



### **WILDLIFE AND COUNTRYSIDE ACT 1981 THE MEANING OF "PRIVATE CARRIAGE ROAD" *DUNLOP V SECRETARY OF STATE FOR THE ENVIRONMENT***

1. This Advice Note explains the judgment in *Dunlop v Secretary of State for the Environment*(1) ("the Dunlop case") in so far as it relates to the interpretation of the phrase 'private carriage road' in an inclosure award made under the Inclosure Act 1801. A number of other issues were considered in the judgment, such as where unexpected evidence is presented at a public inquiry. These are not discussed here.
2. This Advice Note describes and explains the Planning Inspectorate's view of the judgment. It is publicly available, but has no legal force.

### **Background**

3. The Dunlop case concerned a track shown in a definitive map as a road used as a public path ("RUPP") and which was the subject of a reclassification order under section 54 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). The surveying authority made an order reclassifying the RUPP as a byway open to all traffic ("BOAT"). The inspector appointed by the Secretary of State to decide whether to confirm the order proposed a modification to show the way as a bridleway. However, following a further inquiry, he confirmed the order as made. The order was challenged in the High Court by the applicant, Mr Dunlop.
4. A central issue was whether public vehicular rights of way had been conferred by the Glatton with Holme Inclosure Award of 1820. This recorded the track in question as a "public Bridle and Drift road and footpath and private Carriage Road of the breadth of 40 feet". The applicant argued that the Inspector had misconstrued the meaning of "private Carriage Road" as denoting that the track had been historically a public road open to wheeled vehicles and, consequently, improperly concluded that public vehicular rights existed over it.
5. The judge, Mr Justice Sedley, carried out an extensive examination of the proper construction of the phrase "private Carriage Road" in the 1820 Award and came to the conclusion that it was not used to mean a public carriage road. He concluded:

"...throughout [the Award] the words 'public' and 'private' are used differentially and with evident care in a context suggestive of the defining of rights to use the road rather than of the characterisation of the road's quality or status. All the indications are that 'private carriage road' is deliberately used in the Award as a term of art distinguishing the particular road according to the extent of the particular rights over it from

the public carriage roads on which all subjects enjoyed an equal right of vehicular passage”.

6. Since section 53(3)(a) of the 1981 Act required that a public right of way for vehicular traffic be shown to exist in order for the RUPP to have been reclassified as a BOAT, the order was quashed. The existence of a public right of way for vehicular traffic had not been established.

### **The Proper Construction**

7. It was argued that the word “private” either signified a local or inferior road or that it qualified the noun “carriage” in the phrase “private carriage road”. In doing so, reference was made to the article *Inclosure Awards: Public Rights of Way* (Rights of Way Law Review, July 1990) by Christine Willmore. Mr Justice Sedley rejected the second argument:

“It is not a form of construction or usage for which any evidence or any analogue has been put before me, and it is not the natural or comfortable meaning which a reader would attribute to the phrase. The natural grammatical reading of it is that ‘private’ qualifies ‘carriage road’, and although this throws one upon the meaning of ‘private’ in relation to ‘road’, to evade the consequent conundrum by resort to an otherwise inappropriate meaning is not in my view a legitimate mode of construction.”

8. There was nothing in the Inclosure Act 1801 (“the 1801 Act”) or in the evidence presented to the effect that Inclosure awards or highway law generally distinguished between carriage roads on the basis of whether public vehicles, such as stage or post coaches, or private vehicles were entitled to travel along them.
9. The judge turned to the argument that the phrase denoted a ‘local’ or ‘low’ road. It was argued that, particularly since the road ran between a village and a hamlet and not between two private estates, the term ‘private’ was being used to mean ‘local’. It referred to a road by the locality and not by the public at large, that is, a ‘high’ road. There were advantages in calling the road “private” to avoid the repair obligations associated with roads available to public carriages.
10. The argument was rejected. The law required all public roads whether, for example, ‘local’ or ‘high’ to be repaired by the parish or local inhabitants. The judge continued:

“All of this, however, will have been a question of practical usage if ‘private’ meant public. The mere designation would not have made it possible to exclude anybody who wanted to use it with or without a vehicle...[On that view] the word will have created a nominal distinction without a legal difference”.

There was little or no lexicographical support for the interpretation that ‘private’ in the present context meant ‘local’ or ‘low’.

11. An examination was then carried out of the distinction between the words ‘private’ and ‘public’. The normal distinction drawn was that ‘private’ meant

the opposite of the word 'public', denoting something "restricted or intended only for the use or enjoyment of particular and privileged persons". Sections VIII and X of the 1801 Act used the words similarly. The history of legal usage supported the case that the words were used to carry those meanings:

"In my judgment there was a true distinction, certainly into the 18th century, between private or common roads and public roads or highways.....But so far as rights of access were concerned, these differed by definition, being limited in the case of a private or common way to a class which might be defined by any number of factors or criteria... By the beginning of the 19th century, however, it appears that legal usage had changed so as to conflate common ways with highways and to distinguish these from private ways: see *Hawkins Pleas of the Crown* 1787 and 1824 editions, and *Tomlins' Law Dictionary* (4<sup>th</sup> edition 1835). This history furnishes compelling evidence for the construction advanced on the applicant's behalf, namely that both in the Act of 1801 and in the Glatton with Holme Inclosure Award of 1820 public and private carriage roads were deliberately distinguished, and that the distinction signified differential rights of user, embracing all the monarch's subjects in the former case and a limited if unspecified class in the latter".

12. It was also relevant that section VIII of the 1801 Act only allowed an award to create a public carriage road thirty feet or more in width. However, the 1820 Award contained reference to more than one private carriage road "of the breadth of twenty feet". That in itself was not crucial as to the correct interpretation of 'private', because there might be reason in setting a minimum 30 feet width for major as opposed to minor or 'local' roads. However, section VIII of the 1801 Act also required that public carriage roads were to be wide enough to carry the intended traffic. They were to be "set out in such Directions as shall, upon the whole appear.....most commodious to the Public". No requirement, though, was imposed by section X of the 1801 in relation to private roads. This suggested that these were roads which, although larger than bridleways and footways, were not intended for use by the public at large.

## **Conclusion**

13. Inspectors will need to decide, from the specific context and by taking into account all the evidence available, whether the use of the term "private carriage road" in an inclosure award denotes a public vehicular right of way. However, the judgment in the Dunlop case provides valuable assistance for that process of interpretation, particularly on how the 1801 Act is to be properly interpreted.

<sup>1</sup> *Dunlop v Secretary of State for the Environment* [1995] 70 P & CR 307