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The View from the Ground: Public Rights of Way before, during and after lockdown

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PROW Before Lockdown: *Roxlena*

R (oao Roxlena Ltd) v Cumbria CC [2019] EWCA Civ 1639: Council made DMMOs under s.53(3)(c)(i) (*subsists*) & (iii) (*particulars require modification*) WCA '81 to add FPs & extend BW

C argued application failed proc. requirements in Sch. 14 WCA '81: relied upon exactly the same evidence as a previous app (which had failed to comply w notification requirements & was rejected by Council): evidence cannot be "discovered twice"

CA (Lindblom LJ):

- Re-iterated the different tests at order making stage (less onerous) and order confirmation stage (more onerous): [49-54]
  - Council was not obliged to investigate user evidence to establish whether they meant what they said
  - Council could seek more evidence/analysis if could not decide but not obligated to "tackle every actual or potential conflict of evidence that an inspector would have to resolve in due course": generous "margin of appreciation"
- "Event" in s.53(3)(c) is "discovery of evidence" **and** "a consideration of that evidence" with all other evidence available: a "composite event".
- Here, Council had rejected app. 1 on basis of proc. flaw, so had "discovered" the evidence but not "considered" it: could do this on 2nd app, so do not need to provide new evidence: can rely solely on previous
- Council also can act under free-standing duty (s.53(2)(b) WCA 1981) to keep DMS under "continuous review" and look at discovered-but-unconsidered material in that way: not dependent on applications
- Sch 14 procedural requirements are still important and applicants must be complied with them

PROW during Lockdown (1.1): PINS

- Decisions: since mid-March had 11 decisions (8x s.53(2)(b) WCA 1981 DMMOs, 2x s.119 HA 1980 diversion orders, 1x s.326(5) HA 1980 order). All relied on pre-lockdown events.
- Upcoming events:
  - All physical hearings/inquiries postponed/cancelled (at least 12 and probably many more informally notified); some events to be done on Insp's questions & written reps
  - Approached "on case by case basis" = v. late (Aug inq. postponed 24 June)
- Guidance: updated 28 May + new info on website 25 June:
  - Site visits continuing where possible, may take longer than usual to arrange
  - No physical events for "foreseeable future"
  - Virtual hearings/inquiries being tested and rolled out – not come across PROW matter to be done virtually
  - Updates: Temple Quay House closed but officers allowed in 1 day a week to progress matters that cannot be done from home
  - Do not send documents via the post: hard in PROW matters where no online portal as with planning

PROW during Lockdown (1.2): PINS

- **ASSUME THE TIMETABLE WILL BE ADHERED TO!**
- **Early preparation** and **communication with case officer** are even more important than usual
- Councils should be taking proactive role in assisting parties (esp. unrepresented) to view SOCs and appendices electronically, as PINS cannot/will not send out appendices electronically (esp. where not all parties have provided email)
- Challenges are likely to arise with over-scanning of docs/ sending large files of maps/scanned UEFs etc.
- If meeting deadlines will be too challenging, esp. because of other parties' delayed submissions etc., PINS need to know early
- Strategies:
  - Prepare as if it will be dealt with by written reps: deal with matters very fully on paper where you can and frontload the work;
  - Where you cannot respond fully (through other parties' delays/slips in the timetable etc.), let PINS know you cannot deal with X matter and provide a skeleton SOC

PROW during Lockdown (2.1): *Barlow v Wigan MDC* [2020] EWCA Civ 696

- C fell over roots on path in Wigan Park: "dangerous and defective"
- Park built by W MBC in 1930s & paths pre-1959, path not PROW/LoS
- W made tactical concession that "paths dedicated as ROW through long user" (**assumed** post-1949, CL/s.31 so not HMPE), relying on *McGeown v NI Housing Exec.* [1995] 1 AC 233 (see *Gautret v Egerton* (1897) LR 2 CP 371):
  "*Persons using rights of way do so not with the permission of the owner of the solum but in the exercise of a right*"
  SO users of highways non-HMPE : not invitees/licensees/visitors under OLA 1957
  AND THEREFORE: because paths are not HMPE, no duty to maintain the path under s.41 HA 1980, so no liability to C
- To recover, C needed to demonstrate that the path was **HMPE** by falling within s.36 HA 1980. The only options in the circs:
  - S.36(1): HMPE because it was so under HA 1959
  - S.36(2)(a): highway constructed by a highway authority

PROW during Lockdown (2.2): *Barlow*

S.36(2)(a): "a highway constructed by a highway authority?

CA HELD: NO IT WAS NOT, because not constructed "by H.A."

Although council that built the park and path was "highway authority", it needed to be acting as such at the time

- Appr'd Neuberger J in *Gulliksen v Pembrokeshire CC* [2003] QB 123: "*the notion of a 'highway constructed as a highway by a highway authority' means … 'by a highway authority in its capacity* ***as such****'. … The notion of a way constructed by someone which in due course becomes a highway through dedication…would not be thought of as a highway constructed by a highway authority"* [22-23]
- Bean LJ: whilst a local authority may be "*a single body corporate… it does not follow that it is indivisible for all purposes*"

NB. s.36(2)(a) could operate "retrospectively" insofar as could be relied upon to identify a HMPE where "highway" was constructed before 1980

PROW during Lockdown (2.3): *Barlow*

S.36(1): was path HMPE because it was HMPE immediately before commencement of HA 1980 under HA 1959?

CA HELD: YES IT WAS by dedication:

- Not dedicated under s.31 HA 1980: no "calling into question" to begin 20 yrs
- CL dedication on basis of long user beginning in 1930s, even though no thoroughfare until 1949 (*Moser v Ambleside UDC* (1925) 89 JP 118)
- Public permitted to walk paths without restriction or interruption since then: no other explanation for landowner's conduct = presumption of dedication
- Whenever that presumption arose, it is retrospective: Privy Council in *Turner v Walsh* (1881) 6 HL 636: "*presumption…is of a complete dedication, coeval with the early user*", so dedication occurred at the beginning of period of user, so:
  - Path had been dedicated since early 1930s when park was opened, therefore:
  - Dedicated as a FP well before NPACA 1949, therefore:
  - Subject to the old rules under s.23 HA 1835 and, as dedicated FP, was "repairable by inhabitants at large" until 16 Dec 1949 (NPACA 1949), continued until 1 Jan 1960 (HA 1959) when became "HMPE" (under s.38(2)(a) HA 1959), therefore:
  - HMPE under s.36(1) HA 1980 and therefore:
  - **W had a duty to maintain the path under s.41 HA 1980**

PROW during Lockdown (2.4): *Barlow*

Bean LJ also commented *obiter dicta* on *McGeown* and *Gautret* – the rule that there is no duty to maintain or liability to those who injure themselves on non-HMPE paths, because no duties under s.41 HA 1980 nor under OLA 1957:

"I suspect that the true ratio of both *Gautret…* and *McGeown…* 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"

- Otherwise, “if 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.”

PROW after Lockdown

- *Barlow* impact:
  - Applications for park paths in similar circs to be added to DMS under pre-1949 CL dedication?
  - Case brought to pick up gauntlet thrown down by Bean LJ on when rule in *McGeown* applies?
- *Roxlena* impact:
  - Kerr J (at FI) disagreed with PINS's Advice Note 15 that temporary cessation of use of PROW through Foot & Mouth Disease Order in 2001 could not legally constitute an "interruption" for s.31(1) HA 1980: it could but fact-dependent [50]
  - Lindblom LJ did not disagree
  - Will there be COVID-19 "interruptions"?
- Appeals Casework Portal for PROW? Virtual hearings?

Thank you

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