Highways dispute causes the Court of Appeal to 'spit' (City of London v Transport for London)

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Local Government analysis: Martin Carter, barrister at Kings Chambers, comments on the lessons that can be learned from the London Borough of Southwark and the City of London v Transport for London judgment and discusses the practical implications of it. The judgment is likely to be of particular interest to London boroughs who had been threatened with deprivation of significant landholdings without compensation.

Original news

The London Borough of Southwark and the City of London v Transport for London [2017] EWCA Civ 1220

The Court of Appeal has allowed an appeal brought by two local authorities. Certain highways became vested in Transport for London (TfL) under a statutory order. The local authorities submitted that TfL only obtained the 'two top spits' and not the freehold of the land. An arbitrator and the High Court ruled in TfL's favour. The Court of Appeal has now reversed this ruling and said that the term 'highway' in the statutory order was to be interpreted in the same way as in the Highways Act 1980 (HiA 1980), such that TfL did not obtain the freehold, but only the 'two top spits'.

What was the background to this case?

Two local authorities in this case appealed against an arbitrator's award on preliminary questions raised in arbitrations under the GLA Roads and Side Roads (Transfer of Property etc) Order 2000, SI 2000/1552 (the Order).

The Order provided for the vesting of highway property in TfL following its assumption of responsibility as a highway authority for certain Greater London Authority (GLA) roads. Article 2(1)(a) of the Order provided for the transfer of 'the highway, in so far as it is vested in the former highway authority'.

The local authorities had previously been highway authorities in their respective areas for what became GLA roads. For some highways, these local authorities owned not only the road surface, but also the freehold. Disputes were referred to arbitration regarding the extent of the vertical and horizontal limits of ownership where the local authorities owned the whole freehold of land on which the highway was situated. It was not disputed that TfL had acquired only a limited freehold where the highway authority had only had the same limited freehold.

What were the issues?

Article 2 of the Order dealt with the transfer of property. Article 2(1)(a) transferred to TfL in respect of GLA roads 'the highway, in so far as it is vested in the former highway authority'. The issue was what this provision meant.

TfL submitted that Article 2 had the effect of transferring all of the two local authorities' interests in the roads to them, whatever the interest might be. This submission meant that if the local authorities owned the freehold and were not just interested in the land as highway authority, then the freehold was also transferred to TfL by Article 2.

Against this, the two local authorities submitted that TfL had acquired only limited ownership under the Order even if the predecessor highway authority had owned the whole freehold. They relied on the use of the word 'highway' in Article 2(1)(a) and submitted that this word was defined in a limited way in HiA 1980, s 263 to mean only the 'surface' or that it was the general understanding of what a 'highway' was. The local authorities' case was that Article 2 only had the effect of transferring the surface and so much of the sub-soil as was necessary to maintain the highway.

The arbitrator (Mr John Male QC) initially decided that the Order vested the whole of the freehold in TfL, with the result that this allowed TfL to replace the local authorities as freehold owners. In *London Borough of Southwark and another v Transport for London* [2015] EWHC 3448 (Ch), [2015] All ER (D) 21 (Dec), the High Court dismissed the local authorities' appeal from the arbitrator's decision and rejected their limited interpretation of the word 'highway'. The two local authorities appealed to the Court of Appeal.

What did the court decide and why?

The Court of Appeal unanimously allowed the local authorities' appeals.

Lord Justice David Richards gave the unanimous judgment of the Court of Appeal. He ruled that Article 2(1)(a) only transferred to TfL the surface of the highway and so much of the subsoil as was necessary to maintain the highway. The starting point is that Article (2)(1)(a) transferred the 'highway'.

There had been a number of Victorian cases which had considered what was meant by the vesting of a 'highway' in a highway authority. These cases had determined that the vesting was limited to the surface and the 'top two spits' of subsoil. If Article 2 had been intended to transfer more than that, the choice of the word 'highway' was odd, given its long held common law meaning.

David Richards LJ went on to rule that this starting point was supported by these detailed points:

- Article 2(1)(b) of the Order transferred 'property' which was itself defined as 'land'. The difference of approach was deliberate. When 'land' is transferred that does indicate that full legal title is transferred
- there was an alternative means by which transfers to TfL could occur. The Order had been made by the Secretary of State. By HiA 1980, s 14B, the Mayor of London could make transfers to TfL using the power in HiA 1980, s 266A. That power had no equivalent to Article 2(1)(a), because the highway would automatically vest in TfL by the operation of HiA 1980, s 263, which provides that a highway vests in the highway authority for that road. TfL accepted and Mann J had agreed in the High Court that HiA 1980, s 263 vested only in the top two spits. The Court of Appeal thought that such an inconsistency of approach could not be warranted
- Article 2(1)(a) employed the same form of wording as set out in HiA 1980, s 265. Section 265 had been construed by Mr Kim Lewison QC in Secretary of State for the *Environment v Baylis* [2000] All ER (D) 563 when he said that 'the effect of "trunking" a highway is that the highway vests in the Minister…The extent of the vesting is such part of the land as is necessary for the highway authority to perform its statutory functions. It has been described as the "two top spits".' A transfer under HiA 1980, s 265 only transfers the surface and top two spits
- HiA 1980, s 14D provides that a reference to a 'GLA road' is a reference to a highway which was a GLA road, showing that there had been no intention to adopt a different definition of 'highway' from that already given by the common law

David Richards LJ rules that the approach of the judge below had overlooked the repeated use of the word 'highway' in the legislation. If a transfer of more than the surface and 'top two spits' had been intended, it could have easily been spelt out, but it had not been. The judge below had also said that his interpretation would avoid landholdings being split horizontally. However, the Court of Appeal pointed out that this is already a common feature and would not have been avoided if TfL's interpretation had been correct. This is because there are many highways where the local authorities' interest only extended to the highway surface and so split ownership is already an existing circumstance.

Finally, TfL had not been able to offer an adequate explanation as to why the local authorities and their ratepayers should be deprived, without compensation, of more property than was necessary for TfL to perform its function as highway authority.

To what extent is the judgment helpful?

The judgment does not set out any new principles, but is a welcome reinforcement of the limitations of a highway authority's interest in land over which a highway runs. The judgment is likely to be particularly welcome for London boroughs who had been threatened with deprivation of significant landholdings without compensation if TfL's arguments had been upheld. However, an application is being made by TfL for permission to appeal to the Supreme Court.

Interviewed by David Bowden.

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