

Ley v. Devon County Council

Sounding the Retreat on Gulliksen?

When identifying the central issue on appeal in the case of Gulliksen v. Pembrokeshire County Council [2002] EWCA Civ 968, Sedley LJ said “ ... *the answer may have significant implications for local authorities throughout England and Wales.*”

Few recent judicial observations can have proven to be so prescient.

The Court of Appeal handed down judgment in Gulliksen in July 2002. It can confidently be asserted that this decision has, in the intervening period, cost local authorities across England and Wales many hundreds of thousands, if not millions, of pounds in damages and costs paid out in tripping claims on housing land which might, but for this decision, have been successfully defended.

Against this background, the recent decision of the Dobbs J. in Sheila Ley v. Devon County Council (QBD, unreported, 28<sup>th</sup> February 2007), entitles local authorities to take a far more robust view of their prospects of successfully defending tripping claims on housing land.

*The decision in Gulliksen*

In May 1999 Mr Gulliksen was walking along a footpath on the Mount Estate, Milford Haven, when through no fault of his own he caught his foot on a lip of an inch and a half on the edge of a manhole cover. He fell injuring his elbow. Damages were agreed in the sum of £3,000.

The Mount Estate had been built in the early 1970's. The footpath upon which Mr Gulliksen fell ran from a ring-path to a group of houses on the Estate. It was accepted by Pembrokeshire County Council (in their capacity as housing authority and therefore owner of the Estate), that the pathway was to be regarded by virtue of Section 31 of the Highways Act 1980 as having been dedicated by long and uninterrupted user as a public right of way.

Section 31 of the Highways Act 1980 provides:

*“Dedication of way as highway presumed after public use for 20 years*

*(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”*

At first instance, the case was heard by His Honour Judge Hickinbottom. He held that the pathway was not only, as the County Council accepted, dedicated as a public right of way but that it was in law a highway in the simple sense given by Lord Diplock in Suffolk County Council v. Mason [1979] AC 705: “*At common law a highway is a way over which all members of the public have the right to pass and repass without hindrance.*”

HHJ Hickinbottom found for Mr Gulliksen on the basis that the County Council as highway authority was liable to him for a breach of its obligation under Section 41 of the Highways Act 1980 to maintain the pathway in good condition.

The County Council appealed. Neuberger J. allowed the appeal, holding that the pathway was not in law a highway maintainable at public expense.

In the Court of Appeal the parties were geared up to argue various points about whether the Estate had been constructed (under Section 36(2) of the Highways Act 1980) by the highway authority *acting as a highway authority* and/or whether there had been an assumption of liability by reason of the highway authority’s powers of adoption under Section 38 of the Highways Act 1980. As it turned out, these points were not fully argued because the Court of Appeal took the view that the case before both HHJ Hickinbottom and Neuberger J had been argued and decided on a false basis of law.

During the course of argument, Sedley LJ pointed out to the parties that they had overlooked Section 36(1) of the Highways Act 1980 and, more particularly, its implied reference to Section 38 of the Highways Act 1959.

Section 36(1) of the Highways Act 1980 provides:

*“Highways maintainable at public expense*

*All such highways as immediately before the commencement of this Act were highways maintainable at public expense for the purposes of the Highways Act 1959 continue to be so maintainable (subject to this section and to any order of a magistrates’ court under section 47 below) for the purposes of the Act.”* (Emphasis added)

Section 38 of the Highways Act 1959 provides:

*“(1) After the commencement of this Act no duty with respect to the maintenance of highways shall lie on the inhabitants at large of any area.*

*(2) Without prejudice to any other enactment (whether contained in this Act or not) whereby a highway may become for the purposes of this Act a highway maintainable at public expense, and subject to the provisions of this section and of subsection (6) of section two hundred and*

six of this Act, and to any order of a magistrates' court made under section fifty of this Act, the following [are] highways maintainable at public expense, that is to say: -

(a) ...

(b) ...

(c) a highway constructed by the council of a borough or urban district within their own area under Part V of the Housing Act 1957, and a highway constructed by a local authority outside their own area under the said Part V, being, in the latter case, a highway the liability to maintain which is, by virtue of the said Part V, vested in the council of the county, borough or district in which the highway is situated." (Emphasis added)

Mount Estate was constructed by the County Council's predecessors pursuant to its powers under Part V of the Housing Act 1957. On this basis, the Court of Appeal found that by the date when Section 36(1) of the Highways Act 1980 came into force, the path that Mr Gulliksen had his fall on was already a highway maintainable at public expense by virtue of Section 38(2)(c) of the Highways Act 1959.

However, it is very important to understand that the Court of Appeal did not undertake any detailed analysis as to whether the pathway was a highway, either by reason of Section 31 (because of dedication by long user) or by way of it satisfying Lord Diplock's test in Suffolk County Council v. Mason. The former point had been conceded by the County Council at first instance and this is undoubtedly the reason why this aspect did not feature in much detail in the Court of Appeal's judgment.

*The decision in Ley v. Devon County Council*

Mrs Ley and her husband lived in a flat in Prescott Road, Exeter. The flat was part of a complex built by Exeter City Council in 1972. On 13<sup>th</sup> August 2002 Mrs Ley tripped on a pathway which ran along the left hand boundary of the grounds occupied by the Prescott Road flats. She injured her left knee.

The claim was originally intimated against Exeter City Council, the owners of the flats, but their insurers stated that the City Council was not the highway authority and therefore not responsible. In light of this stance, proceedings were eventually commenced against Devon County Council, the highway authority for the area in which the flats were located. The proceedings were defended on the basis that the footpath was not a highway within the meaning of the Highways Act 1980.

The trial was heard by Mr Recorder Salomonsen on 29<sup>th</sup> June 2006. He held that, notwithstanding a sign which stated "*Resident Only – Exeter City Council*", the pathway was not restricted to council tenants, not least because it provided a ready means of access for

those passing across the complex, as well as to any member of the public who wished to do so to go to and from the houses and flats contiguous to it. Relying on Gulliksen, he added that the pathway was, by the date when Section 36(1) of the Highways Act 1980 came into force, already a highway maintainable at public expense by virtue of Section 38(2)(c) of Highways Act 1959, the flats having been erected in 1972. He added that even if he was wrong, he took the view that the pathway had become a highway by virtue of public use for 20 years. On this basis, he entered judgment for the claimant.

The County Council appealed this decision. Permission to appeal was granted by Silber J.

The County Council relied upon three grounds of appeal. For present purposes, its first ground is the material one. It was that the Recorder erred in fact and in law in finding that the pathway was a highway maintainable at public expense for the purposes of the Highways Act 1980, or by public use as of right for a period of 20 years.

It was argued that the Recorder applied the wrong test to the definition of a highway. What makes a pathway a highway is dedication and this can arise expressly or under Section 31 through 20 years of uninterrupted user. Reliance was placed upon paragraph 122 of Volume 21 of *Halsbury*, wherein guidance is given on dedication. It states:

*“In order for a dedication to be inferred, user of a way by the public must be as of right. Members of the public enjoy a way as of right where they use it, believing themselves to be exercising a public right. User as of right is actual enjoyment which is open not by force and not by permission given from time to time, and therefore user which is referable to a licence granted to individuals or a class of employee or to the inhabitants of a parish, or, in respect of access to a common, does not justify an inference of dedication.”*

Counsel for the County Council argued that the Recorder had misled himself in treating Sedley J.'s comments in Gulliksen as providing a proper definition of the word 'highway'. Moreover, he argued that the Recorder had been wrong, for a number of reasons, in holding that the pathway was a highway. In this respect, the Court was urged to look at the pathway, part of which stopped by a drainpipe and provided access to the back of the flats and nowhere else and another part of which was blocked by a bush, and hold that if it had been intended as a highway, a proper footway would have been provided. The Court was also urged to look at the photographs and apply common sense. In this regard it was said that, when one considered that the pathway went by the back door of many of the flats, where the tenants stored personal possessions like gardening utensils, it was clear that the pathway did not look like a public right of way.

Much reliance was also placed upon the signs which stated “*Residents Only*”. It was said that the straightforward meaning of the signs was plain and that the pathway was meant as access for residents only.

The absence of any reference to a public right of way on the claimant's lease, the Land Registry Plan or on any OS Map were also said to be factors to which regard should be had, as was the fact that repairs were undertaken by the City Council (as landowner) as opposed to the County Council (as highway authority).

The appeal was heard by Dobbs J. on 28<sup>th</sup> February 2007.

Dobbs J. allowed the County Council's appeal. She held that the Recorder erred in law in his interpretation of Gulliksen. The Recorder took extracts from Gulliksen where the facts and issues were different and applied them to the instant case. In particular, he had erred in interpreting the judgment in Gulliksen as meaning that since no local authority can provide housing, save under statutory duty, the paths in question were dedicated from the start as highway maintainable at public expense. It was clear that it is not enough simply that the local authority has built the path under its statutory authority; it also has to be a highway in order to be maintainable at public expense. The Recorder had erred in law in treating the words of Sedley LJ as being the definition of a highway, in particular because each case must turn on its own facts.

The facts of this case established that although the pathway was probably built pursuant to powers under Part V of the Housing Act 1957 (and therefore *capable* of being a highway maintainable at public expense because of the relationship between Section 38(2)(c) of the Highways Act 1959 and Section 36(1) of the Highways Act 1980), it was not a highway by way of either Section 31 or at common law.

Dobbs J. accepted the County Council's submission that looking at the photographs and using common sense, it could not be said that the pathway was a highway, in the common law sense that it was a place where the public had a right to pass and re-pass unhindered. It was clearly private property.

As to the Recorder's alternative finding, namely deemed dedication under Section 31, Dobbs J. held that it was difficult from the evidence to see how he came to the decision that the sign was not sufficiently detailed to negative the dedication.

#### *The implications of Ley for local authorities*

There can be no doubt that the decision in Ley is a welcome one for local authorities across England and Wales.

Ley enables local authorities to be far more confident when defending tripping claims on pathways on housing land. Since Gulliksen was decided in 2002 there has been a marked tendency amongst many local authorities throughout England and Wales to proceed on the basis that trips on housing estates were virtually impossible to defend. This need no longer be the case.

Ley makes it clear that the Court must enter into an appropriate analysis of whether the pathway in question (even if built pursuant to Part V of the Housing Act 1957) was also highway, either in the common law sense or by reason of Section 31 of the Highways Act 1980. Consideration of this question will require that local authorities and their legal advisors give consideration to categories of evidence to which, hitherto, little regard has been had.

A consideration of the evidence which is likely to be required to defend these cases lies outside the ambit of this article. For present purposes, it suffices to record the authors' view that Ley sets the foundation upon which it will be possible for local authorities to successfully defend many cases which until recently would have been settled by them. To this extent, it is hoped that Ley will ease some of the financial burden which Gulliksen imposed upon many hard-pressed, cash-strapped highway authorities across England and Wales.

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