Neutral Citation Number: [2020] EWCA Civ 696

Case No: B3/2019/1899

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE WAKSMAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/06/2020

Before :

LADY JUSTICE MACUR
LORD JUSTICE BEAN
and
LORD JUSTICE SINGH

- -

Between :

DEBORAH BARLOW	**Claimant/ Respondent)**
- and -	
WIGAN METROPOLITAN BOROUGH COUNCIL	**Defendant/ Appellant**

- -
- -

Matthew White (instructed by **Active Legal Solicitors**) for the **Claimant**
Mark Cawson QC and Simon Vaughan (instructed by **Forbes Solicitors**) for the **Defendant**

Hearing date: 13 May 2020 (on Skype for Business)

- -

Approved Judgment

Lord Justice Bean:

Introduction

1. On 21 September 2014 Deborah Barlow was walking along a path ("the Path") in Abram Park, Wigan when she tripped over an exposed tree root and sustained injury to her shoulder and arm. It might be thought that the question of whether she has a valid legal claim against Wigan Metropolitan Borough Council ("Wigan" or "the Council"), the present owners and occupiers of the park, would be a straightforward one. Far from it. Although the material facts are scarcely in dispute the case has already resulted in two different decisions by judges in the county court and High Court; the authorities cited to us by counsel include five cases from the 19th century; and some of the issues raised have not been authoritatively decided at appellate level.

The facts

2. At a case management conference on 17 July 2018 an order was made for liability to be tried as a preliminary issue. The trial of that issue came before His Honour Judge Platts at the Manchester County Court on 13 December 2018. In an extempore judgment given at the conclusion of the hearing he dismissed the claim but granted permission to appeal to the High Court. That appeal was heard by Waksman J on 10 June 2019. By his reserved judgment handed down on 19 June 2019 ([2020] 1 WLR 29; [2019] EWHC 1546 (QB)) he allowed the appeal on liability. The Council were given permission to appeal to this court by Males LJ on 25 November 2019.

3. Judge Platts first decided that the Claimant had suffered injury as a result of tripping over the tree root on the Path and that the tree root rendered the Path "dangerous and defective". Those findings are no longer in dispute. Judge Platts said in paragraph 1 of his judgment on liability:-

> "The remaining issue before me is an issue of law, namely whether the defendant – which accepts that it is the Highway Authority in respect of the area – is liable for the defect on the pathway. In short, the issue is whether the pathway was a highway maintainable at the public expense for the purposes of the Highways Act 1980."

4. At paragraph 6 of his judgment he recorded that the following facts were agreed:-

   a) "The land was purchased by the council's predecessor, Abram UBC (nothing turns on that) on 10 November 1920 with the intention of building a public park.

   b) The park was constructed some time in the early 1930s, on the basis that there is reference to it by its previous name Lee Lane Park, in the council records in 1931.

   c) The paths were constructed some time prior to 1959 and thus prior to the commencement of the Highways Act 1959.

   d) The council or the council's predecessor built both the park and the paths.

e) The council's records do not list the relevant park as a public right of way."

5. It was also accepted before us, although not mentioned in the decision of the trial judge, that there had been at least one and probably two entrances to the park on its west side since it was created and that a third entrance to the park, on its north-eastern side, came into existence when some housing was built just outside that north-eastern entrance. There is no evidence of the park ever having been closed to the public since its creation in the 1930s. Judge Platts found at paragraph 8 that "…..there is no doubt that the public enjoyed access to it on an unrestricted basis. Whether the council or its predecessor intended that the public should have a legal right of unrestricted access to the park is not common ground."

6. At the trial Wigan denied that Abram UDC had been the highway authority for the area when the paths in the park were constructed: and Judge Platts decided the issues before him on the basis that there was no evidence that Abram had been the highway authority. However, shortly before the first appeal was heard by Waksman J it was admitted that Abram had been the highway authority, though denied that it was acting in that capacity when it constructed the paths in the park. That remained Wigan's position before us.

Causes of action

7. In response to correspondence before action from Ms Barlow's solicitors the Legal Services Department of the Council replied on 2 October 2015:-

> "We can confirm that Abram Park is an open access site (photographs attached) and was originally opened in 1932. The public have had unrestricted access to the park for over 20 years, thereby establishing this as a public right of way with no duty to maintain. Wigan Council will rely on the judgment in *McGeown v Northern Ireland Housing Executive*."

8. That contention was repeated in subsequent letters of 16 November 2016 and 3 July 2018. The latter included the following:-

> "As previously stated, as far as we are aware, there has always been open and unrestricted access to the park. For the purposes of this action, we seek to rely on the case of *McGeown v Northern Ireland Housing Executive* and we will be providing evidence to confirm that there has been open and unrestricted access to the park for over 20 years. We attach an OS map from 1960 which shows the tennis court, bowling green and unrestricted access to the park. We do not understand the relevance of when the surrounding council owned properties were constructed."

9. Mr Cawson QC for Wigan Council accepted before us that Wigan owe duties under the Occupiers' Liability Act 1957 to users of the park such as Ms Barlow in respect of all parts of the park other than highways: including, for example, the areas of grass on either side of the Path. The Council's repeated reliance in correspondence on *McGeown*'s case was sufficient to persuade the Claimant's legal advisors that no claim

could be put forward under the Occupiers' Liability Act 1957. (The particulars of claim did include allegations of common law negligence, but these were not pursued at the trial). So we, like Judge Platts and Waksman J, have to deal with the case on the basis that Ms Barlow can only succeed in her claim by showing that the Path on which she fell was a highway maintainable at public expense, so that she has a cause of action for breach of statutory duty under s 41 of the Highways Act 1980. But in doing so we must not be taken to endorse the correctness of the Council's contention. Since there may be other cases of this kind in the future, and since the proposition that a local authority can owe a greater duty to park users walking on the grass than to park users walking on a path is to my mind absurd, I should put on record why I consider that *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233 does not require any such conclusion.

10. In *McGeown* the House of Lords had to consider whether the decision of the Court of Common Pleas in *Gautret v Egerton* (1867) LR 2 CP 371 was still good law. In *Gautret* a man fell to his death when crossing a bridge used with the consent and permission of the defendants by persons proceeding to and coming from the defendants' docks. A claim by his widow against the bridge owner was dismissed. In a much quoted passage Willes J said in the course of the argument:-

> "What duty does the law impose upon these Defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes the public must take it as it is. If I dig a pit in it I may be liable for the consequences: but if I do nothing, I am not."

11. The plaintiff in *McGeown* lived with her husband on a housing estate. Part of the land of the estate, in the ownership of the defendant housing authority, was crossed by footpaths over which the public had acquired a right of way. The plaintiff was walking on one of the paths when she tripped on a hole in it and broke her leg. The hole was a danger to persons using the path and resulted from a failure to keep the path in good repair. Her claim against the housing authority for damages for breach of the Occupiers' Liability Act (Northern Ireland) 1957 was dismissed. Lord Keith of Kinkel referred to a number of authorities before saying at 243E:-

> "…..[T]he rule in *Gautret v Egerton* is deeply entrenched in the law. Further, the rule is in my opinion undoubtedly a sound and reasonable one. Rights of way pass over many different types of terrain and it would place an impossible burden upon landowners if they not only had to submit to the passage over them of anyone who might choose to exercise the right, but also were under a duty to maintain them in a safe condition. *Persons using rights of way do so not with the permission of the owner of the solum but in the exercise of a right.* There is no room for the view that such persons might have been licensees or invitees of the land owner under the old law or that they are his visitors under the English and Northern Irish Acts of 1957." [emphasis added]

12. Lord Keith added, at 224C:-

> "If the pathway on which the Plaintiff fell in the present case had not become subject to a public right of way it seems clear that the Defendants would have owed her a common duty of care under the Act of 1957 and would have been liable accordingly."

13. I suspect that the true ratio of both *Gautret v Egerton* and *McGeown v Northern Ireland Housing Executive* is that if a person is only lawfully on a defendant's land because of the existence of a public right of way which he or she is using, then there is no duty of care owed by the landowner either at common law (save in respect of dangerous acts such as the digging of pits) or under the Occupiers' Liability Acts. But whether that is the case will have to await a decision in another claim. I only add that if I am wrong about this, and there really is no duty on anyone to maintain paths in municipal parks which have become rights of way, the traditional notices saying KEEP OFF THE GRASS ought in fairness to park users to be replaced by notices saying KEEP OFF THE PATHS.

Highways maintainable at public expense

14. Before the enactment of s 23 of the Highways Act 1835 all highways were, subject to certain exceptions, maintainable by the inhabitants at large, a responsibility that fell upon the parish. Section 23 relieved the parish of its responsibility in respect of highways constructed or roads dedicated after the enactment of the 1835 Act, save where certain conditions were met allowing the highway to be adopted.

15. Section 23 of the 1835 Act did not, however, apply to footpaths, save where established over a road or occupation way to which the section did apply. Thus, in respect of footpaths constructed or dedicated after 1835, the parish remained responsible for repair.

16. However, Sections 47 and 49 of the National Parks and Access to the Countryside Act 1949 had the effect that "public paths" coming into existence before the commencement of the Act on 16 December 1949 were to be repairable by the inhabitants at large, whereas liability for a public path dedicated after the commencement date fell on the inhabitants at large only if the path was dedicated in pursuance of a public path agreement. (There was no such agreement in this case.)

17. The Highways Act 1959 came into force on 1 January 1960. Section 38(1) provided that after the commencement of the Act no duty in respect of the maintenance of highways should lie on the inhabitants at large of any area, but s 38(2) made certain highways maintainable at public expense. These included, so far as relevant:

    i) A highway which immediately before the commencement of the Act was maintainable by the inhabitants at large of the area or maintainable by a highway authority – s 38(2)(a);

    ii) A "highway constructed by a highway authority after the commencement of this Act, otherwise than on behalf of some other person not being a highway authority" – s 38(2)(b); and

    iii) A highway constructed by a local authority under Part V of the Housing Act 1957 - s 38(2)(c).

18. Section 38(3) of the 1959 Act provided that s 38(2)(a) should not be construed as referring to, amongst other things, a highway maintainable by an Urban District Council otherwise than in its capacity as a highway authority.

19. The Highways Act 1980 was described in its long title as: "An Act to consolidate the Highways Acts 1959 to 1971 and related enactments, with amendments to give effect to the recommendations of the Law Commission". None of the amendments recommended by the Law Commission is relevant for present purposes.

20. Section 36 of the 1980 Act, so far as material, provides:

> "(1) All such highways as immediately before the commencement of this Act were highways maintainable at the public expense for the purposes of the Highways Act 1959 continue to be so maintainable… for the purposes of this Act.
>
> (2) … The following highways (not falling within subsection (1) above) shall for the purposes of this Act be highways maintainable at the public expense:-
>
> (a) a highway constructed by a highway authority, otherwise than on behalf of some other person who is not a highway authority;
>
> (b) a highway constructed by a council within their own area under Part II of the Housing Act 1985…
>
> (f) a highway, being a footpath, a bridleway, a restricted by way or a way over which the public have a right of way for vehicular and all other kinds of traffic, created in consequence of a special diversion order or an SSSI diversion order.…"

Dedication of highways

21. A highway may be created either by statute or by dedication and acceptance. Dedication may be (a) express (of which there is no evidence in this case); (b) deemed by the operation of s 31 of the 1980 Act; or (c) inferred at common law. I shall return to the issue of dedication inferred at common law later in the judgment. Section 31, so far as material, provides:

> "(1) Where a way over any land, other than a way of such a character that user by 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 deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
>
> (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such is mentioned in subsection (3) below or otherwise."

Issues in the case

22. In order to succeed in her contention that Wigan were under a duty to maintain the Path Ms Barlow has to prove one of two alternative cases. The first is that it was a "highway constructed by a highway authority" within the meaning of s 36(2)(a) of the 1980 Act. The second is 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 s 36(1) of the 1980 Act.

The decision of Judge Platts

23. The trial judge's relevant findings, as conveniently summarised by Waksman J, were as follows:

> "(1) In order for s36 (2) (a) of the 1980 Act to apply, it was not enough that the highway, or what had become a highway, was constructed by the relevant highway authority; it had to be constructed as a highway at the time of its construction;
>
> (2) that required an intention so to create it on the part of the highway authority;
>
> (3) however, there was no evidence as to what Abram's intention may have been when it created the Path; as the judge put it in paragraph 9 of his judgment:
>
> > "… The issue is whether, when the path was constructed there was an intention to dedicate it as a highway - that is, an intention that the public should not only have unrestricted access to it, but that they should have a right to unrestricted access. There is no direct evidence as to the intention of the defendant's predecessor at the time of construction and in my judgment there is insufficient evidence to allow me to infer that the defendant's predecessor intended that the public should enjoy a right of unrestricted access to the park. The park was an open space and persons could and no doubt did use it frequently and were permitted to do so, but the reality was that it was not public land. It was land owned by the local authority - the defendant's predecessors - I cannot infer or conclude that at the time that paths were created, there was an intention to dedicate them as part of the highway - ie with a right of passage and re-passage."
>
> (4) Accordingly, since the highway only became such as a result of long usage, not original dedication as it were, the sub-section was not satisfied. As he put it:
>
> > "10. I therefore conclude, on the balance of probabilities, that this path on which the claimant unfortunately fell, became a highway as a result of usage.

> 11. Is that sufficient for the purpose of 36 (2) (a)? In considering that issue I apply the ordinary and natural meaning of the words used in section 36 (2) (a)… In my judgment the intention of the Act was that, for the path to be classified as a highway, it had to be constructed as such rather than it becoming a highway due to subsequent usage. The phrase "a highway constructed by a highway authority" in my judgment refers to a highway which at the time of construction was intended to be such, and it does not, in my judgment refer to a path constructed by a highway authority that subsequently became a highway, by way of usage. In those circumstances it seems to me that this pathway cannot be said to have been a highway constructed by the highway authority for the purposes of section 36 (2) (a)."

(5) That finding alone spelled failure for the claim. However, given the other arguments addressed to him the Judge made the following further findings:

> (a) s36 (2) (a), if applicable, would apply both to pre-existing as well as future highways i.e. it was not limited to those created after the commencement of the Act;
>
> (b) It was not possible to find, as also required by s36 (2) (a), that the Path had been so constructed by a highway authority because as matters stood before him, there was "absolutely no evidence" one way or the other as to whether Abram was a highway authority or not; see paragraph 15, in which he said:
>
> > ".. It was an urban district council. Its purpose, so far as this park was concerned, was to create an urban park in a residential area, for the use of local inhabitants, and there's nothing before me to suggest that, when constructing this path, it was or was acting as a highway authority so as to bring it within section 36 (2) (a)."

The decision of Waksman J

24. By the time the appeal to the High Court was heard by Waksman J, the Council had conceded that Abram UDC had been a highway authority at all material times, but contended that when Abram had constructed the Path it had had no intention to dedicate it as a highway (the intention issue); and in any event when it constructed the Path it did not do so in its capacity as a highway authority and thus the case could not fall within s 36(2)(a) of the 1980 Act (the capacity issue). The latter argument had not been advanced at the trial because at that stage the Council were contending that Abram had not been the highway authority. Wigan further argued by way of cross-appeal that s 36(2)(a) of the 1980 Act can only operate prospectively in the sense that it can only apply to highways constructed after the 1980 Act came into force (the retrospectivity issue).

25. Counsel for Ms Barlow (Mr Matthew White, who appeared before us and Waksman J but had not appeared at trial) also advanced an alternative argument that once the Path has achieved the status of highway by long usage the effect of the decision of the Privy Council in *Turner v Walsh* (1881) 6 HL 636 is that the Path is to be regarded as having been dedicated as such at the time of its construction. It was submitted that the Path:-

    a) had been not only created but dedicated (or deemed to have been dedicated) before 16 December 1949;

    b) had been repairable by the inhabitants at large;

    c) fell within s 38(1)(a) of the 1959 Act and was to be treated as a highway maintainable at public expense under that Act;

    d) retained that status under section 36(1) of the 1980 Act.

26. Waksman J held that s 36(2)(a) of the 1980 Act is not confined to highways which were constructed as such at the outset. He said:

> "14. In this particular case, it is common ground that the Path had the attribute of a highway to the extent that the public had the right of passage and repassage along it, and not simply as invitees or licensees. However, in addition, and as explained above, it had also to be dedicated as such, either expressly or impliedly, in the sense of being presumed by long usage. The construction placed upon s36 (2) (a) by the Judge in effect was that the only kind of dedication which would be compliant with it was an express dedication at the time when the highway was first created. The problem with that is that if a highway authority created a relevant public way but did not dedicate it as a highway for, say, 6 months, it would fall outside of s36 (2) (a). The effect would be that because it was a highway, no duty would be owed to users under the OLA (see *McGeown*), nor would there be any duty to maintain pursuant to s41 of the Act. That would seem a very odd result, but the Council accepted that this is what the Judge's construction, which it supported, entailed. It was said that the problem might be mitigated if the highway authority decided formally to adopt the highway - but of course that would be a matter of choice for the authority. It was also said by the Council that the result was not odd anyway because a private landowner could always dedicate a way running through his land as a highway with the result that he no longer owed any duty under the OLA, nor any other duty. While that statement is correct I do not accept the parallel between the position of a private landowner and a public authority.
>
> 15. The alternative interpretation submitted on behalf of Ms Barlow …… does not do violence to the language of s36 (2) (a). …..[T]he fact that the Path only becomes a highway later, does not mean that it was not constructed by the relevant highway authority. Indeed, the Judge's construction requires the addition

> of the words "as such" in order to confine the sub-section to ways which were intended to be highways from the outset.
>
> 16. It may, however, be said that even if the example of a highway dedicated some time later than when originally constructed would fall within s36 (2) (a), such a highway would at least have the feature of express dedication. It could be argued that on any view, s36 (2) (a) would not apply where there was no express dedication at all but only one which is presumed after an interrupted public usage after time either pursuant to s31 of the Act or at common-law. But so far as the language of s36 (2) (a) is concerned, it is difficult to see why this limitation should be imposed. Once it is recognised that the relevant highway may have become such after its initial construction there is nothing in the wording to limit the way in which it later became a highway.
>
> 17. A different objection to this interpretation, so as to cover the Path in this case, might be that the relevant authority may be unaware that the way which had originally been constructed by it had become a highway so as now to attract the duty to maintain. That is true, but then that depends on the attention paid to paths on what is, after all, its own land which have been used by members of the public for long periods. After all, a highway authority is already fixed with the status of such a path so as to give the public a right to use it after long usage, whether it realised it or not. Moreover, prior to becoming a highway, the Council would have owed duties to visitors in respect of the Path (as with the rest of the park) under the OLA. Practically, therefore, there would not be much difference from the point of view of the Council's legal duties, between the position before the Path became a highway, and afterwards. And even if the emergence of a s41 duty to maintain the Path made some sort of practical difference, if the relevant authority already had to take reasonable steps to ensure that the park itself was in a safe condition it is difficult to see why it adds very much to maintain the paths owned by it and which run to and across the park. Finally, in the context of parks, and using this case as an example, it would seem an undesirable outcome if the park itself, including the Path, attracted duties to visitors under the 1957 Act, whereas the Path no longer attracted similar duties once it became a highway."

27. Waksman J rejected the Council's argument based on the capacity in which Abram was acting at the time. In doing so he gave detailed consideration to the case of *Gulliksen v Pembrokeshire County Council*, to which I shall return later. He held that, provided the relevant local authority at the time was, among other things, a highway authority, then that was sufficient for its construction of the way to attract the operation of s36(2)(a). He could see "no reason of language or logic for an additional 'capacity' requirement." Accordingly he rejected the Council's argument based on the capacity in which Abram was acting at the time.

28. On the retrospectivity issue he said:

> "40. A final point against the applicability of s36 (2) (a) here, made by the Council on its cross-appeal, is that, in any event it can only operate prospectively in the sense that it can only apply to highways constructed after the Act came into force. In that regard I was referred to the observations of Lord Reid in *Sunshine Porcelain Potteries v Nash* [1961] AC 927, giving the judgment of the House, at p938:
>
> > "Generally, there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that...But this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it."
>
> 41. However, first, this is not an example of true retrospectivity where, for example, an event which has already taken place, lawful at the time, is now deemed to be unlawful. Compare the position here: there will be no liability until and unless there has been a failure to maintain the highway causing loss at some point subsequent to the commencement of the Act. The fact that the highway itself may have been constructed at an earlier stage does not amount to the imposition of a retrospective liability. Second, it should be noted immediately that in contrast to s38(2)(b) of the 1959 Act, which is in substance the same as s36(2)(a), there is no express limitation within s36(2)(a) to highways created after the commencement of the Act. Nor is there any basis for implying such a limitation……...
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> 43. The more apposite observation, in my view, is that made by Lord Rodger at paragraph 192 of his judgment in *Wilson v First County Trust* [2004] 1 AC 816 where he stated that:
>
> > "Since provisions which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future…"…….
>
> 44. As the sparks fly upward, individuals and businesses run the risk that Parliament may change the law governing their affairs.
> ……
>
> 46. Accordingly there is nothing in the retrospectivity point and the Judge was correct to rule against it as he did in paragraph 13 of his judgment."

29. The result was that Waksman J, having found for the Claimant on the intention and capacity issues and rejected the Council's retrospectivity argument, allowed the appeal and held that the Claimant succeeded on primary liability under s 36(2)(a) of the 1980 Act. This made it unnecessary to decide whether she could succeed under s 36(1). But as to that, he said:

> "49. …[T]his argument requires that the Path was not only created but dedicated before 16 December 1949. It might have been, by long usage at common law, but this was not a point considered by the Judge on the evidence before him (because this argument was not then in play) and while it was common ground that as at least 1994, the Path was a highway by reason of s31 of the Act, there was no common ground as to a much earlier date. Accordingly, while the Path might have been dedicated before 16 December 1949, I cannot speculate and that being so, and since the point is academic, it is preferable not to consider it any further."

Grounds of appeal

30. The grounds of appeal to this court for which Males LJ gave permission were that Waksman J was:-

> "(1) Wrong to find that the path within Abram Park upon which Mrs Barlow fell was a highway maintainable at the public expense pursuant to section 36(2)(a) of the Highways Act 1980 and was therefore also wrong to find that Wigan MBC was under a statutory duty to maintain that path pursuant to section 41 of the Highways Act 1980.
>
> (2) Wrong <u>not</u> to find that the path on which the Claimant fell was maintainable by nobody and therefore also wrong to find that Wigan MBC could not avail itself of a defence applying the principles set out in *McGeown.*
>
> (3) Wrong to find that Wigan MBC was under a statutory duty to maintain as an adopted highway a footpath which a predecessor authority did not construct as a highway but as part of a park which that predecessor authority then occupied under the Occupiers' Liability Act.
>
> (4) Wrong to adopt the *obiter dictum* statement of Sedley LJ at paragraph 18 of his judgment in the case of *Gulliksen v Pembrokeshire CC [2003] QB 123* and therefore make a finding to the effect that for a path to be a highway and come within section 36(2)(a) of the Highways Act 1980 the local authority did not have to be acting in its capacity as a highway authority when constructing that path.
>
> (5) Wrong to base [his] findings on policy reasons. A reading of the judgment makes it clear that the court was concerned to ensure that there should not be public highways in public open spaces that were maintainable by no-one."

We allowed a sixth ground of appeal to be added by way of amendment:-

> "(6) Wrong to find that section 36(2)(a) of the Highways Act 1980 has retrospective effect such that it is capable of applying to a highway constructed prior to the coming into force of that provision that did not fall within section 36(1)."

31. By a respondent's notice and cross-appeal dated 10 December 2019 the Claimant sought to uphold the decision of the judge on the issues on which he found in her favour and an additional ground, namely that:-

> "If all of the above is wrong, the Claimant seeks to uphold the decision in her favour on the alternative ground that the path was probably dedicated before 1949 such that the path was highway maintainable at public expense by the operation of the National Parks and Access to the Countryside Act 1949 Section 47(1), Highways Act 1959 Section 38(2)(b) and Highways Act 1980 Section 36(1)."

This can conveniently be called "the date of dedication issue".

The parties' submissions before this court

32. Mr Cawson submitted that s 36(2)(a) of the 1980 Act, referring to "a highway constructed by a highway authority" only applies if the relevant body (in this case Abram) constructed the highway in its capacity as a highway authority. The subsection therefore has no application to the Path which, on the balance of probabilities, was likely to have been constructed by Abram in the exercise of its public amenity functions. Mr Cawson found support for this interpretation in the High Court decision in *Gulliksen*, where Neuberger J held at [21] that "the notion of 'a highway constructed by a highway authority' means 'a highway constructed as a highway by a highway authority in its capacity as such'." Mr Cawson submitted that if Parliament had intended s 36(2)(a) to extend to a local authority acting in any capacity, it would have referred to "a council or other body which is a highway authority". He submitted further that the Claimant's interpretation would render s 38(2)(c) of the 1959 Act and s 36(2)(b) of the 1980 Act otiose; there would be no need to refer to highways constructed "by the council of a borough or urban district council… under Part V of the Housing Act 1957" if this interpretation of s 36(2)(a) was adopted. Finally, Mr Cawson found support for his interpretation in s 38(3) of the 1959 Act which provided that s 38(2)(a) should not be construed as referring to a highway maintainable by an urban district council otherwise than in its capacity as a highway authority. In his submission, this demonstrated that the legislation preceding the 1980 Act was concerned with the capacity in which a local authority acts.

33. Mr Cawson submitted that s 36(2)(a) applied only to highways which were constructed as such at their inception, not to ways which subsequently became highways. He relied on the dicta of Neuberger J in *Gulliksen* at [22] that "the notion of a way constructed by somebody which in due course became a highway through dedication, for instance under s 31 in the present case, would not be thought of as a highway constructed by a highway authority". Mr Cawson submitted that this interpretation is supported by the language of s 24(2) of the 1980 Act, which provides that "a local authority may construct new highways": the power is not expressed as one to construct ways which subsequently become highways, for example by dedication, but one to construct ways which are intended to be highways from their inception.

34. Mr Cawson further submitted that the Path was not maintainable at public expense when the 1980 Act came into force and that the change in wording between s 38(2)(b) of the 1959 Act and s 36(2)(a) cannot have been intended to change the law. Relying

on *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 287, he submitted that we should look to the true intention of Parliament when construing the 1980 Act. Since it was enacted primarily as a consolidating statute, Parliament cannot be said to have intended to change the law and render existing highways maintainable at public expense. While some of the provisions in the Act did change the existing law to give effect to Law Commission recommendations, none of those provisions is relevant for the present appeal. Mr Cawson submitted that Parliament's intention is further evidenced by the operation of s 36(1) of the 1980 Act, which provides that highways that were maintainable at public expense immediately before the commencement of the Act continue to be maintainable. He submitted that if Parliament had intended s 36(2)(a) to apply retrospectively, it would not have enacted an additional provision designed to catch highways constructed prior to the commencement of the 1980 Act.

35. Mr White submitted that s 36(2)(a) does not require an authority to be acting in its capacity as a highway authority. He relied on the decision of this court in *Gulliksen* , in which Sedley LJ said at [18] that a local authority is a single body corporate, and that he "would not in any event have found it easy to adopt the view of Neuberger J that section 36(2)(a) of the 1980 Act contemplated a highway authority acting as such". He also rejected the notion that his interpretation would render otiose s 38(2)(c) of the HA 1959 and s 36(2)(b) of the HA 1980. Those sub-sections, he argued, were designed for those local authorities which are not highway authorities and which construct housing pursuant their powers under the Housing Act 1957.

36. Mr White submitted that even if his interpretation is wrong and s 36(2)(a) does require an authority to be acting in its capacity as a highway authority, then the judge ought to have found that the Council was acting in its capacity as a highway authority when it constructed the Path. Mr White suggested that there was sufficient positive evidence to demonstrate that the Council did act in its capacity as a highway authority, but that even if no such evidence was available, the burden should fall on the Council to prove that it was not acting as a highway authority. Mr White submitted that in the light of the evidence, the Council could not discharge this burden and thus could not show that it was acting exclusively in any capacity other than as a highway authority.

37. Mr White submitted that s 36(2)(a) does not require a highway authority, when constructing a highway, to intend it to be a highway. There is nothing in the language of the subsection to support such an interpretation and there are positive reasons for rejecting it. The common law process of dedication requires the public to accept a highway for it to be created; it cannot be constructed "as such" by a highway authority. Mr White also submitted that practical difficulties would be created by reading into the legislation a requirement that an authority must construct the highway with the intention of building a highway. It would mean, for example, that a highway authority which initially intends to create a path, but subsequently decides to upgrade the path to a bridleway, would not have created a highway maintainable at public expense. Mr White submitted that there are good policy arguments for rejecting a requirement of intention at the time of construction. Rejecting it would reduce the number of highways for which no one is liable to repair and would afford a remedy to individuals who are injured by neglect on the part of public authorities.

38. Mr White submitted that even if his interpretation is wrong and s 36(2)(a) does require an authority to have intended to construct the way as a highway, then the judge ought

to have inferred such an intention on the part of the Council when the Path was constructed.

39. On the question of whether s 36(2)(a) amended the previous law, Mr White submitted in oral argument that there is nothing ambiguous about the language of the provision, and that it clearly removes the previous restriction on its retrospective application. Consequently this court should not (and need not) have recourse to an interpretative presumption in relation to consolidating statutes. However, when at our request counsel undertook further research into the Parliamentary history of the 1980 Bill, revealing that the Joint Committee on Consolidation Bills had reported that (with the exception of the Law Commission amendments) the Bill was intended to be a pure consolidation, he accepted that this point is unsustainable.

40. Ms Barlow cross-appeals on the basis that the Path was a public path which came into existence before 1949 and was at the time of the accident a highway maintainable at public expense even if it was not dedicated as a highway at the time of its construction. Mr White submitted that under s 47(1) of the National Parks and Access to the Countryside Act 1949 all public paths became repairable by the inhabitants of the parish at large, so if the Path had been, or is deemed to have been, dedicated prior to the commencement of the 1949 Act (16 December 1949) it was repairable by the inhabitants of the parish at large. Since s 38(2)(a) of the HA 1959 provided that a highway maintainable at public expense included "a highway which immediately before the commencement of this Act was maintainable by the inhabitants at large of any area or maintainable by a highway authority", the Path became a highway maintainable at public expense in 1959. It was therefore caught by s 36(1) of the HA 1980 which provided that highways maintainable at public expense included highways which were already maintainable at public expense before the 1980 Act came into force.

41. Mr White submitted that on the Council's evidence alone the Path must have been dedicated prior to the commencement of the 1949 Act (16 December 1949), either on a statutory or a common law basis. In terms of a statutory presumption of dedication under s 31 of the HA 1980, Mr White submitted that while the Path was not used for 20 years prior to 16 December 1949, the date on which the Path should be deemed to have been dedicated is the start date of the period of proven continuous use. In terms of a common law presumption of dedication, Mr White relied on *Turner v. Walsh* (1881) 6 HL 636 as authority for the proposition that when a period of time passes which enables a presumption of dedication, a court should infer that dedication occured at the beginning of that period. Accordingly, he invited us to infer that the Path was dedicated as (and therefore intended to be) a highway when the park was opened in the 1930s. He submitted that *Turner v Walsh* requires us to look at "the whole of the evidence" to determine "whether there has been such a continuous and connected user as to raise the presumption of dedication", and argued that a presumption of dedication should be inferred from the public's use of the Path for something like 17 years prior to 1949.

42. Mr Cawson rejected the Claimant's submission that the burden is on the Council to disprove dedication; rather, the onus is on the Claimant to prove dedication. He submitted there is insufficient evidence to prove or deem dedication at the time at which the Path was constructed. Indeed, Mr Cawson submitted that the presumption must be that a local authority, when establishing a park with facilities, would not have intended to divest itself of the right to exclude the public from using the park's paths. The Path was therefore not dedicated prior to the 1949 Act and so s 36(1) of the 1980

Act had no application. In the alternative, if dedication prior to the 1949 Act could be deemed, s 38 (3) of the 1959 Act expressly excluded "a highway maintainable by the council…..otherwise than in their capacity as a highway authority". He accepted that by 2014 the Path had become a highway by the operation of s 31(1) of the 1980 Act.

Discussion

Was the Path "constructed by a highway authority" within the terms of s 36(2)(a)?.

43. The main issue under this heading is whether Ms Barlow has to show that, when Abram constructed the Path in the 1930s, they did so in their capacity as the local highway authority. The capacity issue was considered on very similar facts in *Gulliksen*. Mr Gulliksen was walking on a footpath on a housing estate to the house of a friend. He had an accident because there was a depressed manhole cover on the footpath over which he tripped. The footpath had been constructed by Pembrokeshire County Council, who were both the local housing authority and the highway authority at the time of the path's construction and at the time of the accident. The footpath was a highway, because it had become deemed to be dedicated as such by the time of the accident. At the trial in the Haverfordwest County Court Judge Hickinbottom, as he then was, accepted the county council's argument that the *McGeown* decision defeated any claim in negligence, but in what was described on appeal as a "clear and careful judgment" found for the claimant on the basis that the council had constructed the path; they were the highway authority; and that was sufficient to establish that they owed the claimant the statutory duty under s 41 of the 1980 Act.

44. The county council's appeal was heard by Neuberger J, as he then was, sitting (unusually) as a judge of the Queen's Bench Division in Cardiff. His judgment is reported at [2002] QB 825. He said, at paragraphs 19-27:-

> "19 I turn then to the issue of construction relating to section 36(2)(a). In order to be "a highway constructed by a highway authority" does the way have to have been constructed as a highway and/or does it have to have been constructed by the highway authority as such? I have been referred to no helpful authority, and judging by the notes to section 36 of the 1980 Act in *Halsbury's Statutes of England and Wales*, 4th ed, vol 20 (1999 reissue) and in the *Encyclopaedia of Highway Law and Practice* it would appear that there is no helpful authority on the point.
>
> 20 It is said with obvious force by Mr Thomas, on behalf of Mr Gulliksen, that to construe "a highway constructed" as meaning "a highway constructed as such" and/or to construe "by a highway authority" as meaning "by a highway authority as such" involves implying words into a statutory provision which are not there, and that the court is at least as slow to imply words into a statutory provision as it is to imply words into a contractual provision.
>
> 21 That has considerable force on the face of it. However, it seems to me that, as with any words in a statute or in a contract,

one has to take the words in their context and by reference not to what each word means, but by reference to what the phrase naturally conveys to the reader. As has been pointed out in many cases, it is sometimes difficult to identify precisely why a word or set of words conveys a particular meaning either in general or in its or their particular context. To my mind, the notion of "a highway constructed by a highway authority" means "a highway constructed as a highway by a highway authority in its capacity as such". I suspect that the two aspects are almost always going to lead to the same result. It must be rare that a council or other body which is a highway authority constructs a road which is a highway other than in its capacity as a highway authority. Equally, it must be rare for a council which is a highway authority to construct a highway other than in its capacity as a highway authority. Of course, there will be circumstances, of which this appears to be an example, where a council which is a highway authority will construct a highway other than in its capacity as a highway authority or where a highway authority as such will construct a way which is not a highway.

22 In my view, the notion of a way constructed by someone which in due course becomes a highway through dedication, for instance under section 31 in the present case, would not be thought of as a highway constructed by a highway authority. As I say, it is idle to pretend that there is not considerable linguistic force in Mr Thomas's contention that a way which was constructed by someone who was a highway authority at the time, albeit in a different capacity, which has become a highway through dedication, has become, as a matter of language, a highway constructed by a highway authority, but I do not think that that is what the section naturally conveys in its context.

23 It would be somewhat surprising if the result were otherwise. One can conceive of circumstances, such as the present, where a housing authority constructs a housing estate with private roads and subsequently sells off the estate to the residents or to a third party, and subsequently the residents or the third party allow the public to use the private roads so that they become impliedly dedicated as highways under section 31. To my mind, it would be surprising if, in those circumstances, some 20 years later after selling the estate, the local authority found itself being liable to maintain those roadways at public expense because much earlier it, in its capacity as the housing authority, had constructed the roads as private roadways on the estate. If the words of section 36(2)(a) were clear and conveyed the contrary view to that which I think they convey, then I cannot pretend that this somewhat odd consequence should deter the court from giving the words their natural meaning. However, in my judgment, their natural meaning in their context, at least to me, is as the council in the present case contends.

> 24 A little support for the conclusion that the reference to a highway in section 36(2)(a) is to a highway constructed as such seems to me to be found in the provisions of section 24 of the 1980 Act, subsection (2) of which provides: "A local highway authority may construct new highways …" To my mind, in section 24(2) the power given to the local highway authority is not to construct ways which in due course may, for instance by dedication, become highways, but to construct ways which are intended to be highways from their inception. Again, it would be wrong to make too much of that point, but the terminology of section 24(2) in Part III of the 1980 Act is similar to, and therefore of some relevance when considering, section 36(2)(a) in Part IV of the 1980 Act.
>
> 25 Further, it appears to me that if section 36(2)(a) was intended to extend to the council in whatever capacity, it would have referred to "a council or other body which is the highway authority" and not "a highway authority".
>
> 26. It seems to me that whether a highway authority means the highway authority as such or the council which happens to be the highway authority must depend on context. For example, if money was left by someone to enable the employees of the highway authority to enjoy a Christmas party, I would have thought that it could not seriously be argued that all employees of the local authority were entitled to attend the Christmas party because the local authority was the highway authority: it would only be those employees in the highways department. Similarly, it is noteworthy that under section 1(1) of the 1980 Act it is the minister which is the highway authority for certain main roads, including trunk roads. Technically, the minister does not exist, he is an emanation of the Crown. Yet it is clear from that very first subsection of the Act, and other provisions of the Act, that the draftsman of the Act identifies for the purposes of the Act the minister as a separate entity. By the same token, it seems to me, that at any rate in section 36(2)(a) the highway authority is being referred to in its capacity as such and not in its capacity as the council or other entity which happens to be the highway authority.
>
> 27. Although I can well understand how the judge arrived at a contrary conclusion, and it should be said he did not have the benefit of all the arguments raised before me, I have reached the conclusion that the council's argument is correct."

45. The claimant appealed to this court (Lord Woolf CJ, Waller and Sedley LJJ) who allowed the appeal ([2003] QB 123). The ground on which the appeal succeeded was that all highways which had been maintainable at public expense under the 1959 Act continued to be so maintainable under the 1980 Act; that s 36(2) was an explicitly residual set of categories since it excluded highways which fell within s 36(1); and that since the path on which the Claimant tripped had been maintainable at public expense

prior to the coming into force of the 1980 Act by virtue of s 38(2)(c) of the 1959 Act as a highway constructed by the council under Part V of the Housing Act 1957, it continued to be maintainable at public expense after the coming into force of the 1980 Act.

46. Before us, however, Mr White relied on paragraph 18 of the judgment of Sedley LJ (with whom Lord Woolf CJ and Waller LJ agreed). Sedley LJ noted that the Claimant was entitled to succeed on the ground derived from s 38(2)(c) of the 1959 Act, which had not been argued below; and that the capacity issue, on which the argument below had turned was therefore excluded from consideration. He added:-

> "I would nevertheless venture the following observations on the provisions which were canvassed in the courts below. By s.2(1) and (3) of the Local Government Act 1972 a county council, like every other local authority, is a single body corporate. A local authority may well have to take care from time to time (for example when considering whether to grant itself planning permission) to keep its various capacities distinct, but it is one body in law. Agreements between its departments may be necessary for budgetary purposes, but they are not contracts because a legal person cannot contract with itself. For this reason I would not in any event have found it easy to adopt the view of Neuberger J that s.36(2)(a) contemplated a highway authority acting as such."

47. Mr White rightly accepts that these remarks were *obiter dicta* and thus not binding on us: the case had already been decided on another point. With respect to Sedley LJ and his colleagues who agreed with him, I cannot accept them. It may well be true that for the purposes of the law of contract a local authority is a single body corporate. But it does not follow that it is indivisible for all purposes. To take only one example, a council which is both housing authority and planning authority is not exempt from the need to obtain planning permission if it wishes to construct new housing. On the capacity issue under s 36(2)(a) of the 1980 Act I entirely agree with the reasoning and conclusions of Neuberger J.

48. There is, moreover, a further ground (not, apparently, argued in *Gulliksen*) on which I would hold that s 36(2)(a) should be construed to refer only to highways constructed by a highway authority acting in their capacity as such, namely that as a provision in a consolidating Act it was not intended to change the law.

49. The critical issue in this case is whether the path on which Ms Barlow fell was, or is deemed to have become, a highway before 16 December 1949, the date on which ss 47-49 of the National Parks and Access to the Countryside Act 1949 came into force.

50. If a footpath was expressly dedicated or deemed to have been dedicated as a highway before 16 December 1949 then it was repairable by the inhabitants at large of the local parish.

51. Section 47(1) of the 1949 Act provided that the rule of law whereby a highway was repairable by the inhabitants at large was to apply to all public paths (that is to say all paths which had been or were deemed to have been dedicated as highways). However,

the effect of s 49 of the same Act was that this would not apply to any public path constructed after the commencement of the Act otherwise than in pursuance of a public path agreement.

52. The Highways Act 1959 abolished the duty with respect to the maintenance of highways placed previously on the inhabitants at large of any area and replaced it with the concept of a highway maintainable at the public expense.

53. Section 38(2)(a) of the 1959 Act created two kinds of highway maintainable at public expense, in each case by reference to the position immediately before the 1959 Act came into force (which was on 1 January 1960). The first was those which were in 1959 maintainable by the inhabitants at large; that meant those responsible by virtue of s 47 of the 1949 Act; and that in turn depended on whether the highway was dedicated or deemed to have been dedicated before 16 December 1949. The second category is those which in 1959 were "maintainable by the highway authority". The fact that the highway authority (in this case Abram) had *constructed* a path before 1949, whatever the capacity in which they did so, would not help Ms Barlow because under the 1949 Act regime that did not make the highway maintainable unless it had been dedicated or was deemed to have been dedicated as a highway before 16 December 1949 (or there was a later public path agreement). Section 38(3) of the 1959 Act applies to this second category. Section 36 of the 1980 Act, in particular s 36(2)(a), was not intended to, and did not, alter that position.

54. I therefore consider that Ms Barlow cannot succeed under s 36(2)(a) of the 1980 Act, because when Abram constructed the Path they were not acting in their capacity as the highway authority for the area. This makes it unnecessary to decide whether intention is a factor under s 36(2)(a), though the issue of intention crops up in a different form under the heading of dedication.

Section 36(1) and the deemed date of dedication

55. I have already noted that whether Ms Barlow can succeed under s 36(1) depends on whether the Path was, or is deemed to have been, dedicated as a highway before 16 December 1949.

56. A highway may be created by (a) express dedication by the landowner (of which there is no evidence in the present case); (b) deemed dedication under what is now s 31 of the 1980 Act; or (c) dedication inferred at common law.

57. Section 31(1) of the 1980 Act states (with a proviso not material for present purposes) that where a way over land has been has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway in the absence of sufficient evidence of a contrary intention. If that stood alone it would be helpful to the Claimant's case: but s 31(2) states that the period of 20 years is to be calculated retrospectively from the date when the public's right to use the way is brought into question. The strictness of that rule, which goes back to the Rights of Way Act 1932, is illustrated by *De Rothschild v Buckinghamshire CC* [1957] 55 LGR 595. The public used a path across the appellant's land from 1914 to 1940. From 1940 to 1947 the land was requisitioned and there was no evidence of public user. Prior to 1914 and again in 1948 the public right to use the path was questioned by the padlocking of a gate and by the erection of notices. The Divisional

Court held that the relevant dates for considering the 20 year period under the 1932 Act were 1914 and 1948, and as there was no evidence of 20 years' uninterrupted use prior to 1948 no statutory presumption of dedication arose. In the present appeal, there is no evidence that the public's right to use the Path has ever been called into question; but even if one takes the 20 years leading up to the date of the accident in 2014, that would be of no use to Ms Barlow because the deemed dedication would be long after 1949.

58. The decision in *De Rothschild* is not binding on us. It is unnecessary to decide whether s 31(2) applies in this case, because in my view the Claimant succeeds on the basis of inferred dedication at common law, to which I now turn.

59. Mr Cawson submits that (a) to create a highway a landowner must have what in *Dawes v Hawkins* (1860) 141 ER 1139 is described as "*animus dedicandi"*, that is to say an intention to divest himself for all time of the right to exclude members of the public from using the way in question; (b) the presumption of dedication only applies if there is no evidence of another explanation for the user; (c) the burden of proof rests on the person who alleges dedication; (d) there must be evidence of continuous and unobstructed user over a long period, though not necessarily 20 years.

60. All these propositions are no doubt true; but it is also true that *animus dedicandi* can be inferred from the fact that the landowner allows the public to use the path every day of the year for several years without restriction and without putting up notices saying that there is no right of way. In the classic case of *Trustees of the British Museum v Finnis* (1833) 5 C&P 1053 Patteson J directed the jury that "if a person opens his land, so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it and use it as a way; and if the person does not mean to use it as a way, but only to give a licence, he should do some act to show that he gives a licence only. The common course is to shut it up one day in the year."

61. At the end of the hearing before us the impression of each member of the court gained from the oral submissions and skeleton arguments on behalf of the Council was that it was accepted that the Path had been used as a thoroughfare from the western side of the park to an exit on the north eastern side since the building of social housing in or before April 1947. However, in further submissions made on receipt of draft judgments the Council argued that we had misunderstood these submissions; that the social housing opened in early 1947 was on the west side of the park; and that there is no evidence of the north east entrance to the park having been opened before 1949. They rely on the witness statement of the Claimant in the county court that the housing which now exists outside the north east entrance had been developed since she was a child (she was born in 1963), and a witness statement of her brother-in-law David Jones, born in 1947, that when he was a child the relevant area was farmland. The Council points to the absence of evidence that in the 1930s and early to mid-1940s, when the only two entrances to the park were on its west side, the Path was used as a through route.

62. Mr Cawson acknowledges that invitations to a court to reconsider its decision after circulation of a draft judgment are generally to be deprecated; and Mr White is certainly entitled to protest at the lack of clarity, and to some extent inconsistency, in the Council's arguments. But in his further submissions Mr Cawson accepts that the question of when the Path was first used as a thoroughfare is not decisive: as Atkin LJ observed in *Moser v Ambleside UDC* (1925) 89 JP 118:

> "It has been suggested that you cannot have a highway except insofar as it connects two other highways. That seems to me to be too large a proposition. I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway."

63. What the evidence does clearly establish is that the park was opened in the early 1930s; the Path and other paths were laid out soon afterwards; and that ever since that time (about 80 years before Ms Barlow's accident) the public have been allowed to walk on the paths without restriction or interruption of any kind even on one day a year.

64. This is in my view ample evidence to support the implication or presumption of dedication at common law. There is no evidence of any alternative explanation.

65. The importance of this is that when the common law presumption arises, it is retrospective, according to the decision of the Judicial Committee of the Privy Council in *Turner v Walsh* (1881) 6 HL 636. The appellant in that case owned land in New South Wales, acquired from the Crown in 1879, over which there was a track. The respondent was sued for trespass when he went upon the track and removed fences running across it installed by the appellant. The respondent argued that he had a right to do so because the track had in fact become a highway by long usage and so there was a right to pass and repass without obstacle. The appellant said that there was no such long usage and in addition, said that by reason of the New South Wales Crown Lands Alienation Act 1861, the Crown had lost the legal power to dedicate highways save under certain conditions which did not apply here: thus there could be no presumed dedication. The court below directed the jury that it could find that there was presumed dedication by reason of the period of user beginning prior to the commencement of that Act as well as subsequent to it. The Privy Council agreed. At page 642, Sir Montague Smith stated as follows:

> "The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; *and the presumption, if it can be made, then is of a complete dedication, coeval with the early user.* You refer the whole of the user to a lawful origin rather than to a series of trespasses. It may be that in this case the evidence of user prior to 1861 was alone sufficient to establish the presumption of dedication; but the strength of that presumption is increased by the subsequent user, and would certainly have been much diminished if the user had been discontinued after 1861. In this case their Lordships have no doubt that, the user being continuous, the direction is right, and if the direction is right, it is not contended that the verdict is wrong." [emphasis added]

66. Although this was a decision of the Privy Council, and technically not binding on the English courts, the italicised passage is accepted to be a correct statement of English law, and Mr Cawson did not contend otherwise. The effect is that the act of dedication – one thinks of a hypothetical ribbon-cutting ceremony, or at least the execution of a

deed – is deemed to have occurred at the beginning of the period of continuous user, not at the end of it. In the present case this means that the Path is deemed to have been dedicated since the early to mid-1930s, well before the commencement of the 1949 Act. It is therefore deemed to have been "repairable by the inhabitants at large" until 16 December 1949 and thereafter until 1 January 1960 (the commencement dates of the 1949 and 1959 Acts), and "maintainable at public expense" since that time. The Claimant's cause of action for breach of statutory duty under s 41 of the 1980 Act is accordingly established.

Conclusion

67. For these reasons, albeit on different grounds from those on which Waksman J gave judgment for Ms Barlow, I would dismiss this appeal.

Lord Justice Singh:

68. I agree that this appeal should be dismissed on the alternative ground that was advanced by Mr White in the Respondent's Notice. I would like to add some words of my own both because we are differing from the reasoning of Waksman J and because, like Bean LJ, I respectfully disagree with the *obiter dicta* of Sedley LJ in *Gulliksen*, at [18] (quoted by Bean LJ at [46] above). Like Bean LJ, I prefer the interpretation of s. 36(2)(a) of the 1980 Act given by Neuberger J in *Gulliksen*, essentially for the reasons that he gave, although not entirely.

69. Neuberger J appeared to accept the submission made by counsel in *Gulliksen* that the interpretation he would give to s. 36(2)(a) would involve the reading in of the words "as such" into that provision, in other words to make it clear that it only applies where a highway authority constructs a highway acting in its capacity as such. I do not consider that any words have to be read into the provision. In my view, it has the effect that Neuberger J thought it had, simply on its face. This is because, in my view, the words "highway authority" are used by Parliament to mean "an authority exercising its highway functions".

70. This is consistent with how Parliament refers to all kinds of public authorities in many different statutes. For example, planning legislation refers to a "planning authority"; housing legislation refers to a "housing authority"; education legislation refers to an "education authority" and so on. Often the body that exercises the relevant functions will be the same entity: for example, a district council will often have planning functions and housing functions; a county council will often have highways functions and education functions. But Parliament is not referring to that entity as such. It is referring to that entity only in so far as it exercises the functions referred to in that particular statutory provision. This is why I disagree with the analysis of Sedley LJ in *Gulliksen*. His analysis turned simply on the fact that a local authority is a single body corporate. So it is but that does not lead to the conclusion that it does not matter in what capacity it was acting in a particular context, that is what statutory functions it was exercising.

71. In the present case, it seems to me clear that, when the park was first laid out in the early 1930s, Abram was exercising the functions conferred on an urban district council by s. 164 of the Public Health Act 1875. What matters for present purposes is that, when the Path was first constructed, Abram was not acting as a highway authority.

Lady Justice Macur:

72. I also agree that the appeal should be dismissed, on the ground predicated upon ss. 47 and 49 of the National Parks and Access to the Countryside Act 1949 and consequent impact of s. 38(1) and (2)(a) of the 1959, and s. 36(1) of the 1980 Highways Acts, for the reasons given by my Lord, Bean LJ. I join with my Lords, Bean and Singh LJJ in their respectful dissent from the obiter dicta remarks of Sedley LJ in *Gulliksen*, and prefer the construction placed upon s. 36(2)(a) of the 1980 Act by Neuberger J (as he then was), for the reasons they both give, feeling it unnecessary to add to the discussion above. In summary, although I am persuaded by the Appellant's arguments that the Path was not constructed as a highway by a highway authority and does not thereby establish Ms Barlow's claim by reference to s. 36(2)(a) of the 1980 Act, the undisputed evidence does establish that a thoroughfare had been created before 1949, and continued and unfettered public use thereafter and to date created a common law dedication of the Path which, upon retrospective dating prior to 16 December 1949 in accordance with dicta in *Turner v Walsh,* means the Path was maintainable by the inhabitants at large, and subsequently at public expense, consequent upon the 1949 and 1959 and 1980 Acts respectively.