

# SUPREME COURT FINDS THAT THERE IS NO FIXED COMMON LAW MEANING OF 'HIGHWAY'

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The Supreme Court handed down judgment today in *London Borough of Southwark and another v Transport for London* [2018] UKSC 63 - finding that there is no clear and consistent meaning of 'highway' in common law. Rather, the meaning of 'highway' depends on the context in which it is used, so its meaning can change in different statutes and even different provisions within statutes.

The Court also preferred the term 'zone of ordinary use' in place of the widely-used 'top 2 spits' to indicate an extent of highway ownership.

The Court considered the use of 'highway' in the GLA Roads and Side Roads (Transfer of Property etc) Order 2000 (SI 2000/1552) ("the Transfer Order"). The Transfer Order provided for the transfer from local highway authorities to TfL of specified property and liabilities relating to highways designated as GLA roads.

There was a dispute as to what land transferred to TfL by virtue of the Transfer Order. Central to the dispute was what was meant by 'highway'.

## The Appeal

Transport for London ("TfL") brought the appeal to determine the vertical extent of land transferring to it under the Transfer Order.

The key part of the Transfer Order was paragraph (1)(a) of article 2, which stated that land to be transferred to TfL was:

"the highway, in so far as it is vested in the former highway authority."

The meaning of "highway" in the context of the Transfer Order was therefore crucial.

## The Land Transferred - What is 'Highway'?

London Borough of Southwark and City of London ('the Councils') argued that the only part of the land transferred on the vertical plane was the part understood to be 'highway' at common law - i.e. the surface insofar as necessary for use and maintenance (known as the 'necessary land'), together with the top 2 spits of subsoil. The Councils argued that this common law meaning of 'highway' had been settled some time ago. Therefore, only that limited vertical slice should pass to TfL by the Transfer Order and not any greater airspace or subsoil.

In contrast, TfL argued that, as with conveyances of land generally, the transferee acquires not only the surface of land itself, but the full extent of the vertical plane (both airspace above it and ground below). As the purpose of the Transfer Order was to pass to TfL the rights held by the Councils in their capacity as highway authority, the whole interest had to pass to TfL - there was no fixed common law meaning of 'highway' that should limit the vertical extent of the land being transferred.

## Supreme Court's Judgment

The Court found that all rights in the vertical plane that were originally vested in the Councils as highways authorities in their capacity as such would pass to TfL under the Transfer Order. This is because the meaning of 'highway' in the Transfer Order was not limited by the common law definition found in historic case law.

Rather, the meaning of 'highway' in this instance was to be found by analysing the context in which it was used - article 2 of the Transfer Order and section 265 of The Highways Act 1980 (dealing with the designation of roads as trunk roads), which is almost identical wording. The historical development of the legislation was highly significant for its interpretation.

The intent of section 265, and consequently of the Transfer Order, was to transfer to a public body the rights and responsibilities held by its predecessor, in its capacity as highway authority. Therefore what transferred to TfL was the entirety of the interest in the vertical plane held by the Councils, and was not limited to the 'zone of ordinary use'. Land would not, however, be transferred where it had not been originally acquired by Councils for highway purposes, or had been appropriated for a different use by the time the

Transfer Order was in force.

With regard to the term 'top 2 spits' to mean the subsoil immediately beneath the surface of the highway (*Tithe Redemption Commission v Runcorn Urban District Council* [1954] 1 Ch 383 at 407); this term did not take into account the airspace also included within a common law meaning of highway. Therefore the Court adopted the term 'zone of ordinary use' in its place.

## Initial views

This is a welcome clarification for all those dealing with highways, including highway authorities and developers. Rather than adopting a static meaning, 'highway' is a flexible term that has been used by drafters to reflect the intentions of particular legislation. Advisers should be alert to these issues of interpretation.

Whilst a common law meaning of 'highway' remains, parties should not assume this is the only, or definitive, meaning. Depending on the context, 'highway' can entail a far greater extent of land than the 'zone of ordinary use' - this phrase should now be added to lawyers' vocabulary.

The Court also emphasised the importance of considering the historic derivation of statutes which consolidate previous law, particularly when there are complex issues of interpretation. In particular, the Court made it clear that section 265 of the 1980 Act has a different interpretation to section 263 of that Act (which deals with vesting highway "maintainable at the public expense" that was previously in private ownership). Section 263 only vests so much of the vertical plane as is needed for the highway authority to maintain it.

This principle may well apply to other sections of the 1980 Act as it is a consolidation statute.

Finally, this judgment could have significant commercial consequences, as airspace above and subsoil below roads may have development value. Depending on the context, a highway may extend beyond the commonly believed 'top 2 spits' and may instead encompass the full vertical extent of airspace and subsoil. Parties should ensure they are dealing with the correct owner when seeking to make use of land.

Further comment will follow over the next few days once the full impact of the judgment has been considered.

Martin Thomas and Şenay Nihat of Gowling WLG, working closely with Tfl's in-house legal team, acted for the successful appellant.

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