Neutral Citation Number: [2019] EWHC 1546 (QB)

Claim No: D60YM368
Appeal Ref: M18Q200

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
On Appeal from HHJ Platts sitting at Manchester County Court

Date: 19 June 2019

B e f o r e :

MR JUSTICE WAKSMAN

DEBORAH BARLOW

Claimant

- and -

WIGAN COUNCIL

Defendant

Matthew White (instructed by Active Legal, Solicitors) for the Claimant/Appellant
Simon Vaughan (instructed by Forbes, Solicitors) for the Defendant/Respondent

APPROVED JUDGMENT

Hearing date: 10 June 2019

INTRODUCTION

1. This is an appeal from a decision of HHJ Platts dated 13 December 2018 for which permission was granted by the Judge. By that decision, after a trial on liability, he held that a public path in Abram Park, Wigan ("the Path"), was not a highway maintainable at public expense within the meaning of s36 (2) (a) of the Highways Act 1980 ("the Act"). As a result, the Claimant and Appellant, Ms Barlow, who tripped on an exposed tree root on the Path on 21 September 2018, had no cause of action against the Defendant and Respondent, Wigan Metropolitan Borough Council ("the Council") and her claim for damages failed. Had the Path been such a highway, the Council would have owed her a duty to maintain it pursuant to s 41 of the Act. It was found by the Judge and common ground on the appeal that the Path was in a dangerous or defective condition.

BACKGROUND FACTS

2. The following facts are not in dispute for the purposes of this appeal:

   (1) The land used to develop the park had been purchased on 10 November to 1920 by Abram Urban District Council ("Abram"); this body remained in existence until 1977 although it ceased to act as a local authority on 1 April 1974;

   (2) the land had been purchased by Abram with the intention of constructing a public park; Abram was the predecessor in title to the Council;

   (3) the land was not developed for some years but when it was, it was called The Lane Park. The park was constructed some time in the early 1930s and the paths (including the Path) were present before 1959;

   (4) the Path had been made in order to provide access to and across the amenities built within the park and while the public at large might have enjoyed unfettered access, the Judge stated that he could not conclude or infer there was an intention to dedicate the Path as or part of a highway, as at the time of its construction;

   (5) The Judge held that the Path became a highway by reason of at least 20 years usage pursuant to s31 of the Act (see further below). Indeed, the Council had always contended that this was the case (see its letter dated 2 October 2015, subsequent letters and paragraph 4 b of the Defence).

3. The claim was never put on the basis that the Council was liable to Ms Barlow under the Occupiers Liability Act 1957 ("the OLA"). This was because it was common ground that the Path was a highway and as a result of the decision of the House of Lords in *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233, there could be no liability under the OLA. The issue for the Judge was whether the Path was not merely a highway but one which was maintainable at public expense at the time.

4. Furthermore, although the Council denied this at the trial before the Judge, it has since accepted that Abram was itself a Highway Authority for the purposes of the relevant legislation namely the Act and its predecessor, the Highways Act 1959 ("the 1959 Act"). The Council itself is a highway authority as has always been accepted. The Council has been the relevant local authority since 1 April 1974.

THE RELEVANT LEGAL FRAMEWORK

5. The duty to maintain a highway on the part of a relevant highway authority under s41 of the Act is owed only in respect of a highway "maintainable at the public expense".

6. Section 36 of the Act provides as follows:

> "(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.…"

7. It is common ground that, in order to be a highway, the relevant way must be as described in paragraphs 17 and 18 of the decision of HHJ Curran QC in *Young v Merthyr Tydfil* [2009] PIQR 23, namely:

> "17 [quoting from Halsbury] .. A way over which there exists a public right of passage that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and re-pass without let or hindrance.
>
> 18. … A highway may be created… either by statute… or by the common law doctrine of dedication and acceptance. There is a statutory presumption of dedication after 20 years uninterrupted use by the public (see s31 (1) Highways Act 1980) but as that period has not elapsed, there can be no statutory presumption of dedication. But dedication at common law does not require 20 years (or indeed any period) of interrupted user. If there is dedication and acceptance, a highway is created."

8. Section 31 (1) of the Act provides that:

> "Where a way over any land, other than a way of such a character that used 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."

9. As already noted, the Judge found that the Path had become a highway here pursuant to s31. Ms Barlow contended that this had occurred a long time ago but the Council contended that time could only have start to run from 1974 when it became a local authority. This dispute did not and does not matter because on any view the Path had achieved the status of a highway by no later than 1994, some 20 years before Ms Barlow sustained her injuries.

10. Accordingly, the issue for the Judge so far as the applicability of the duty to maintain was concerned, was a narrow one: while the path was a highway at the relevant time, was it also one which was "maintainable at the public expense"? Before the Judge, both sides proceeded upon the basis that the only route to such a finding was the applicability or otherwise of s36 (2) (a) namely that the Path was a "highway constructed by a highway authority". Ms Barlow contended that it was while the Council contended that it was not. The Judge agreed with the Council.

THE ISSUES ON THE APPEAL AND CROSS-APPEAL

11. The Judges relevant findings were as follows:

(1) In order for s36 (2) (a) 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 created 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 defendants 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 defendants 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 your 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 commencement of the Act; see paragraphs 12 and 13 of the judgment;

(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)."

(6) However, as noted above, it is now accepted that Abram was in fact a highway authority.

12. The challenge to all of this made by Ms Barlow is as follows:

(1) s36 (2) (a) does not require any proof of intent to create (or dedicate) a highway at the time of the construction of the Path; it is enough that (a) the Path was constructed, (b) that at the relevant time (ie at the time of the accident), it had become a highway and (c) that it had been constructed by a highway authority, not now in dispute;

(2) as an alternative and new ground of appeal and one not argued before the Judge, the Path fell within s36 (1) of the Act, , taken in conjunction with the operation of ss47 and 49 of the National Parks and Access to the Countryside Act 1949, along withs38 (2) (a) of the 1959 Act (" the Alternative Ground").

13. The Council did not oppose the introduction of the Alternative Ground. It resists both of those challenges to the decision of the Judge but adds that if (contrary to its primary submission) the requirements of s36 (2) (a) were in fact met, that sub-section nonetheless did not cover the Path because, in order to avoid constituting retrospective legislation, one had to construe it as applying only to highways constructed after the introduction of the Act. It therefore did not cover the Path. I shall refer to this as the Retrospectivity Argument. Ms Barlow disagrees with the Retrospectivity Argument but in any event says that the Alternative Ground avoids any retrospectivity problem.

ANALYSIS

Does s36 (2) (a) apply?

Is s36 (2) (a) confined to where the highway was constructed as such at the outset?

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 (see paragraph 12(1) above) does not do violence to the language of s36 (2) (a). To take this case, the 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.

18. I now refer to some of the case-law cited to me on this point.

19. *McGeown* does not directly assist. This is because in that case, the only claim brought was under the OLA and the sole question was whether, once the footpath had become a public right of way by usage, the duties to invitees previously owed under the OLA ceased. The House of Lords held that they did so cease. Lord Browne-Wilkinson observed that this seemed a strange result but in the case before him, he agreed with the outcome.

20. In *Young*, also referred to above, *McGeown* was followed. The Claimant suffered injuries when she slipped on a bridge which was constructed by the Second Defendant on land owned by the First Defendant local authority ("the Authority"). As between users and the Authority, the bridge was held to have become a highway by usage. However, while the Authority had intended to dedicate it as such, it never adopted it or considered it to be a highway maintainable at public expense. And since it had not constructed it (because the Second Defendant had), it followed that there was no liability under the Act. Nor was there any liability under the OLA. The facts there are different from those here, critically in respect of who constructed the way which became a highway. However at paragraph 34, the judge observed thus:

> "… Had the first defendants [ie the Authority] themselves constructed the highway, by the operation of s36 of the Highways Act 1988 [it should be 1980] it would have been maintainable at the public expense but that point was of no avail as it was the second defendants, a wholly separate legal entity who constructed it."

21. I consider that observation (albeit *obiter* and not otherwise binding on me) to be of some significance because it would seem that the only way that the path could have become a highway maintainable at public expense was through the operation of s36 (2) (a). But if so it is a case where, had the path been constructed by the relevant defendant, the sub-section would have applied even though it only acquired the status of a highway through subsequent usage. See the findings at paragraph 26 of that judgment.

22. Accordingly, there is no reason in statutory language, principle or case-law, why the Path here cannot fall under s36 (2) (a) because it only became a highway after long usage and was not constructed as such at the outset.

If the (or what became the) highway was constructed by a highway authority, did it have to act in that capacity when constructing it, for s36 (2) (a) to apply?

23. A related, but strictly different argument made by the Council was to the effect that even if the Path would otherwise be caught by s36 (2) (a) and on the agreed basis that Abram was a highway authority at the time of construction, it is not caught because Abram was not acting *qua* highway authority at the time. Rather, in constructing the park (including the Path) it was acting as local authority. Put another way, although Abram was a single legal entity, liability depends on which "hat" it was wearing at the time.

24. This point arose, albeit *obiter*, in *Gulliksen v Pembrokeshire County Council* [2003] QB 123. At first instance, in the County Court, the case had certain similarities with the instant case. The footpath in question on which the Claimant fell due to the raised lip of a manhole cover had been constructed by the Defendant local authority in its capacity as a housing authority and the path was intended for use by the residents of a private housing estate. But because of public use for more than 20 years it became impliedly designated as a highway pursuant to s31 of the Act. HHJ Hickinbottom (as he then was) held that regardless of the capacity in which it was acting the local authority was a single entity. As such it had constructed the path which was now a highway and so s36 (2) (a) applied, making it a highway maintainable at the public expense. Thus the duty to maintain arose. The Judge also held that in the alternative, if it could not be said that there was a single entity, it made no difference because acting as a highway authority, the local authority had agreed to undertake the maintenance of the path anyway and so s38 (1) of the Act applied. I need say no more about this alternative ground.

25. On appeal to the High Court, Neuberger J (as he then was) reversed the decision below on both grounds.

26. However, in the second appeal to the Court of Appeal, the landscape changed and the Court was not required to decide which of the decisions below was correct by reference to s36 (2) (a). This is because it held that s36 (1) of the Act applied on the basis that the path was already a highway maintainable at the public expense under the 1959 Act. This was by virtue of s38 (2) (c) thereof which rendered a highway maintainable at the public expense if it had been constructed by "the Council of a borough or urban district within their own areas under Part V of the Housing Act 1957." In the absence of evidence to the contrary the Court was prepared to assume that the path here must have been constructed by the local authority using its Part V powers, and so was maintainable at the public expense. On that footing the debate about the applicability or otherwise of s36 (2)(a) was a false one; the primary category of highways maintainable at the public expense was contained in s36 (1) and s36 (2) (a) was no more than a residual category, to be considered only if s36 (1) did not apply - in that case, it did apply.

27. However, in a section headed "Remarks", at paragraph 18 of his judgment (with which Waller LC and Woolf LCJ agreed), Sedley LJ said this:

> "I would nevertheless venture the following observations on the provisions which were canvassed in the courts below. By section 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 section s36 (2) (a) of the 1980 Act contemplated a highway authority acting as such."

28. Although *obiter*, this observation deals precisely with the argument maintained by the Council before me that on any view, the Path was not constructed by Abram in its capacity as a highway authority but simply as the local authority. If this observation is correct it is strong support for the rejection of the Council's argument. It should be noted that in *Gulliksen* the two relevant capacities in which the local authority could be said to have acted were as housing authority or as highway authority. In the instant case, on any view Abram, when constructing the Path as part of the park, could not have been acting as a housing authority and the distinction drawn by the Council was between Abram, simply acting as a local authority providing some public amenity, and Abram acting as a highway authority.

29. For my part, I would respectfully agree with Sedley LJ's observation. If it was necessary always to ensure that the local authority which constructed the relevant highway had been acting as highway authority at the time, this may not always be an easy task. Moreover as this case shows, there will not always be a distinction between the local authority acting in two different particular capacities (i.e. housing and highway) but rather one between a particular capacity (highway) and the local authority's general capacity as creating amenities on land which it owns. Any investigation into the particular "hat" which the local authority was wearing at the time seems to me to be susceptible to uncertainty and arbitrariness insofar as the result may depend on which particular department was handling

that particular matter. In my judgment, one should take the usual approach which is to identify the relevant legal entity and not attempt to look behind it.

30. Sedley LJ's observation has attracted some adverse comment, however. At para. 4-31 of *"Highway Law"* by Stephen Sauvain QC, 5th Edition, he suggests that this approach

> "would very largely render the provisions in s38 (2) (b) [this must in fact be a reference to s36 (2) (b)] otiose and render the safeguards in that subsection ineffective. It was not necessary for the decision in *Gulliksen* and it is suggested that the existence of the express provisions in s38 (2) (b) [see above note] dealing with ways constructed under housing powers indicates that this was not the legislator's intention."

The Council made a similar point in argument.

31. I do not agree with this point because as *Gulliksen* itself shows, in the event, the construction of the path by the local authority there pursuant to its Housing Act powers brought the case within s36(1) of the Act anyway so that s36 (2) (a) was irrelevant. Furthermore, as noted above, the instant case is not one where it can be said that the other "hat" worn by Abram at the time was its Housing Authority "hat". Moreover, this argument assumes that every council is also a highway authority. While this might often be the case it is not always so. See, for example, *Ley v Devon County Council* 28 February 2007.

32. Finally, the Council argued that if there is only one "hat", as it were, then a local authority which owned the relevant way could not avoid its dedication by long user by putting up a relevant notice. But I cannot see why not.

33. I thus remain of the view that, provided the relevant local authority at the time was, among other things, a highway authority, then that is sufficient for its construction of the way to attract the operation of s36 (2) (a). I can see no reason of language or logic for an additional "capacity" requirement.

34. For all of those reasons I reject the Council's argument based on the capacity in which Abram was acting at the time.

Was there a deemed intent by Abram to dedicate at the outset?

35. An alternative argument made before me by Ms Barlow was that if (contrary to my finding above) and intention on the part of Abram was required at the outset, then, once the Path had achieved the status of highway by long usage, the effect is that it is to be regarded as having been dedicated as such at the time of its construction. Although this argument is not now necessary, I make some brief comments about it.

36. The argument is based upon the decision of the Privy Council in *Turner v Walsh* (1881) 6 HL 636. Here, the Appellant 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 NSW 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 prior to the commencement of that Act and also subsequent to it. The Privy Council agreed. At page 642, Sir Montague E Smith stated as follows:

> "Would not the inchoate right run on to maturity rather than be blocked by the intermediate passing of this Act ?" This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the Appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. 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."

37. Ms Barlow argues from *Turner* that once there is a presumed dedication the highway must be taken to have been dedicated at the outset. I do not accept that the passage referred to above was making such a general statement, for all purposes. In the instant case such a view, if correct, would mean that a Court now would have to say that at any point in the prior public user period (or even before if the way was created prior to such user) the highway authority had a duty to maintain by reason of the application of s36 (2) (a). That would be the result even if a failure to maintain had occurred at a time when, if an action was commenced then, there would be no operative duty because the necessary period of public user had yet to elapse. I consider that to be a very odd result. I think that context is all, here. So I do not accept that once there is a presumed dedication it must be taken for the purposes of s36 (2) (a) to have been made at the outset so as to satisfy the requirement (had it existed) that the way must have been dedicated as a highway when constructed.

38. Furthermore, and despite what is said later on, the first part of the extract rather suggests that the (pre-1861) "early user" was not merely inchoate as at 1861. But if so, the necessary period for the presumption would have been complete by then, in which case there would have been no problem over the capacity of the Crown.

39. Accordingly, had it been necessary, I would not have accepted this argument.

s36 (2) (a) and Retrospectivity

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 a 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.

42. Likewise, the case of *Price v Powys County Council* [2017] EWCA 1133, also relied upon by the Council is not relevant here. That was a case where the Court of Appeal held that on the correct interpretation of the Environmental Protection Act 1990, where the Defendant's predecessor in title had polluted land, and would have (now) incurred a liability to remediate, that liability did not pass to the Defendant. But, as noted above, in this case, there is no question of making the Council liable for an event which has already occurred.

43. The more aposite 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. So, as Dickson J went on to point out in *Gustavson Drilling* [1977] 1 SCR 271, 282-283, with special reference to tax legislation:
>
> > "No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed."
>
> As the sparks fly upward, individuals and businesses run the risk that Parliament may change the law governing their affairs."

44. I agree that para. 4-26 of *"Highway Law"* rather suggests that the sub-section is prospective only in that it refers to "newly created ways". However, there was no analysis of any retrospectivity issue and in my view this general description does not displace the points made above.

45. Accordingly there is nothing in retrospectivity point and the Judge was correct to rule against it as he did in paragraph 13 of his judgment.

Conclusion on the applicability of s36 (2) (a)

46. For all the reasons given above I would respectfully disagree with the Judge's conclusion that s36 (2) (a) does not apply.

The Alternative Ground

47. Since the Alternative Ground was introduced by Ms Barlow on appeal simply to avoid any problem of retrospectivity it is not strictly necessary to consider it since there is no such problem. However given that I heard argument on it, I will refer to it briefly.

48. Section 47 of the National Parks and Countryside Act 1949 ("the 1949 Act") provides that the rule of law whereby a highway is repairable by the inhabitants at large shall apply to all public paths. However, s23 of the Highways Act 1835 had provided that certain highways would not be repairable by the inhabitants at large unless certain conditions were met (which would not be satisfied in the case of the Path). However, s47 of the 1949 then applied s23 to public paths dedicated after the commencement of the 1949 Act, being 16 December 1949. So, it is argued, since the Path was likely to have been created before then, s23 did not apply. If so, it was repairable by the inhabitants at large. But if so, it then fell within s38 (1) (a) of the 1959 Act, being "a highway which immediately before the commencement of this Act was maintainable the inhabitants at large of any area." And was thus to be treated as a highway maintainable at public expense under that Act. Finally, if that was the case then that status would be continued by s36 (1) of the Act referred to above.

49. I follow all of that but this 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.

CONCLUSION

50. For the reasons given above, this appeal succeeds. I am most grateful to Counsel for their very helpful submissions. As it appears to be common ground that if s36 (2) (a) applies, there has been a failure to maintain it would follow that Ms Barlow must succeed on liability. The case then needs be remitted only on the question of contributory negligence and quantum.