemed by 20 years' uninterrupted use prior to any challenge of the right of way; or inferred by common law such as by the landowner allowing the public to use it over a period of years (not necessarily 20 years).

Creation of a Highway Maintainable at Public Expense

It is useful here to set out a chronology of sorts:

1835 - prior to the **Highways Act 1835** all highways were maintainable by the public at large via the local parish. S23 of that Act abolished that responsibility in respect of highways dedicated or roads constructed after that Act came into force unless the road was formally adopted. However, the Act only applied to roads and not footpaths.

1949 - the **National Parks and Access to the Countryside Act 1949**, Sections 47 and 49, brought footpaths in line with roads from the 16 December 1949. So until that date all footpaths remained maintainable by the public at large.

1959 - the **Highways Act 1959** came into force on the 1 January 1960 and removed the obligations from the inhabitants at large and made certain highways maintainable at public expense. Put simply under s38(2) these included:

a) Any highway that immediately before the Act was maintainable by the public at large;
b) A highway constructed by a highway authority after the Highways Act 1959;
c) A highway constructed by a local authority under Part V of the Housing Act 1957.

1980 - the **Highways Act 1980** - this Act consolidated previous Highways Acts and s36 included the following as highways maintainable at public expense:

a) Any highway that immediately before the Act was maintainable at public expense;
b) A highway constructed by a highway authority;
c) A highway constructed by a local authority under Part II of the Housing Act 1985.

The case of **Gulliksen v Pembrokeshire County Council [2002] EWCA Civ 968** explored the issue of whether a particular path on a housing estate footpath was maintainable at public expense or not. In 1999 Mr Gulliksen tripped whilst walking on the path.

It was accepted by the Council that the path was a highway, but they argued that it was not a highway maintainable at public expense because whilst it had been built by them it had not been built by the local authority acting as a Highway Authority and had never been formally adopted by them. It was simply a public footpath with no duty on them to maintain it pursuant to **McGeown v NI Housing Executive [1995] 1 AC 233** (no duty to maintain a public right of way).

The path had, however, been built under Part V of the Housing Act 1957 by the local authority acting as Housing Authority. No local authority could build housing except under its powers contained in Part V (now Part II of the Housing Act 1985). The estate roads and paths were built at the same time as the houses. As such the path in question fell within the definition of the Highways Act 1959 s 38 (2)(c) above and was maintainable at public expense.

As indicted above, the Highways Act 1980 states that any highway that was highway maintainable at public expense before the coming into force of the 1980 Act remains publicly maintainable, so at the time of Mr Gulliksen's accident, he had fallen on a highway maintainable at public expense.

This case caused consternation at the time it was handed down by the Court of Appeal because of the issue of stock transfer agreements. Many Local Authorities had thought that by divesting themselves of their housing stock they had divested themselves of the need to maintain the footpaths and roads leading through those estates, unless they had been formally adopted by them. The case of Gulliksen made it clear that they were wrong to assume that. So unless the stock transfer agreement contained an indemnity in favour of the Local Authority from the organisation that they were transferring the housing stock to, they remained responsible for the inspection and maintenance of the roads and paths, and for any accidents that arose as a result of any lack of such inspection and maintenance. This remains good law, and so in this respect Gulliksen has not ceased in relevance.

However, in obiter comments in the Gulliksen case, Lord Justice Sedley said that he disagreed with the lower court's view that a highway authority had to be acting as such in the construction of a road or path for it to be publicly maintainable. He was of the view that a local authority was one body in law, so if any part of a local authority constructed a highway, it would be maintainable at public expense.

Then came **Barlow v Wigan MBC [2020] EWCA Civ 696**. Mrs Barlow tripped on a defect in a path in a park. The Council defended the claim on the basis that the path was a public right of way, but not one that was maintainable at public expense, and so there was no liability. They relied on the case of **McGeown** to say that there could be no liability for failing to maintain a path which was a public right of way.

It was argued on behalf of Mrs Barlow that the path was in fact maintainable at public expense. The claimant argued two alternative cases. The first was that it was a "highway constructed by a highway authority" within the meaning of S36(2)(a) of the 1980 Act. The second was that it was one of those highways which "immediately before the commencement of this Act were highways maintainable at public expense" within the meaning of S36(1) of the 1980 Act.

The Court rejected the initial argument. For it to bite the path had to have been created by the local authority acting as highway authority, they said. Here is where the obiter comments in Gulliksen have been challenged. Since the Barlow case it has become clear that a highway authority must be acting as such when it creates a highway for it to be

maintainable at public expense under that part of the Highways Acts 1959 and 1980. The Court of Appeal decision effectively went further than that too. Since the first Highways Act that referred to highways constructed by a highway authority becoming highway maintainable was the 1959 act, it cannot now be argued that a highway constructed before 1959 by a council that is now a highway authority is, for that reason alone, a highway maintainable at public expense.

However, the Court of Appeal found for Mrs Barlow on the basis that the path had become a highway through inferred dedication of the path as a public right of way under common law due to the public having had continuous use over the path for sufficient time. This time began when the park was constructed, in the 1930s, or soon afterwards. As such the path was in existence prior to Ss47 and 49 of the National Parks and Access to the Countryside Act 1949 so that it fell within the definition of a highway maintainable for the purposes of S36(1) of the 1980 Act. The Court of Appeal disagreed with the Council that deemed dedication could not be backdated to the beginning of the period of use by the public, which, in this case meant that it was deemed to be a highway from when the park was laid out in the 1930s.

Conclusion

- Gulliksen remains good law. Highways Authorities should carefully consider any estate roads and paths in their areas and make sure that an adequate system of maintenance is in place. This does not mean that all footpaths necessarily need to be inspected as frequently as main roads and pavements. The duty is to "take such care as is in all the circumstances was reasonably required" (s58(1) Highways Act 1980). And the court will have regard to the character of the path, the traffic reasonably expected to use it, the appropriate standard of maintenance for the particular path and the state that a reasonable person would have expected the path to be in. An infrequent or even reactive system may be appropriate for some paths. This fits with the Well-managed highways infrastructure Code of Practice which requires that you take a risk-based approach to your highways network.
- Barlow clarified that a highway authority must be acting as such when it creates a highway for that highway to become maintainable at public expense under s 36(2)(a) Highways Act 1980.
- The S36(2)(a) Highways Act 1980 duty to maintain highways constructed by highways authorities at public expense can only apply to highways built by highways authorities from 1980 when the Act came into force. (NB There is a similar provision relating to such highways constructed from 1959).
- Housing Associations should think carefully before accepting responsibility for maintenance of and claims arising from trips on estate roads and paths. It may be that the local highways authority has responsibility. However, they should carefully consider their stock transfer agreement as they may have agreed to indemnify the local authority. This is more likely if the transfer took place after 2002 and the Gulliksen judgment.
- It is usually not difficult to establish highways maintainable at public expense. But where it is not clear cut it will still be necessary to carry out enquires as to the historical nature of the path concerned. It will be important to establish when it was created, and who by and in what capacity.

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