Case No: SE300196

IN THE MANCHESTER COUNTY COURT

186 Deansgate
Manchester
Date: 8, 9 and 12 December 2003

B e f o r e:

HIS HONOUR JUDGE HOLMAN

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BRITISH TELECOMMUNICATIONS Plc **Claimant**

- and -

GWYNEDD COUNCIL **Defendant**

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Ian Mayes QC and Niran da Silva (instructed by **BT Wholesale Legal and Business Services** for the Claimant)
Stephen Sauvain QC and Miss Ruth Stockley (instructed by **Head of Administrative and Legal Services, Gwynedd Council** for the Defendant)

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JUDGMENT

His Honour Judge Holman:

1. Under or alongside the roads throughout the country lie many of the services, which we regard as essential to our way of life – water, sewerage, gas, electricity and telephone. Inevitably, from time to time, the highway authority wishes to undertake work on a road, which may affect those services. Parliament has created a framework designed to address such situations, and it is that framework, which provides the backdrop to this case. The claim is for the princely sum of £684.14, but a trial lasting two days, documentation contained in 12 ring binders and the instruction of Leading Counsel by both parties are all indications that there are wider issues at stake, which are of interest to other organisations as well as the parties. Indeed, as a result of the most recent of a number of amendments to the statements of case, I am asked to grant declaratory relief. I am not required to consider whether the sum claimed is reasonable. That is in issue, but is for another day.

2. I heard evidence for the Claimant from Mr Cemlyn Hughes, a projects engineer, who was involved in the day-to-day running of the relevant events, Mr Malcolm Rogers, his line manager, and Mr Roger Fagg, a senior manager based in Kent, whose area of responsibility includes Wales. For the Defendant I heard evidence from Mr Owen Rhys Jones, a senior engineer, who dealt with Mr Hughes, and from Mr Michael Thomas Jones, also a senior engineer and who represents the Local Government Association for Wales and Welsh Highway Authorities on the Highway and Utilities Committee (HUAC) Working Party.

3. It is convenient to begin with the framework. It contains four elements – a statute, a statutory instrument, a code of practice and an advice note.

4. The statute is the New Roads and Street Works Act 1991. The material sections are 84 and 85.

Measures necessary where apparatus affected by major works.

84.—(1) Where an undertaker's apparatus in a street is or may be affected by major highway works, major bridge works or major transport works, the highway, bridge or transport authority concerned and the undertaker shall take such steps as are reasonably required—

a. to identify any measures needing to be taken in relation to the apparatus in consequence of, or in order to facilitate, the execution of the authority's works,
b. to settle a specification of the necessary measures and determine by whom they are to be taken, and
c. to co-ordinate the taking of those measures and the execution of the authority's works,

so as to secure the efficient implementation of the necessary work and the avoidance of unnecessary delay.

(2) The Secretary of State may issue or approve for the purposes of this section a code of practice giving practical guidance as to the matters mentioned in subsection (1) and the steps to be taken by the authority and the undertaker.

(3) Any dispute between the authority and the undertaker as to any of the matters mentioned in subsection (1) shall, in default of agreement, be settled by arbitration.

(4) If the authority or the undertaker fails to comply with an agreement between them as to any of those matters, or with the decision of the arbitrator under subsection (3), the authority or undertaker shall be liable to compensate the other in respect of any loss or damage resulting from the failure.

Sharing of cost of necessary measures.

85.—(1) Where an undertaker's apparatus in a street is affected by major highway works, major bridge works or major transport works, the allowable costs of the measures needing to be taken in relation to the apparatus in consequence of the works, or in order to facilitate their execution, shall be borne by the highway, bridge or transport authority concerned and the undertaker in such manner as may be prescribed.

(2) The regulations may make provision as to the costs allowable for

this purpose.

Provision may, in particular, be made for disallowing costs of the undertaker—
(a) where the apparatus in question was placed in the street after the authority had given the undertaker the prescribed notice of their intention to execute the works, or
(b)in respect of measures taken to remedy matters for which the authority were not to blame,
and for allowing only such costs of either party as are not recoverable from a third party.

(3) Where the authority have a right to recover from a third party their costs in taking measures in relation to undertaker's apparatus but in accordance with section 84 it is determined that the measures should be taken by the undertaker, the right of the authority includes a right to recover the undertaker's costs in taking those measures and they shall account to the undertaker for any sum received.

(4) The regulations shall provide for the allowable costs to be borne by the authority and the undertaker in such proportions as may be prescribed.

Different proportions may be prescribed for different cases or classes of case.

(5) The regulations may require the undertaker to give credit for any financial benefit to him from the betterment or deferment of renewal of the apparatus resulting from the measures taken.

(6) The regulations may make provision as to the time and manner of making any payment required under this section.

5. The statutory instrument, made pursuant to section 85, is the Street Works (Sharing of Costs of Works) Regulations 1992, which came into force on 1 January 1993. The material part of Regulation 2(2) provides:

   For the purposes of these Regulations "allowable costs" means all the reasonable costs of the measures needed to be taken for the purpose specified in section 84(1) of the Act except costs incurred:—

   (a) in preparing the initial set of plans and estimates in relation to those measures (but not in preparing any further plans and estimates which the authority may require);

6. The regulations also provide for the sharing of allowable costs between the highway authority and the undertaker. It is not necessary to address these in detail. In essence, the authority pays 82% and the undertaker 18%, provided that the authority pays in advance 75% of the estimate of the 82%. If is does not make such a payment, it meets all the allowable costs.

7. The code of practice, issued by the Secretaries of State for Transport, Wales and Scotland in June 1992 pursuant to section 84, and which also applied from January 1993, is entitled "Measures necessary where apparatus is affected by major works (diversionary works)". It runs to over 90 pages, but it is necessary to go into some detail. Its object is plainly to encourage cooperation and coordination between highway authorities and undertakers.

8. Chapter 2 is headed "Guiding Principles". There are four, including:

   ii. total costs should be minimised consistent with good practice regardless of who has to meet those costs

   iii. staff must work together to obtain the optimum solution rather than seeking to protect only the interest of their own organisation

   iv. all parties must acknowledge that it will sometimes be right to accept some detriment to their own interests in the overall interest

9. Chapter 9 contains Section 9.2 "The Standard Cost Sharing Principle". The first paragraph refers to the costs sharing arrangement to which I have already referred. The second paragraph is important. It reads: "The allowable costs are the costs of the works described in

Appendix C section C4 and do not include financing charges, nor the costs of either party in respect of that part of the work described in Appendix C sections C2 C3 and C4 which consists of preliminary planning and liaison."

10. Appendix C is entitled: "Procedures for necessary measures in relation to undertakers' apparatus". There are 7 basic stages – (i) preliminary inquiries, (ii) draft scheme and budget estimates, (iii) detailed scheme and detailed estimates, (iv) formal notice and advance orders, (v) selection of contractor and issue of main orders, (vi) construction, and (vii) financial monitoring and payment.

11. It is plainly envisaged that in appropriate circumstances some of the stages can be omitted. By way of specific example, in the case of smaller schemes or other schemes which may have minimal affect on the undertaker's apparatus, the first and second stages can be omitted.

12. The salient parts of the Appendix read as follows:

C2 Preliminary Enquires.

At this stage the highway authority would seek from the undertakers details of their apparatus within a specific section of the scheme which is being considered for improvement without making any commitment to the scheme. Undertakers should provide such information as they have available from records and draw attention to any likely special problems which could arise from the authorities works. Information should be provided normally within 10 working days.

C3 Draft Schemes and Budget Estimates

The authority should submit details of the proposed scheme to undertakers. They will respond with preliminary details of the effects on their apparatus together with budget estimates for the necessary works and an indication of any special requirements involved… (there follows 6 examples of special requirements)

Budget estimates provided by undertakers should include all costs likely to arise from the necessary measures in consequence of the authority's works as far as can reasonably be assessed at the draft design stage including administration and supervision charges and specifying a base date. These estimates should be provided normally within 20 working days.

Where undertakers are not aware of the general position in line and depth of their apparatus they should at this stage take any necessary steps to determine this information (see section C.14).

This stage may be followed by discussions between the authority and the undertakers either separately or jointly, to consider any modifications to the scheme which may assist in facilitating the programming of the works and/or reducing the costs of diversionary works.

C4 The final detailed scheme and detailed estimates.

Following joint discussions, the authority should submit to each undertaker details of the final design with working drawings and an outline programme. The undertakers should respond, normally within 25 working days, by providing details of their requirements, (if there is a requirement to provide more than one detailed estimate, the utility may charge for such additional estimates) as follows:

There then follows a very detailed list of the contents for the specification and estimate to be provided by the undertaker. The section concludes with the words: "This stage may be followed by further discussions between the authority and undertaker to consider modifications to the works in order to minimise costs".

C5 Formal notice and advance orders

Formal notice of the authority's intention to proceed with the scheme should be served on the undertakers. Unless otherwise stated, the formal notice will be taken as an instruction to the undertaker to proceed with advanced ordering those materials which have long delivery periods and to undertake those works which require more extensive preparation. It is possible for the authority to serve formal notice at an earlier stage of the procedure, but it is

preferable to have done so following consultation and receipt of proposals from the undertakers.

The undertaker should acknowledge receipt of the notice and respond with a detailed specification, itemised estimate and programme if not already submitted.

13. It is C4 which is at the heart of this claim.

14. The advice note was issued in August 2001 by the Highways Agency, the Scottish Executive Development Department and the National Assembly for Wales. It forms part of Volume 6 of the Manual of Contract Documents for Highway Works and is stated to "provide guidance for the implementation of" section 84 and the code of practice. This guidance is stated to have been produced in consultation with the National Joint Utilities Group. It addresses various facets of the statute and the regulations and then turns in detail to the seven stages under the code of practice. Chapter 4 concerns "Detailed Assessment (C4)".

15. At 4.1.4 appears the following: "The OO" (which means the highway authority) "will accept the cost of the preparation of initial C4 estimates. The exception to this rule is smaller scale works when the preliminary or draft scheme stages could be omitted and the process could commence with the submission of a detailed scheme to the undertakers. In cases where no C3 budget estimate has been prepared the undertaker should prepare the C4 estimate free of charge."

16. Although the real issue is one of interpretation, so that the facts are not directly germane, I set them out in order to provide a context to the dispute.

17. The Claimant is, of course, a utility or undertaker. The highway authority in this particular case (which concerns a trunk road) is the National Assembly of Wales, which appointed the Defendant as its agent.

18. The arrangement which the Claimant operates at C2 stage is that the Defendant is required to use "Map by e-mail". This involves entering the BT website and applying for a map by entering a grid reference. The Defendant is then sent by e-mail the relevant extract from the

Ordnance Survey map showing the approximate line of the cables and of the junction boxes. It is plainly approximate because the line drawn is quite thick and certainly not to scale.

19. On 10 July 2001 the Defendant (through Mr Rhys Jones) wrote to the Claimant. The letter is headed in bold block capitals: **NEW ROADS AND STREET WORKS ACT 1991 DRAFT SCHEME AND BUDGET ESTIMATES Appendix C3 of the Code of Practice.** It indicates that the Defendant proposes to undertake major bridge works on 3 bridges on the A494 near Bala – Pont Llafar, Llafar Cattle Creep and Pont Llanfor. It encloses two copies of the draft scheme plans and continues: "I should be grateful if you would provide preliminary details of the effects on your apparatus together with budget estimates for the necessary works and an indication of any special requirements involved." There follows a lengthy list of information requested. On the second page one reads: "If you are not confident or aware of the general position in line and depth of your apparatus you should take any necessary steps to determine this information at your own expense." Later on: "Detailed discussions should follow in order to consider any modifications to the scheme which may assist in facilitating the programming of the works and/or reducing the cost of diversionary works. Following the consultation period, the Authority will submit details of the final design scheme with working drawings and an outline programme"

20. To this the Claimant (through Mr Hughes) responded on 24 July. There are 3 letters, one for each bridge. Inevitably there are differences for each bridge, but those differences are not material. To enable him to respond, he had the Ordnance Survey maps, to which I have already referred, duct plans and the duct space records. He reproduced the Ordnance Survey maps and, by way of example, in relation to Pont Llafar, on this noted in block letters that the junction boxes on either side of the bridge contained a four way and a single duct containing fibre, trunk and local cables. He also drew attention in the letter to the existence of fibre optic cables, which are particularly sensitive. It is of note that the duct plans told him that the ducts were shallower than the recommended depth, but not the precise depth.

21. Mr Hughes concluded that protection to the cables should be afforded by the strongback method involving securing the ducts to a rigid brace and moving them sideways slightly ("slewing"). He decided that actual diversion was not required, but also that it was not

appropriate to leave the matter of protection to the Defendant and its contractor. He used a computer model to calculate the estimated cost.

22. There is no evidence of any discussions between Mr Rhys Jones and Mr Hughes taking place upon receipt by the Defendant of these estimates, despite the fact that discussion is plainly envisaged by both the code of practice and the Defendant's letter of 10 July. Instead on 27 July the Defendant wrote again. Again there is a heading in block capitals, which, after the reference to the statute, continues: **FINAL DETAILED SCHEME AND DETAILED ESTIMATES Appendix C4 of the Code of Practice.** It encloses 2 copies of the final scheme plan and "In accordance with Appendix C4 of the Code of Practice would you please provide me with a specification for protecting/diverting your apparatus… together with a detailed estimate of costs." The letter concludes: "Please send me your advance payment invoice in accordance with Clause 9.2 of the Diversionary Works Code of Practice." It is clear that the Defendant wishes to use the cost sharing arrangements.

23. This letter was received on 30 July, a Monday. On the Thursday, 2 August, Mr Hughes visited the sites. On 3 August he acknowledged receipt of the C4 letter adding on instructions "BT will accept your letter as an order to produce the detailed specification and will invoice you on completion of this work whether or not your scheme progresses to the execution stage." On 4 August he sent a detailed specification and cost estimate for each bridge. For this purpose he had available to him two documents, which, although part of the Claimant's records, he had not had at the C3 stage. These were works diagrams (called A55s). These had been prepared in 1973 and 1994 and, for example, gave precise information as to the depth below the surface of the ducts. He had also, of course, had the benefit of the site visit, from which he had learned that it would not be possible to move the ducts sideways. Mr Hughes concluded, therefore, that the Claimant could entrust appropriate protection work to the contractor engaged by the Defendant. (It should be noted in passing that this is encouraged in the Code of Practice at item v under Section C4). The specification includes under 6.1.1: "BT will allow Gwynedd Council's appointed contractor to expose and protect the existing plant during the proposed bridge works". The paragraph continues: "The contractor is to submit a method statement for BT's approval". Earlier in the document under 6, there is another paragraph: "BT's Project engineer will monitor on site works." The estimates were, accordingly, significantly lower, because much less work would be involved.

24. Unfortunately the specification document is somewhat confusing, because there are many sections, which are plainly predicated on the Claimant or its own contractor undertaking work by way of diversion or protection. At the time, the computer system did not allow Mr Hughes to delete inappropriate sections. He could only insert additions, which he did as indicated in the previous paragraph. As he was to confess in court, it never crossed his mind to put a line through the inappropriate sections with a pen.

25. It was, however, Mr Hughes's evidence that he spoke to Mr Rhys Jones before he sent the letter of 4 August. He could not recall if it was on the day of the site visit or the next day. He thought he had used his mobile. He was sure that he must have called Mr Rhys Jones because of the change of position. It is at this point that a dispute of fact arose, because according to Mr Rhys Jones this conversation did not take place until 14 August, on which day he made a brief note in his diary. It is not necessary for me to resolve this issue of fact in order to decide the central issue on which my ruling is sought. Nevertheless, it may be helpful if I do so, albeit very briefly.

26. Mr Rhys Jones was not a good witness. He was very defensive, and Mr Mayes on more than one occasion was able to suggest to him, with, I am bound to say, some justification, that he appeared to be "making it up as he went along". It is not necessary to go into great detail. It is sufficient to give just a few examples. First, for the very first time in the witness box, he claimed that he had spoken to Mr Hughes after receipt of the letter of 24 July and before the despatch of the letter of 27 July. There is no mention of this in either of his witness statements, both signed this year and one as recently as 15 October. He claimed that he asked for a site meeting. At one point, he said that Mr Hughes had actually refused to have one, but later he retracted this. None of this had ever been put to Mr Hughes in cross-examination. Moreover, his assertion that he had asked for a meeting had been immediately preceded by an admission that he knew BT would not agree to site meetings at C3 stage. Secondly, he prevaricated about the failure to procure a method statement, despite that fact that even on his own version he must have known that this was wanted after 14 August. Thirdly, he agreed he had on two occasions issued site instructions to the contractor to encase BT ducts in concrete. Having accepted that it would be incumbent on him to tell the Claimant about this, he went on, I suspect in realisation of his predicament, to assert that he "would have" asked Mr

Hughes if this was in order. Again there was no mention of any such contact in his witness statement.

27. While he too tended to be defensive on what might be termed the policy aspects, I prefer Mr Hughes's evidence on this factual point and conclude that it is more likely than not that he explained the changed position to Mr Rhys Jones before sending the letter of 4 August.

28. It may well be that they spoke again on 14 August, because on 16 August the Defendant moved to stage C5 and gave formal notice of intention to proceed to the Claimant. Interestingly, the letter also gives notice of acceptance of the agreed measures, which, of course, included the provision of the method statement.

29. By letter of 30 August the Defendant returned the specifications duly signed by Mr Rhys Jones without any alteration. (On the basis of the assertion by Mr Rhys Jones that the C4 estimate was unclear, this seems curious, and that the specification was signed unaltered undermines his evidence on the point). On 17 September the Claimant received a request to mark the line of the ducts on site and attended to this. This clearly will have indicated that works were imminent, but Mr Hughes said, and I accept this, that he never undertook any formal monitoring because he was never told that the works had started. He learned of it from another source and when he went to the sites to see what was going on, he found that the work had been largely completed. Happily no damage had been caused to any of the Claimant's apparatus.

30. In December 2001 the Claimant raised an invoice to the Defendant for £684.14 including VAT representing the cost of the preparation of the C4 estimates. It did not seek to charge for Mr Hughes's later visit, when he found the work was almost complete. Correspondence ensued but the Defendant consistently declined to meet the invoice, contending that the Claimant was not entitled to charge for these estimates. Since the invoice related only to the cost of the estimates and nothing else, the scene was set for the differences between the parties about C4 to be aired in court.

31. Some other background information is worth recording. According to Mr Fagg in his witness statement the Claimant receives about 30000 to 33000 C3 budget notices each year. Each

enquiry takes on average 4.5 hours to deal with. It receives about 3500 C4 requests per year. Each one takes on average 16 hours to deal with. He supplemented this in his evidence in court by producing the statistics for the year ended 31 March 2003. They were very close (save in one respect) to his witness statement. 33202 C3 notices were received, requiring on average 4.4 hours each. 3497 C4 notices were received requiring on average 13 hours each. It can be seen, therefore, that the Claimant receives a large number of C3 requests, but a very much smaller number of C4 requests.

32. The Claimant acknowledges that it has to meet the costs it incurs at C3 stage. It insists that it is entitled to be paid for the C4 specification and estimate, and that this is in accordance with the legislation. It will be appreciated, therefore, that there is a financial advantage to the Claimant to keep work at C3 stage to a minimum. I viewed with some degree of caution Mr Fagg's suggestion that the Claimant's stance as regards the information and assistance to be provided at stages C2 and C3 was not connected with its perceived ability to be paid at C4. Of course, the Claimant does not wish to engage on unnecessarily detailed work on proposals, which may well go no further, but I am not convinced that this is the entire explanation.

33. The issue can be stated succinctly. In cases where stages C2 and C3 are used, is the cost of the preparation of the first C4 estimate an allowable cost under section 85(2) and Regulation 2(2)? The Claimant accepts that if C2 and C3 are omitted, so that the parties proceed directly to C4, the cost of the first estimate is not an allowable cost. That does not arise in this case, because C2 and C3 were not omitted. Equally the Defendant accepts that if a request is made for a second estimate at C4, this is an allowable cost. Here there was only one C4 estimate. The Claimant contends that the answer to the question is Yes, the Defendant that the answer is No.

34. There was an alternative claim in the Claimant's statements of case based in contract, but Mr Mayes did not seek to pursue this.

35. My task is to interpret the legislation. That consists of the statute and the regulations. Although the code of practice is part of the framework, and, indeed, it is impossible to understand the workings of the legislation without reference to it, it is not legislation. In the

event, therefore, of conflict between the legislation and the code of practice, the former must prevail.

36. I cannot attach great weight to the advice note. The Claimant can, of course, point to the fact that it is a considered view of an official nature, but it is simply a view, and cannot absolve the court of its interpretative duty, particularly when the Defendant is firmly of the view (as Mr Malcolm Jones made clear) that it does not accurately state the legal position. Nevertheless, it remains a fact that the advice note supports the Claimant's contention and the court is entitled to have regard to this.

37. Under the regulations the Claimant cannot recover the cost incurred in preparing **the initial set of plans and estimates** (my emphasis). Unfortunately the code of practice does not use the same terminology. At C3 the undertaker is to respond with **preliminary details of the effects on their apparatus together with budget estimates for the necessary works.** Section 9.2 of the code refers to **preliminary planning and liaison**. The words which require interpretation are "the initial set of plans and estimates".

38. The submissions of Mr Mayes can I think, without doing injustice to them, be summarised as follows:

    1. "Initial" may embrace more than just a first set of plans/estimates but it is far removed from "final" and C4 is concerned with the final detailed scheme and detailed estimates.

    2. The wording in brackets near the start of C4 "(if there is a requirement to provide more than one detailed estimate the utility may charge for such additional estimates)" does not mean that the Claimant may not charge for the first detailed C4 estimate.

    3. The plain meaning of paragraph 9.2 is that such costs incurred at C4 stage as represent preliminary planning and liaison are not recoverable. That stage is at an end once joint discussions have taken place and the final design is submitted. The dividing line comes after the words "following joint discussions" at the start of C4.

4. The definitions in the Oxford English Dictionary are of assistance. The primary definition of "initial" is: *of or pertaining to a beginning; existing at, or constituting, the beginning of some action or process; existing at the outset; primary; sometimes = elementary, rudimentary*. Of preliminary it is: *a subordinate step measure statement etc that precedes another to which it is introductory or preparatory. Chiefly in plural = preparatory measures or arrangements*.

5. The words "set of plans" are directly analogous with the word "scheme". The initial set is the draft scheme.

6. There is no valid distinction to be drawn between the cost of implementing measures to safeguard apparatus and the cost of providing plans and estimates. Section 85 is simply the money aspect. Section 84 deals with the taking of the measures. This is in accordance with the title given to each section.

39. Mr Sauvain's submissions can in the same way be summarised thus;

1. The statute draws a distinction between (1) the identification and planning of measures which may need to be taken to protect apparatus – addressed in section 84, and (2) the measures themselves and who is to meet the costs of those measures – addressed in section 85 and the regulations.

2. The regulations follow this distinction between, on the one hand, identifying settling and coordinating the measures i.e. planning, and, on the other hand, the measures themselves. The allowable costs are the costs of the works themselves, not the preparation.

3. C4 is the final part not of the process but of the planning aspect. By reference to the word "initial", the specification produced at C4 is the Claimant's plan for dealing with their apparatus and is provided at the beginning of the works. By reference to the word "preliminary" the C4 plans are preparatory to the works that are to be carried out.

4. The words in regulation 2(2) "but not in preparing any further plans and estimates which the authority may require" (the reasonable cost of which is allowable) are remarkably similar to the words in brackets near the start of C4. Those words in C4 would be unnecessary if the first C4 estimate was chargeable, since it would inevitably follow, if the first was chargeable, that subsequent ones would be as well.

5. This interpretation is consistent with the objectives set out in section 84. It would be contrary to the purpose, spirit and intent of the legislation if an authority only got all the information it needed at C4 stage (for which it had to pay) and then, in the light of that information, had to change its final plans (so that it would have to pay again).

40. I do not find my task particularly easy. As is not uncommon, the regulations and code of practice are not a model of clarity. However, applying what I believe to be a common sense, everyday approach to the word "initial", if one looks at the various stages in the process, C3 is the initial stage. C4 may not be the end of the process, but it cannot properly be categorised as initial. I agree also with Mr Mayes that "set of plans" can properly be equated with "scheme". The draft scheme is the initial step. It is difficult to think of a final scheme being an initial stage, when it has been preceded by a draft scheme, and where it is also plainly contemplated that there will be discussions after the draft, which may result in changes to the scheme. Since the word in the regulations is "initial", I do not strictly need to address the word "preliminary" but, even if I do, C4 can hardly be described as introductory or preparatory. The process has gone beyond that by this stage. Some assistance can be derived from the wording of the headings to the sections in the code of practice. C3 concerns the **draft** scheme – plainly initial. C4 concerns the **final** scheme, and consistently with that a detailed specification and estimate is required in contrast with C3, which calls only for preliminary details of effects and budget estimates. The word preliminary appears in C3 but not C4.

41. Section 9.2 of the code of practice does not undermine this view. It excludes from allowable costs only those parts of the C4, which consist of preliminary planning and liaison. Joint discussions prior to the issuing of the final scheme are an obvious example and self-evidently this preliminary planning and liaison element will be greater, if stages C2 and C3 have been omitted. It may be a small point, but if the detailed estimate is part

of the preliminary process, but the specification is part of the works, it seems a little odd that the requirements for the detailed estimate appear as iii in C4 after the requirements for the specification which appear as ii.

42. In the pre-litigation correspondence the Defendant repeatedly based its position on the wording in brackets near the start of C4 – "if there is a requirement for more than one detailed estimate the utility may charge for such additional estimates". This is point 4 in my summary of Mr Sauvain's submissions. Whilst it is certainly a possible interpretation that it means you cannot charge for the first C4 estimate, that view is, as I see it, inconsistent with the proper interpretation of regulation 2(2). Where there is inconsistency, the regulation prevails.

43. I therefore answer the question posed: Yes. Accordingly, there will be judgment for an amount to be decided by the court. Whilst there is a dispute about the reasonableness of the charge, the amount in issue is very modest, and, as I indicated during the trial I proposed to do, I direct that the trial of the issue of damages be stayed to enable the parties to settle that aspect by negotiation, mediation or otherwise. I consider it appropriate to grant a declaration. Mr Sauvain has not so far taken issue with the draft wording produced by Mr Mayes. Subject to any submissions, which may be made on December 12, I would be minded to make it in the terms sought.

44. The Claimant is entitled to its costs to be subject to detailed assessment, if not agreed. An interim payment towards those costs is plainly appropriate, and I will consider representations as to the amount on December 12, if the parties are not able to agree a suitable figure. While any other issues will be for the District Judge on assessment, I record, for the avoidance of doubt, that the Claimant shall not be entitled to recover the costs incurred in connection with the obtaining of expert evidence.

45. Since this dispute is of great importance not only to the parties but also other highway authorities and utilities, it is appropriate that I give permission to appeal. If the Defendant wants more than the usual 14 days, I will hear representations on December 12. Since the stay, which I am imposing, relates only to the issue of damages, it does not preclude an appeal being pursued. It is nevertheless open to the parties to explore alternative dispute

resolution, and no doubt they will be mindful of, for example, the observations of the Lord Chief Justice in *Cowl v Plymouth City Council*.

46. Although not part of my decision, I hope it will assist if I conclude with some further observations. First, it was readily apparent that the Defendant considers that the Claimant is less than helpful in the assistance and information it provides at stages C2 and C3. For example, it feels that the Map by e-mail is not a reasonable response at C2, that the A55s should be available at C3 and also that there should be a site visit at that stage. It is no part of my function to adjudicate on this, and indeed, if the parties cannot reach a consensus, the resolution of the issues would have to be by way of arbitration under section 84(3). On the basis of the evidence I have heard and read, whilst I am mindful that it has not been investigated in detail, I can see some merit in some of the Defendant's complaints. It should be remembered that it was at the site visit stage that Mr Hughes established that slewing was impossible. He also discovered that two ducts contained fibre optic cables at Pont Llafar rather than the one duct shown in the records. He also only had the A55s, which showed the precise depth of the ducts, at C4 stage. Whether or not these matters would have made a difference in this case (as to which I express no view), one can see that situations may arise, where information, which can be obtained earlier, is only disclosed at the later stage and this necessitates changes with consequent expense. If one considers the second and penultimate paragraphs on page 66 of the code of practice, it is plainly arguable that they have not been followed. Mr Mayes told me that the Claimant was concerned that, if I ruled in favour of the Defendant, it would become commonplace for the Defendant to seek to omit stages C2 and C3. Looking at the other side of the coin, since I have found that C is entitled to be paid for the C4 estimate, it seems to me that there is an obvious temptation to the Claimant to do as little as possible at C2 and C3, so as to load as much as possible of its costs into C4. This may well be contrary to the spirit and intent of the code of practice. Self-interest must not prevail, as the guiding principles in the code of practice make clear.

47. Secondly, as is stated in the Executive Overview to the code of practice, there must be close cooperation and coordination and "the need for this underpins all the provisions of the code". I have the clear impression that relationships between the parties have been allowed to deteriorate over a period of time (which period began well before this dispute)

to such an extent that the objectives of the code of practice have been undermined. Where the fault lies, I do not know. Each side accuses the other of being intransigent. I rather suspect that, as Mr Sauvain observed, there has been fault on both sides. They need to start working together again in order "to obtain the optimum solution".

48. Thirdly, there appears to be some validity in the reference by Mr Mayes to a crusade by the Defendant. Whilst I have, for good reason, given permission to appeal, a party given permission is not obliged to appeal. I noted from Mr Fagg's evidence that the process of revision in Wales of the code of practice has been "stymied" by this case. The Defendant is, as matters stand, at odds with the views of the National Assembly of Wales as expressed in the advice note. It may wish to consider whether it would be in its own and also the public interest to take the view that resuscitating the revision process would be preferable to further legal challenge.