Closing and then Opening the Floodgates for Highway Authorities

Department for Transport v Mott Macdonald Ltd and ors [2006] EWHC 928 (QB); [2006] EWCA Civ 1089.

Introduction

This case brought under section 41 of the Highways Act 1980 considered whether *Burnside v Emerson [1968] 1 WLR 1490* (*"Burnside"*), an authority which had exposed Highway Authorites to potential liability for flooded highways since 1968 survived *Goodes v East Sussex County Council [2000] 1 WLR 1356 ("Goodes")* and the narrow formulation of a Highway Authorities duty to maintain the highway.

Facts

Between 8th November 1999 and 21st September 2000 PC Richard Mitchell, Miss Laura Packer and Mr Raymond Hardie all had car accidents whilst travelling on either the A3 or the A38. All of the accidents were allegedly caused by the presence of water standing on or flowing across the carriageway. The roads had allegedly been flooded.

The Department for Transport, Environment and the Regions ("the DTER") were the Highway Authority responsible for both the A3 and A38 trunk roads and were named as the First Defendant in all three actions. The allegations against the DETR included the inadequate design of the drainage, the disrepair of the drainage and the blocking of the drainage by silt, detritus and vegetation. Counsel for the DTER confirmed that the cause of the presence of water on the carriageway was the blockage by silt, debris and vegetation of the drains intended to serve the road. All three actions were compromised.

The DTER sought a contribution or an indemnity from Mott Macdonald Limited ("Mott"), who had agreed to act as the agent of the DETR for the purposes of inspecting and maintaining the A3 and the A38 in all three actions. In the claims which related to the A38 they made similar claims against Amey Mouchel Limited ("Amey"), who had entered in to a contract with the DTER to undertake

maintenance works on the A38. Mott, in its turn, also brought contribution claims against both Amey and Cornwall County Council ("Cornwall") to whom they had subcontracted their responsibilities with regards the A38.

The Issue

The Courts were concerned with the preliminary issue of whether the DETR was liable in law for the accidents, a necessary pre-cursor to any successful claim for contribution or indemnity. The Court of Appeal (Carnwath, Moses LJJ and Chancellor of the High Court) identified the issue as follows:

"*Whether the Highway Authority would have been liable in law to the original claimants, in their actions upon the following assumption:*

…that the accidents were caused by a dangerous accumulation of water on the surface of the highway, caused by the longstanding blockage of the highway drainage system by silt, debris or vegetation."

The Law

Section 41(1) of the Highways Act provides as follows:

> *"The authority who are for the time being the highway authority for a highway maintainable at the public's expense are under a duty ….. to maintain the highway".*

By section 329:

> *"Maintenance" includes repair and "maintain" and "maintainable" are to be construed accordingly".*

In *Burnside* the first Defendant had driven in to a pool of water causing him to crash in to the Claimant on a road for which the Second Defendant was the relevant highway authority. The pool of water had accumulated due to inadequate design and maintenance of highway's drainage. It was held that to succeed in a claim under s41 a Claimant must first show that the road was in

such a condition as to be dangerous to traffic and second that the dangerous condition was caused by a failure to maintain. If both of these steps were satisfied a Highway Authority would only avoid such liability if they took such care as was reasonable in all the circumstances, a defence now embodied in s.58 Highways Act 1980. The Claimant in Burnside succeeded. One of the significant aspects of the judgment was the observation of Diplock LJ that *"repair and maintenance thus include providing an adequate system of drainage for the road"*.

In *Goodes* the central issue was whether a highway authority owed any duty to users of the highway to remove snow or ice which had fallen or formed on the highway, ice having caused an accident. In that case it was held that the obligation of a Highway Authority under s.41(1) Highways Act 1980 was to keep the Highways for which it was responsible in repair, and not any further or wider obligation. That is to say, they were not under an obligation to, for instance, remove ice that had formed on the Highway as this went beyond what was meant by "maintenance". The presence of ice or snow did not mean that the Highway was out of repair. The duty did not extend beyond the physical or structural condition of the highway.

It is to be noted that the effect of the actual decision in *Goodes* has since been qualified by Parliament, although not retrospectively, by section 111 of the Railways and Transport Safety Act 2003, which added to section 41(1) a duty "to ensure, so far is reasonably practicable, that safe passage along a highway is not endangered by snow or ice".

The Arguments

It was submitted by the DTER that, following *Burnside*, the duties of a Highway Authority included providing an adequate system of drainage for the road. Consequently, the duty of a highway authority to maintain the highway included a duty to provide an effective system of drainage if one was otherwise lacking. This would include clearing out debris which had accumulated and impeded the efficient working of the drainage system. The DTER's position was that *Burnside*

had been expressly approved by the House of Lords in *Goodes* and *Gorringe* and as such was binding on the Court.

By contrast, Mott, Amey and Cornwall argued that *Burnside* had been impliedly overruled by both *Goodes* and *Gorringe* with which it was inconsistent. They submitted that, as the law had developed a highway authority is only liable if it fails to repair and to keep in repair the surface of the highway. Whilst the highway authority had a power to provide drains to drain the highway and also to keep those drains clear (Highways Act 1980 s.100) it had no duty to exercise those powers. Thus, *Burnside* must, given the present state of the law, be incorrect. Further, even if the s41 duty did extend to drains, a drain which was not itself damaged, was not out of repair simply because its efficient operation as a drain was impeded by debris. Support for this latter point was taken from *Quick v Taff –Ely BC [1985] 3 WLR 981*, a case concerning a Landlord's covenant to repair where the Court had been of the view that: *"disrepair is related to the physical condition of whatever has to be repaired and not to questions of lack of amenity or efficiency"*.

The Decision at First Instance

HHJ Richard Seymour QC held that *Burnside* could not stand with *Goodes* or *Gorringe* as it was inconsistent with them. In his view the duties of a highway authority in respect of the roads for which it was responsible were confined to the repair and the keeping in repair of the **surface** of those roads. Further, the *"word "repair" should be understood in the same sense that it is in landlord and tenant cases*" (as to which see *Quick* above). It *"does not extend to dealing with obstructions which render the highway less commodious but do not damage the surface"*. Thus even if it had been held that the duty did extend beyond the surface of the highway to the maintenance of drains, in the view of the Judge the presence of water on a highway as a result of drains being blocked was not caused by a breach of that duty because a blockage did not mean that a drain was out of repair. As such the DETR would not have been liable to the accident victims and the claims for contribution failed.

The Decision of the Court of Appeal

Lord Justice Carnworth identifed the central question as being whether the Court of Appeal decision in *Burnside v Emerson [1968] 1 WLR 1490* remained binding on the Court in the light of later decisions of the House of Lords. However, underlying this were two main issues described as follows:

"i) The "Surface" issue" Whether, the authority's statutory duty to maintain the highway applies only to the "surface" of the Highway, a term, which as I understand it is used by the Respondents to refer simply to the part of the highway not used by traffic or pedestrians ("the traffic surface") and accordingly does not extend to highway drains beneath or beyond the traffic surface, or in the central reservation…

ii) The "repair" issue If there is a duty to maintain such highway drains, whether it requires only the repair of physical defects in the fabric of the drains, and does not extend to clearing blockages (as in this case)."

Dealing first with the surface issue, the Court of Appeal, having reviewed the relevant case-law, decided (Carnwath LJ giving the lead judgment) that the duty under s.41 was not confined to the "surface" of the road; the surface is simply to be treated as one important part of that which is to be maintained which is, using the language of the case-law, the structure and fabric of the roadway. References in some of the cases to the duty applying to the "surface" of the highway were to be in read in the context of the facts of those cases, which involved the surface of the highway. Further, the House of Lords had not thrown any doubt on *Burnside* in either *Goodes* or *Gorringe* and indeed in *Goodes* had cited passages from *Burnside* with approval. Thus *Burnside* was not inconsistent with *Goodes* or subsequent cases and the Court of Appeal considered it remained bound by *Burnside.*

As to the repair issue, the Court of Appeal's interpretation of the language of s.41 Highways Act 1980 (and the associated definitions) was that the word "repair" could not be read in isolation and must be read alongside the word "maintenance". As a consequence, where blockages occurred in drainage systems, and led to flooding, as a consequence of poor drainage maintenance, the s.41 duty would be breached. By basing liability upon an absence of maintenance a distinction could be drawn between on the one hand an icy patch in winter (*Goodes)* or occasional flooding which would not by themselves evidence a failure to maintain, and on the other a persistent problem caused by a Highway Authority's failure to satisfy their obligations.

The Court of Appeal also looked at what it referred to as 'the wider picture'. First, they concluded that Parliament, by its failure to amend the relevant legislation in response to *Burnside* in contrast to its swift response to *Goodes* intended the duty to be a broad one. Further, in light of the recent legislative amendment it would be anomalous if there were a cause of action for reasonably preventable hazards caused by ice or snow but not by flooding.

For these reasons the appeal was allowed. The Highway Authorities were liable in law to the original Claimants. The DTER could claim a contribution or indemnity from their subcontractors.

The Effect of DTER v Mott and ors

Subject to any contrary ruling by the House of Lords, Highway Authorities will potentially be liable accidents caused by failures to maintain the drainage system which render a road dangerous (unless of course they can satisfy the s.58 defence). Lord Justice Carnwath considered it a "remarkable contention" to suggest otherwise. This, in his view, was the common sense approach.

However, it is worth bearing in mind that the conditions of liability set out in *Burnside* must still be established – it must be established that the road in question was dangerous and that that danger was caused by a failure to maintain

the Highway. It is to be noted that in *Burnside* Diplock LJ, whilst upholding the decision of the trial judge that liability had been established in the light of a concession made by the highways inspector in that case that the pool of water constituted a danger, went on to say that for his part he had doubts as to whether any driver driving with reasonable care at a proper speed would have sustained an injury as a result of the pool of water. In subsequent cases there has been a trend towards imposing a greater responsibility on motorists to take the highways as they find them. It was put thus in *Gorringe* by Lord Scott:

> "*an overriding imperative is that those who drive on public highways do so in a manner and at a speed that is safe having regard to such matters as the nature of the road, the weather conditions and the traffic conditions. Drivers are first and foremost themselves responsible for their own safety"* (par 76).

There may well be considerable argument in individual cases about whether or not a highway was dangerous by reason of water on the road.

Conclusion

The potentially huge ramifications of the issues in this case are testified to by the fact that the Court of Appeal expedited the hearing of the Appeal from HHJ Seymour's decision. The latter's decision was given on 11th April 2006 and the Court of Appeal's judgment was handed down on 27th July 2006.

The result was in many respects a mixed one for the DTER. Whilst they enjoyed success on this occasion they have exposed themselves to a wider liability than was previously the case. It remains to be seen whether the House of Lords and/or the legislature will respond to this decision and if so whether they will support the broad scope of the duty which the Court of Appeal has defined.

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