

12. Roadside ditches

Ownership problems

1. The question of ownership of ditches alongside the highway and consequent maintenance responsibilities gives rise to frequent difficulties. The powers of highway authorities are constrained by statute and common law and are narrower than generally appreciated.

2. Where a highway authority has acquired, by agreement or compulsory purchase, the freehold of a site occupied by a road, ownership of that land will lie with the authority. However, where a highway is created by dedication, as is usually the case, ownership of the soil beneath the highway remains with the owner of the land who originally dedicated it, or his successors in title. Accordingly, the highway authority usually owns only the surface of the road and as much of the soil below, and air above, as is required for its control, protection and maintenance.

3. The lateral extent of a highway is in general terms a question of fact, applying the presumption (subject to evidence to the contrary) that a highway extends between the hedges or fences. Section 263 HA 1980 makes it clear that the whole of the 'highway', together with 'the materials and scrapings of it', vests in the highway authority. The section of the highway (vertically) that vests in the highway authority is only that which may be necessary to enable it to carry out its duty of maintenance and to enable the public to pass and to re-pass. Denning L.J. said that the depth below the surface that vested in the authority may be said to be 'the top two spits' (*Tithe Redemption Commission v. Runcorn District Council* (1954) 2 W.L.R. 518).

4. Where a ditch lies between neighbouring land and the carriageway there is a presumption that the ditch does not form part of the highway, and the highway authority therefore cannot alter it or otherwise deal with it, except with the consent of the owners. This was affirmed in *Hanscombe v. Bedfordshire County Council* (1938) 1 Ch. 944, where the council claimed that it was entitled to act in relation to the ditch by common law or, if not so entitled, it was authorized to act under S.47 Highways Act 1864 (now S.72 HA 1980), and S.67 Highway Act 1835 (now S.100 HA 1980), but the council lost the action. Farwell J. said: 'The rights of the public in a high road are to pass and re-pass along it, and their right to use the way for that purpose is not limited to that part of the way which is metalled or made up, but extends to the whole highway. When, therefore, the whole portion of a highway which is bounded

by a fence or hedge is capable of being used to pass and re-pass, the whole portion is deemed to have been dedicated to the public. When, however, a portion of the whole is a ditch which *prima facie* is not adapted for the exercise by the public of their right to pass and re-pass, the presumption, in my judgement, is that the ditch does not form part of the highway. That is a presumption which may be rebutted (see *Chorley Corporation v. Nightingale* (1906) 2 K.B. 612; (1907) 2 K.B. 637), but the onus lies on those who assert that the ditch is part of the highway.'

5. The status of ditches in relation to the highway have been considered by the courts on many occasions and the following decisions may be found instructive: *Chippendale v. Pontefract Rural District Council* (1907) 71 J.P. 231; *Simcox v. Yardley Rural District Council* (1905) 69 J.P. 66; and *Walmsley v. Featherstone Urban District Council* (1909) 73 J.P. 322.

6. Highway authorities are empowered by S.100 HA 1980 to provide for the drainage of highways on land in or adjoining the highway and to take effective action if drainage works are interfered with. Compensation is payable to an owner or occupier of land who suffers damage by the exercise of these powers. A highway authority may not, in exercising these powers, interfere with a watercourse or other works vesting in a drainage authority, without the latter's consent. In *Hanscombe v. Bedfordshire County Council* (1938) 1 Ch. 944, a highway authority placed pipes in a ditch belonging to the owners of land abutting the highway without their knowledge or consent, and filled in the ditch. The pipes effectively drained the adjoining land and the highway. It was held that the statutory provisions did not entitle the highway authority to trespass on the ditch and to lay pipes without the permission of the owners concerned. In *Attorney General v. Waring* (1899) J.P. 789, it was held that the owner of land adjoining the highway has a common law duty to scour and cleanse the ditches that adjoin the highway to prevent them from causing a nuisance to the highway, and that the highway authority can, notwithstanding its statutory remedies, bring an action against the owner for an injunction restraining the continuance of the nuisance.

7. In *Provender Millers (Winchester) Ltd v. Southampton County Council* (1940) 1 Ch. 131, where the county council diverted the flow of a watercourse when carrying out its highway duties, it was decided that, even though the council was carrying out its duties under statutory powers, it had no general right to invade the rights of others: 'such an invasion may render them liable in damages or to an injunction, unless they can show that the work done was reasonably necessary and was properly performed in all respects, and that, if it resulted in damage, there was no way of doing it that would not have had the effect'.

8. If a highway authority has from 'time beyond memory' discharged water from the highway on to an adjoining owner's land from a highway drain, the court must presume a legal origin for this right if it is challenged and if the authority can show no document conferring the right (*Attorney General v. Copeland* (1902) 1 K.B. 690).

9. In *King's County Council v. Kennedy* (1910) 2 I.R. 544 there was a bank by the side of the highway and a hole in the bank by means of which surface water from the highway was discharged on to the defendant's lands. There was no evidence as to the origin of the hole nor was there any defined channel on the defendant's land into which the water discharged could flow. This hole had been in existence for at least 29 years. It was held that the court ought to presume a legal origin for this outlet.

10. In general terms, it is usual for the roadside ditches to be the responsibility of the adjoining landowner; exceptions to this rule are where the ditch was constructed to drain the highway or where it falls within land owned by the highway authority.

Filling in or culverting

11. In a situation where a ditch appears to a highway authority to constitute a danger to users of the highway, S.101 HA 1980 gives the highway authority the power either

- (a) to fill in the ditch if it is considered unnecessary for drainage purposes, if the occupier agrees; or
- (b) to place pipes in substitution for the ditch, if the occupier agrees, and to fill in the ditch (see further Chapter 13 below).

The highway authority must pay compensation to the owner or occupier of any land who suffers damage from these actions.

12. If the landowner wishes to carry out the piping himself he must make allowance for the established right of discharge by the highway authority and he will retain the responsibility for its maintenance.

13. Before culverting any watercourse (which term includes ditches), the consent of the drainage authority is required (S.23 LDA 1991).

Powers of diversion

14. Section 110 HA 1980 empowers the highway authority to divert a non-navigable river or watercourse or to carry out any other works on any part

of a watercourse including a navigable watercourse (as defined in S.111 HA 1980). The diversion may be for the purpose of highway works, the provision of new accesses, maintenance compounds, trunk road picnic areas, lorry areas and service areas. The highway authority must consult every council in whose area the works are to be carried out and serve notice on the owners and occupiers of land affected. Compensation can be claimed for any damage to, or depreciation of, any interest in land or interference with access to a watercourse, unless the works are carried out on land acquired compulsorily.

15. An Order, made under S.108 HA 1980 by the highway authority and confirmed by the Transport Minister, may authorize a highway authority to divert a navigable watercourse in connection with the construction, improvement or alteration of the highway. Parts 1 and 3 of Schedule 1 to HA 1980 require copies of the order to be served on the Agency and on every navigation authority affected by the proposals.

Culverts under highways

16. Culverts under highways are normally the responsibility of the highway authority if they were constructed to facilitate the maintenance of the highway. The culvert must be of sufficient size and depth to accommodate the normal flows from the catchment. If development takes place upstream, however, there is no statutory responsibility for the highway authority to enlarge the culvert to take the increased run-off. Accordingly, careful consideration of planning applications will be required to avoid problems caused in this way (see generally Chapter 10 above). Similarly, if an upstream landowner wishes to drain his land with a tile drainage system and requires a lower invert level to an existing culvert, he must pay for the required work (see 13.26 below).

Acceptance of other flows

17. Where a highway authority has used its powers to culvert a ditch or watercourse, it cannot then refuse to accept the natural run-off of surface water to it. But if, as a result of a change in conditions upstream, the system causes flooding of the highway, the authority may exercise the power of a sewerage undertaker under the WIA 1991 (see S.100 HA 1980). Before doing so, it must give notice of its intention to the relevant district council or unitary authority and the Agency within whose area the powers are proposed to be exercised.

Drainage to existing sewers

18. Section 264 HA 1980 establishes the right to drain a highway to existing drains and sewers, and the dispute resolution procedures concerning this (see also 5.48 above).

Run-off on to highways

19. A number of engineers have reported that difficulties have arisen in dealing with the problem of the discharge of surface water from fields through farm gateways and on to the highway. While the legal position over the maintenance of roadside ditches is clear, there has been some doubt as to the powers available to deal with this problem. It has been suggested that the powers under S.163 HA 1980 could be used (see 5.47 above).

Right of statutory undertakers to discharge into a ditch or watercourse

20. Statutory provisions relating to the pollution of water are now provided for under Part III WRA 1991. Section 100 HA 1980 entitles a highway authority to discharge from a drain without committing the offence of polluting controlled waters unless the discharge contravenes a notice of prohibition under S.86 WRA 1991.

21. At common law, a discharge may be made to a watercourse as long as the effluent does not prejudicially affect the quality of the water in the watercourse and a nuisance is not created. In *Durrant v. Branksome Urban District Council* (1897) 2 Ch. 291, it was held that a discharge could lawfully be made although it contained some sand and soil. A nuisance can be created if the discharge contains oil or other pollutants washed off the surface of the highway.

Ditches maintained by highway authority

22. In certain circumstances, a highway authority will take over responsibility for roadside ditches. This is regarded as a responsible working arrangement which is neither embodied in statute nor based on court decisions, as far as is known. The basis is that if work is done by the highway authority for the improvement of highway drainage then the highway authority should be

responsible for the maintenance of the new drainage works. The circumstances relevant are:

- (a) where the ditch has been materially interfered with and significantly regraded by the highway authority in order to assist the drainage of the highway;
- (b) where the highway authority was responsible for realigning a ditch, e.g. following a highway improvement; or
- (c) where the highway authority had piped a length of ditch in accordance with S.101 HA 1980.

23. Where a highway floods as a result of an obstruction in a roadside ditch and where the landowner responsible is clearly not prepared to remove the obstruction, the highway authority will often undertake the necessary clearance work. This practice is frequently adopted for expediency, although the owner has a liability to clear the obstruction.

24. Water passing along ditches eventually leaves the side of the highway either by being transmitted on to adjacent land or by entering a watercourse. In the case of water transmitted on to adjacent land, this can vary from what is little more than a hole in a hedge to a substantial culverted watercourse across adjacent land. The right to transmit water in this manner can be established as an easement in a formal deed, or alternatively by long usage. In either case, the highway authority would probably be liable for maintenance of the drainage facility to whatever extent is necessary to ensure the highway is effectively drained.

Highway or land drain

25. Where water is present on a highway and is removed through a gully and highway drain, some highway authorities take the view that they are responsible for the maintenance of the drainage system only until a point is reached where water other than that originating from the highway enters the system. This principle will justify a finding that a surface water drainage system on a new housing site is a liability of the highway authority, provided that no house or land drainage is connected to it.

26. In distinguishing between a highway drain and a lain drain, the courts have adopted a functional test rather than one based on the historical origins of the drain. In *Att.-Gen. v. St. Ives R.D.C* (1961) 1 All E.R. 265, the Court of Appeal approved the test put forward by the Judge in the lower court who said that:

There are, of course, road drains and gullies whose main, if not whose only, function is to drain the highway. The repair of such drains and gullies is, in

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my judgement, clearly a function with respect to highways. There are often drains and ditches whose sole function is to drain agricultural land and which cannot in any way affect highways. The repair of such drains and ditches is equally clearly not a function with respect to highways. Then there are drains and ditches that affect both agricultural land and highways. Whether or not the function of maintaining and repairing these drains and ditches can properly be described as a function with respect to highways depends, in my view, on the degree to which the drains can be truly regarded as land drainage or road drainage.

27. The devolution of responsibility over what are sometimes termed 'awarded drains' must therefore be investigated with care and is likely to depend on the facts of each individual case (see also 5.52 above).