IN THE SWANSEA COUNTY COURT
Claim No. 8CF02149

BETWEEN:-

BRITISH TELECOMMUNICATIONS PLC

Claimant

-and-

CARMARTHENSHIRE COUNTY COUNCIL

Defendant

Mr Andrew Latimer, instructed by British Telecommunications plc, Legal and Business Services for the Claimant

Mr Andrew Keyser QC, instructed by Douglas-Jones Mercer for the Defendant

Introduction

1. The claimant, British Telecommunications plc ("BT"), is a telecommunications operator. The defendant, Carmarthenshire County Council ("the Council") is the highway authority and the street authority for the county of Carmarthenshire. BT maintains telephone apparatus in streets in Carmarthenshire (and of course elsewhere). BT's cables are buried under the highway. BT engineers obtain access to the cables through chambers or "boxes" laid at intervals in the roadway. At surface level there is a cast iron frame, on which sit the covers, which are lifted to allow access to the cables.

2. Underlying the dispute which is directly concerned in this litigation is a question which can be posed in its most general form in these terms: if the Council as highway authority carries out road works which make it necessary to change the position of BT's boxes, who has to pay for that repositioning work? BT argues that as the Council has "created the problem", the Council must pay. The Council argues that it has a statutory duty to maintain the highway, and if works carried out in pursuance of that statutory duty mean that BT's apparatus needs to be repositioned in the interests of highway safety, then BT should pay.

3. This issue does not arise on every occasion when road resurfacing works are carried out. Sometimes the Council digs up the surface and the courses below it, and relays the road. In such a case if the road surface is relaid flush with the BT covers then no further action is necessary. On other occasions the Council does not dig up the road, but lays an extra layer of tarmac (usually, I was told, 40 mm thick) on top of the existing surface. In that case if the BT covers were exposed, there would be a 40 mm difference between the level of the top of the cover and the surface of the road. Except for the regular shape of the dip, it would be the equivalent of a 40 mm deep pothole. The Council alleged, and BT did not dispute, that the proper long term solution to this problem is to excavate around the frames for the covers and to lift and reposition them so that the covers will be level with the new surface of the highway.

4. The underlying issue is, as I have said, who has to pay for this work. This is essentially a question of construction of the relevant sections of Part III of the New Roads and Street Works Act 1991 ("NRSWA").

5. However, the issue which is directly raised in these proceedings is slightly different. In the three cases before me the Council carried out resurfacing works by laying tarmac which covered BT's inspection covers with a layer of tarmac to leave a level, but in the long term unsatisfactory, road surface. BT had to excavate and lift its frames and covers. As a result, BT sues for damages for breach of statutory duty, negligence, conversion and trespass to goods. The underlying dispute is not necessarily determinative of these claims.

6. It is obvious that the issues which arise in these consolidated claims may arise in many other cases up and down the country. However, the cases before me have not been the subject of any Group Litigation Order.

Procedural History

7. The claims heard before me were all issued on 28 March 2008. They were consolidated by order of District Judge Peter Evans dated 24 July 2008 [1/79].[1] The statements of case, which are all in similar form, comprise Particulars of Claim and Further Information given by BT and a Defence with three amendments served by the Council. Permission for the last amendment was given at the Pre-Trial Review [1/83].

8. The claims before me are as follows: -

Claim No	Location	Amount of Claim	
8CF02149	A484 between Woodlands and Gelli Gatti	Wrekin invoice	£6,972.17
		Add profit & overheads @ 16.43%	
		Total excluding interest	£8,117.70
		Statutory interest	
8CF02155	A4066, Antshill, Laugharne	Wrekin invoice	£5,353.51
		Add profit & overheads @ 16.43%	
		Total excluding interest	£6,233.09
		Statutory interest	
8CF02156	A484 between Forest Lodge and Cenarth Bridge	Wrekin invoice	£3,562.92
		Add profit & overheads @ 16.43%	
		Total excluding interest	£4,148.31
		Statutory interest	

9. At the Pre-Trial Review the listing of 7 days was reduced to 4, with one reading day and written submissions to follow the trial. The Order on the Pre-Trial Review directed the parties to produce a Statement of Agreed Facts. This they did, and it proved to be an extremely helpful document [1/84]. I have reproduced this as an Appendix to this judgment. In the light of the level of agreement revealed by that document, the parties each called only two witnesses, and the trial was completed in a day and a half.

10. The witnesses who were called were Mr Morton and Mr Unwin from BT and Mr Williams and Mr Morgan from the Council. I should say at the outset that in my judgment they were all honest witnesses, on whose factual evidence I could rely. When they were invited to comment about the rights and wrongs of the matter, they saw the case, as is only natural, from the point of view of their employers. Thus Mr Morton and Mr Unwin seemed to me to attach greater importance to access to the telephone cables than to the surface of the highway, and Mr Williams and Mr Morgan seemed to me to attach more

[1] Unless otherwise stated references in square brackets are to the trial bundle by volume and page number.

importance to the highway surface than to the telephone cables. As I have indicated, this seems to me to be entirely natural, and it did not cause me to have doubts about their evidence on matters of fact.

11. At the conclusion of the hearing I reserved judgment. In view of the legal issues which arise, I might well have done so of my own volition, but the Order on the Pre-Trial Review directed written closing submissions, and as it did not seem reasonable to expect these to be provided overnight, it was necessary for me to reserve judgment in order to allow a reasonable opportunity for their preparation. Helpfully, Counsel agreed to an initial exchange of submissions in draft form, so that there was no need for a right of reply.

12. Mr Latimer represented the Claimant. Mr Keyser QC represented the Council. I am grateful to them for the clarity and concision both of their oral presentation of the case and of their written submissions.

The Facts

13. In view of the Statement of Agreed Facts and the fact that much of the history is undisputed or undisputable on the face of the documents, I will set out the background to the dispute fairly briefly. The following are my findings of fact. I will give reasons for them where I understand there to have been an issue between the parties.

14. BT is only one of a number of public bodies, statutory undertakers and utilities with the right to place apparatus on, in and under the highway. A Highway Authorities and Utilities Committee ("HAUC") was established in Wales[2] as a forum within which issues arising between the Councils and the owners of such apparatus could be discussed, and hopefully resolved, between them.

15. It was common ground that the works which were carried out at the three locations identified above are properly classified as "street works" under NRSWA. Major works are classified as major highway works, major bridge works and major transport works. Different provisions apply to them under NRSWA.[3]

16. For quite some time, the Council and BT apparently sidestepped the underlying dispute as I have described it in paragraph 2 above, in relation to resurfacing works, by an agreement made after negotiations through Wales HAUC. The agreement was that when BT covers needed to be lifted because highway works were raising the level of the surface, BT would supply any new frames and covers which were required, and the Council would carry out the work required free of charge. In 1995 Welsh HAUC issued a document entitled "Notes for Guidance: Re-levelling of frames and covers incorporated in highway works" which provided operating procedures and guidance [Core/80]: the statutory undertakers named in it included BT and other

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[2] There are other HAUCS across the UK.

[3] As I shall explain below, major works are dealt with under sections 84 and 85. The sections directly relevant to the works in this case are sections 81 and 83.

telecommunications operators, and also electricity, gas and water undertakers [Core/81].

17. On BT's case this arrangement was a concession by BT, because if new parts were required due to Council works, and as BT contends that the Council should pay for all the works, it would follow that the Council should have paid for the frames. On the Council's case it was a concession by the Council, because they contend that BT should have carried out the work at its own expense, and so it would follow that the Council was not obliged to do the work free of charge. In effect although each party believed that the other party was solely liable, they reached a solution which involved sharing the costs.

18. While this was a sensible commercial arrangement it was not one which could be justified by the terms of NRSWA. Accordingly it could only continue so long as both BT and the Council were willing for it to do so. If one or both parties became unwilling for the arrangement to continue, the parties would have to fall back on their strict rights under NRWSA.

19. BT provided a specification for re-levelling work which was called Specification LN 320. Understandably it was a document which went through a number of revisions. The 8th edition of LN320 in the Core Bundle (at [Core/105]) is dated 2003. The Statement of Agreed Facts at paragraph 5 states that LN 320 superseded the £1 Agreement which BT proposed in 2002 [1/85], though I think that since version 8 came out in 2003 it may well have been in existence rather earlier than the Statement of Facts indicates. Principally, LN 320 is a technical specification. At paragraph 12 of version 8 there is an indemnity clause. However, this is not referred to in the Contents page on [Core/105], and in the body of the document the paragraphs 12 to 15 inclusive which are on the Contents page appear as paragraphs 13 to 16 inclusive. It seems to me likely that the indemnity clause must have been a recent inclusion which had not been picked up on the index page. However, this probably does not matter for two reasons:

    (1) first, at least most and probably all of the work of which BT complains was done before 2003; and

    (2) secondly, LN 320 applied to work done by a Highway Authority with the consent of BT. When the work which gave rise to these proceedings was carried out the agreement for the Council to re-level the BT frames and covers was no longer in existence.

20. In about 1999 BT produced for highway diversionary works what was described as a "£1" agreement. It was an agreement expressed to be made in consideration of a payment of £1, a nominal consideration, and required the highway authority concerned to enter into obligations, including indemnities, in favour of BT. On 13 July 1999 the proposed £1 agreement was discussed in a meeting at the Powys County Council Offices attended by a Welsh Assembly Member, and representatives of Highway Authorities (including the Council) and BT (see [3B/486]). A BT representative confirmed:

"BT's intention to have one model agreement nationally on 'a take it or leave it basis'. Informal agreements between HA's will no longer be acceptable. BT will in future insist on implementation of a contract as a prerequisite to allowing HA's to undertake section 84/85 works on it's behalf.

Re-levelling covers and frames as part of Carriageway resurfacing is exempt and will continue to be undertaken in accordance with the Wales HAUC agreement."

21. At this stage, therefore, BT was proposing that for resurfacing works the commercial arrangement which I have outlined above would continue. However they were insisting on the £1 agreement in relation to major works (to which sections 84 and 85 of NRSWA apply).

22. After negotiations between BT and highway authorities there was apparently agreement between BT and the authorities on the terms of a £1 agreement for major works. Throughout this time the compromise position set out in paragraph 13 above continued to operate to operate in relation to street works.

23. In late 2001 BT produced a £1 agreement in relation to raising or replacing highway boxes affected by street works in Wales. This aroused protests from a number of highway authorities: see, for example the letter dated 7 December 2001 at [3B/604]. The Council and at least a number of other highway authorities in Wales took the view that the terms were too onerous to sign; in fact an e-mail dated 16 April 2002 ([3B/624]) indicates that all the highway authorities in Wales rejected this agreement.

24. So far as the Council was concerned, the introduction of the £1 agreement effectively brought to an end the arrangement for sharing the costs of raising BT's boxes, because BT would not allow the Council to carry out the works unless the Council signed the £1 agreement, which the Council was unwilling to do. (Mr Latimer questioned whether this was actually BT's position: I shall deal with this below).

25. It appears that the person who dealt directly with BT, and who formulated the policy which the Council subsequently implemented, was Mr Roger Griffiths. He is sadly now deceased. A rather brief witness statement taken from him in 2004 was put in [1/122]. The Council's witnesses who gave oral evidence to me were Mr Elfryn Williams and Mr David Morgan. Mr Morgan said that he understood from Mr Griffiths that BT had made it clear that if the Council did not sign the £1 agreement, then BT would not allow the Council to interfere with its apparatus and would hold the Council liable in trespass (see 1st Witness Statement at [1/176-7]). However, this is not referred to in the statement given by Mr Griffiths.

26. Mr Morgan was the manager of the Direct Labour Organisation at the time of the relevant works, and did not come to his present post until 2003. He was therefore not in his present post at the relevant time. He told me that he came into his present post in November 2003, and discovered that there was no written guidance, and so he held a meeting at which he was told what the policy was. He was unable to point to any letter, e-mail or minute of a

meeting at which BT insisted on execution of a £1 agreement as a condition of the Council being permitted to carry out works to raise BT's boxes.

27. Founding himself on the absence of any document or first hand evidence of BT's insistence on the £1 agreement as a condition of the Council carrying out works to raise BT's boxes, Mr Latimer suggested in cross-examination that as the Council could not say with any clarity when and by whom the Council's previous authority to lift boxes was revoked, that authority must have continued in existence. Mr Keyser QC intervened to point out that it was an agreed fact (see Statement of Agreed Facts paragraph 5 at [1/85]) that the Council were not permitted to lift the BT boxes. What was in dispute according to that paragraph was the threat to hold the Council liable for trespass.

28. In my judgment paragraph 5 of the Agreed Statement of Facts makes it clear that BT did permit Councils which had signed up to the £1 agreement to re-level BT frames and covers, and that BT did not permit Councils which had not signed the £1 agreement to do so. Mr Latimer did not apply to withdraw any admission contained in paragraph 5, In addition, the oral evidence called by BT supports what is stated in the Statement of Facts. Mr Morton said in cross-examination that if he received notification of works from a Highway Authority, then he would send an estimate of the costs of having the works done by a BT contractor, and wait for the authority either to send a cheque or come back with an offer to work to LN 320. The obvious implication of this evidence was that in the absence of the £1 agreement the authority was not entitled to raise the covers itself. Quite apart from the Statement of Facts and the evidence, it seems to me overwhelmingly probable that some representative of BT would have made a statement that if the Council did not sign the £1 agreement it was not allowed to re-level BT frames and covers: if the £1 agreement was put forward on any other basis, there would have been no inducement to the Highway Authorities to sign it. BT would in effect have been saying, "Please sign the £1 agreement, but if you don't it won't make any difference". I cannot imagine that BT would have adopted such an uncommercial stance.

29. In the circumstances I find as a fact that BT did make it clear that the Council could not re-level BT frames and covers without signing the £1 agreement. BT's contention to the contrary really flies in the face of its own case.

30. I am less certain about the alleged threat by BT to hold the Council liable in trespass if it interfered with the BT boxes, which is in dispute on the Statement of Facts. Mr Morgan's source of information was Mr Griffiths, who did not mention this threat in his witness statement. However, that statement was given in other proceedings nearly 4 years before the present proceedings were started. Further, in putting forward the £1 agreement BT was obviously putting into execution a considered strategy. The logical consequence of BT's withdrawal of permission to re-level boxes would be that BT would at least be in a position to argue that re-levelling them would be a trespass to goods. In my judgment it is inherently probable that a BT representative would have added that if the Council raised boxes without BT's permission BT would hold the Council liable in trespass, since that was an obvious element of the

strategy which had been adopted. Although the evidence is not as clear as it might be, on the balance of probabilities I hold that this threat was made.

31. Finally, I would add here that since I am about to criticise the Council for failing to make an adequate communication of its response to this new approach by BT, it is right to record that BT was only able to argue that the Council was still authorised to re-level the frames and covers because there was no clear record of the position which BT had in fact adopted.

32. Both Mr Elfryn Williams and Mr David Morgan, who gave evidence before me, were aware of the policy which was formulated by the Council to deal with the impasse created by BT's insistence on the £1 agreement and the Council's unwillingness to execute it. The person who decided upon it was Mr Griffiths. The policy was, when the works would necessitate raising BT boxes, to tarmac over the BT boxes in their then existing positions and subsequently to serve notice requiring BT to excavate and raise them to a level flush with the new road surface.

33. Both Mr Williams and Mr Morgan told me that the normal method of resurfacing by adding tarmac was to cover the whole of the carriageway, including any boxes, and then to break out the frames and covers and install them at the higher level which would make them level with the surface of the highway. Neither Mr Morton nor Mr Unwin were aware of this, but neither of them was in a position to dispute it. I therefore accept that this was the normal method of resurfacing.

34. Mr Latimer cross-examined and made submissions on the basis that the Council had deliberately adopted an extreme and aggressive course as a means of putting pressure on BT. He also asserted that there was no urgency about the resurfacing works and that there was therefore no reason why the Council should not have delayed them while seeking some form of legal ruling. Mr Williams's answer to this was that the work had to be done before the snow and ice of winter set in. Mr Latimer challenged this response on the basis that the work was done in winter, as it was done in November and December 2002.

35. In my judgment both the general and the specific criticisms put the case too high. Having listened carefully to the evidence of Mr Williams and Mr Morgan I do not accept that they were deliberately adopting an aggressive approach or that things were "getting dirty" (cf [3B/413]). They told me, and I believe them, that they could not find any alternative. I find as a fact that they adopted the policy which they did adopt because they accorded primacy to their job, which was to ensure the safety of the highway, and they could not see any other way in which they could carry out works which were needed for the safety of the highway.

36. In fairness to them I should point out that BT had taken the decision to jettison the arrangement which had apparently worked successfully since at least 1995, and had told the Council that they were not entitled to re-level the BT boxes. BT had created the Council's dilemma.

37. Nonetheless, the Council is plainly open to criticism. Once the decision had been made it should have been clearly communicated. It was not. I will come to the statutory position below. But quite outside the statutory regime, the Council ought to have given give clear warning of what it was going to do. I bear in mind that there is no evidence exactly when Mr Griffiths decided upon the way forward. It is possible that he only made his mind up very shortly before the works. That would explain the timing of the letter of 15 November 2002 to which I shall refer below. However, there was no excuse for making the decision at such a late stage, if that was the case, and even at that late stage the full implications of the Council's policy decision were not communicated. As I have indicated, the Council should have been explicit with BT about its future intentions.

38. BT severely criticised the Council for failing to take legal proceedings to establish the legality of its position. That criticism is to some extent justified. However, in my judgment it also applies to BT. BT could have applied for a declaration that it was entitled to require the Council to sign the £1 agreement or pay for re-levelling the boxes. It did not. Instead BT's attitude was that the highway works could not take place unless the Council accepted BT's demands.

39. In *Gwynedd Council v British Telecommunications plc* [2004] EWCA Civ 942 at paragraphs 86 to 87 Wall LJ, while recognising the budgetary pressures on both utilities and highway authorities pointed out the desirability, indeed necessity, of cooperation. I respectfully agree. However before even agreement, there should be clear communication. I am driven to the conclusion that the parties sleepwalked their way into this dispute when it must have been possible to resolve the issue at much less expense than by the events which have given rise to these proceedings.

40. I reject BT's allegation that there was no urgency about the works. First, sitting as a judge in the County Court I am, in my judgment, entitled to take judicial notice of the fact that even in 2002 highway budgets were under pressure and that works were not programmed unless they were necessary. Secondly, the effect of snow and ice on road surfaces is well known: water penetrating the road surface and freezing expands, causing the break up of the surface and creating holes. Thirdly, while I would accept that December is winter, it is rare (though December 2009 was an exception) for there to be extensive snow and ice before the New Year, while January and February typically are the worst months for snow and ice. I find that the Council had a genuine reason for urgency, namely the need to complete the work before bad weather which they expected in early 2003.

41. In my judgment, therefore, the Council's highways officers adopted a course which they genuinely believed was the only course which they could adopt, and they did so under genuine pressure of time.

42. The policy was to give notice under section 83 NRSWA. According to Mr Griffiths typically a month's notice would be given (witness statement at paragraphs 6 to 8 [1/122-3]).

43. On 15 November 2002 the Council sent a letter to, among others, BT. Under a heading referring to the three locations relevant to these proceedings, the letter stated:

"I refer to the above-named scheme and hereby notify you under **Section 83** of the New Roads and Street Works Act that the resurfacing works will commence on Monday 18 November 2002." [emphasis as original]

44. This clearly was not one month's notice or anything like it. It was notice sent on a Friday giving notice of works due to commence the following Monday. Mr Latimer put to Mr Williams that somebody at the Council had thought that it was clever to give notice on the Friday for the Monday. Mr Williams did not accept that, though he made it clear that he did not condone the giving of notice at such a late stage and frankly accepted that the notice was too short. I do not think that the notice was deliberately held back until the last minute, principally because the giving of late notice could only harm the Council by making its reliance on section 83 of NRSWA vulnerable to challenge. It is, however, unfortunate, to say the least, that such short notice was given. If nothing else it must have caused BT, when they subsequently reviewed the case, to think that they had been "set up".

45. It was agreed in the Statement of Facts at paragraph 14 [1/88] that the letter was sent to BT at the correct address, BT's National Notice Handling Centre at the BT offices at Hanley in Stoke on Trent (see the distribution list at [Core/2]]. However, BT has no record of having received this letter and there is no record of any response to it.

46. The letter of 15 November 2002 did not come completely out of the blue: as the Statement of Facts records (paragraphs 9 to 13 at [1/86-88]) the following events preceded it:

(1) a quarterly coordination meeting to identify and discuss planned road works was held on 18 June 2002. Mr Brian Jones of BT submitted an apology for non-attendance;

(2) on 26 June 2002 the Council sent BT a letter [Core/1]. This stated:

"I enclose for your information a part-list of my resurfacing programme together with location plan for the financial year 2002/2003.

I do not require details of your Authority's apparatus in order to carry out these works, however I should be grateful if you would advise me as soon as possible whether or not you have any proposals which may affect these sections of the highway.

As you are aware, there will be a twelve months restriction on cuttings in these carriageways from the time of the completion of the resurfacing works."

(3) The parties have been unable to find a copy of the list, but somebody at BT has written the reference numbers on the letter at [Core/1] and one of them is the Forest Lodge reference number.

(4) The parties have not found any response in relation to Forest Lodge. There was a response dated 31 October 2002 [Core/4-5]. This was in relation to resurfacing the A485 between Alltwalis and Pencader, which bears another of the reference numbers written in on the letter of 26 June 2002.

(5) On 17 September 2002 there was another quarterly coordination meeting. Mr Brian Jones attended on behalf of BT.

(6) Also on 17 September 2002 the Council sent another letter to BT [Core/2]. This was in the same terms as the letter of 26 June 2002 (except that BT is referred to as "your company" instead of the previous inapt reference to "your Authority"). The enclosed list is at [Core/3] and it includes the reference numbers for the resurfacing works at Gelli Gatti and Ants Hill. BT's receipt stamp indicates that the letter was received on 25 September 2002.

47. Mr Keyser QC relied upon these events for two purposes: first, he argued that section 83 of NRSWA does not actually require a notice, and so far as information has implicitly to be given, there is no prescribed form, and therefore the information given out in meetings and/or the letters sent by the Council themselves amounted to such notice or information as might be required. Further, the letters of 26 June and 17 September were also sent to Hanley, and they were clearly received, since the original letters were produced by BT and the letter of 26 June was answered, in part. Mr Keyser relied upon this in support of his argument that the letter dated 15 November 2002 was probably received by BT, but mislaid within their offices.

48. Mr Unwin's first witness statement contained the following (paragraph 8 at [1/107])

"Further, Sue Taylor at the National Notice Handling Centre at the BT offices in Handley, Stoke on Trent, has advised that the section 83 Notices for these three claims have never been received, and it is believed that they may have been sent to the incorrect department."

49. In cross-examination Mr Unwin said that he had spoken to Ms Taylor after BT became aware that its boxes had been covered up (with tarmac). He said he did not know what investigations Ms Taylor had made, but incoming notices are scanned and put on to a database, and she said that she had searched the database and the paper records. Mr Unwin accepted that neither the database nor the search had been disclosed, that he had not carried out any search himself, and that he did not know who complied the records and how.

50. Mr Latimer argued that the proper inference to draw was that the letter had gone astray before reaching Hanley.

51. Mr Keyser QC argued that the proper inference to draw was that the letter was received and mislaid. He relied not only upon the fact that the other letters were received, but also on the exiguous nature of the evidence as to the system for receiving notices and the search of the system. In addition at paragraph 3 of his closing submissions he relied upon the following:

(1) a section 81 notice was faxed to BT offices in Coventry [Core/8] but no action was taken on it; see Statement of Facts paragraphs 18 and 24; and

(2) three section 81 notices were given on 8 January 2003 [Core/13-15] and action was only taken in relation to the Ants Hill notice; see Statement of Facts paragraphs 22 to 24.

52. It is true that the evidence about the BT system for receiving notices was sparse. It is a curious feature of this case that there is very little or no evidence and documents in a number of areas where one would expect the position to be well documented, including:

(1) BT's insistence on the £1 agreement;

(2) the formulation of the Council's policy in response; and

(3) the nature and cost of the work done by BT (see below).

53. I have to consider which is more likely: a notice going astray in the post, or its receipt and loss by BT's National Notice Handling Centre. In my judgment it is much more likely that the letter dated 15 November 2002 went astray in the post than that it arrived at an office which, from its name, was a centre dedicated to the receipt of legal notices, and was there mishandled. While Mr Keyser QC is factually correct in his comment that the letter of 26 June was answered in part only, the fact that it was answered at all suggests that it was not the receiving department of BT which was at fault but the reacting department. Failure to respond to the letter of 17 September is consistent with this. The fact that the section 81 notices sent to offices in Coventry were in most cases not acted upon, does not tilt the balance in favour of loss of the section 83 notice within BT: first, the lack of action in response to the section 81 notices does not mean that they also must have been lost. It may just be that BT was slow in passing them on or in deciding to carry out works. Secondly, the Coventry office is not the National Notice Handling Centre, and I do not know how important a part in the role of the business of that office the receipt of notices would play.

54. I therefore find as a fact that the letter dated 15 November 2002 was sent by the Council and was correctly addressed, but it did not arrive.

55. It is agreed that the Council laid a new layer of tarmac some 40 mm thick across the whole surface of the highway. BT's covers were thus buried in the highway, 40 mm below the surface. The Council marked the location of at least some of the boxes, though the adequacy of the marking was disputed.

The dates when the word was done are agreed in the Statement of Facts at paragraphs 18 to 20 as follows:

(1) Gelli Gatti, by 21 November 2002;

(2) Forest Lodge, not before 12 December 2002;

(3) Ants Hill on or about 3 December 2002.

56. As I read paragraphs 24 and 25 of the Statement of Facts it is agreed that BT subsequently engaged contractors to excavate the boxes and to lay frames and covers flush with the surface of the highway. It is also agreed, as I understand it, that BT paid the amounts shown as paid to Wrekin, the contractors who carried out the work. All other matters regarding damage and quantum are in issue, two important issues being whether the frames and covers were replaced, or the existing ones reused, and if the former whether replacement was necessary or reasonable.

The Council's Duty to Maintain the Highway

57. Mr Latimer submitted that the Council owed only a qualified duty to maintain the highway under section 41 Highways Act 1980, because of the special defence in section 58(1) of that Act. While I cannot see that there are any practical consequences so far as this case is concerned, in my judgment that is not correct. As Lord Hoffmann pointed out in *Goodes v East Sussex County Council* [2000] 1 WLR 1356 at 1361-2 the duty is an absolute duty; but when the Highways (Miscellaneous Provisions) Act 1961 by section 1(1) abolished the common law exemption from civil liability for damage caused by failure to maintain, the same act, by section 1(2) provided the special defence which is now in section 58(1) of the 1980 Act. Thus the duty remains absolute for the purposes, for example of enforcement under section 56(1): it is not the duty which is qualified, but the right of a person suffering loss to recover damages. It was because the duty was absolute that it was held in *Goodes* not to extend to keeping the highway free of ice: see pp 1366-8. In contrast, the duty which was inserted by amendment by section 41(1A) is a qualified duty, because it is a duty to ensure that safe passage is not endangered by snow and ice "so far as is reasonably practicable".

BT's Right to Maintain Apparatus

58. Paragraph 2 of the Statement of Facts reads as follows:

"The Claimant is and was at all material times a statutory undertaker. At all material times it was the owner of carriageway joint boxes and associated carriageway frames and covers ("the apparatus") that were placed and retained in the street at the said locations and elsewhere pursuant to licence under Part III of [NRWSA]."

59. In his written closing submissions Mr Latimer argued that BT's right to maintain its apparatus in the highway does not arise under a street works licence, but under Schedule 2 of the Telecommunications Act 1984 (as

amended by the Electronic Communications Act 2003). Schedule 2 as originally enacted was entitled, "The Telecommunications Code" and is referred to as "the Code". The amendments were obviously not in effect at the date of the matters giving rise to these proceedings. Mr Keyser QC referred in his closing submissions to the contradiction between this submission and the Statement of Facts, but submitted that the rights of a statutory undertaker are the same in either case.

60. Mr Latimer further submitted that the Council was a "relevant undertaker" under the Code: see paragraph 23(10)(a). If this submission is correct, then street works which would affect BT's apparatus would be subject not only to the provisions of NRWSA but also to the Code. However, Mr Latimer does not rely upon any breach of the provisions of the Code as material to my decision in these proceedings. The definition of "relevant undertaker" in paragraph 23(10)(a) is, so far as material, as follows:

"any person (including a local authority) authorised by an Act (whether public general or local) … to carry on –

(i) any railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking …

Because Mr Latimer does not rely upon any breach of the Code as relevant to the issues which I have to decide I do not think that it is necessary for me to reach a concluded view as to whether a street authority is a "relevant undertaker" so defined. In addition, because the issue arose in closing speeches, and involved departure from the Statement of Facts, I also think that it would be undesirable for me to express a concluded view. I will therefore merely record that I have considerable doubt as to whether a street authority can properly be described as carrying on a "road transport undertaking". If that doubt is well-founded then the Council is not a relevant undertaker for the purposes of the Code.

61. Section 50(1) of NRWSA authorises a licence to place, or to retain, apparatus in the street, and thereafter (among other things) to maintain, repair, alter or renew the apparatus, to change its position or remove it and to carry out any required or incidental works. Paragraph 9(1) of the Code is in very similar terms.

62. It is common ground between the parties that BT retains ownership of its cables and frames even though they are buried in the ground. Since BT does not own the land, it is agreed that BT's interest in the apparatus is as an owner of chattels. Mr Keyser QC submitted that BT retains title to its apparatus, but does not have possession of it, so that BT is not entitled to maintain an action for conversion or trespass to goods in relation to it. Mr Latimer disputed this proposition.

63. Both Counsel referred me to *Transco v United Utilities Water plc* [2005] EWHC 2784 (QB). That was a case where an employee of the Defendant water undertaker, while carrying out repairs to the Defendant's system, shut off a valve on the Claimant gas undertaker's gas network, so cutting off 2,600

Transco customers. Transco sued for the costs of investigating and restoring the supply, compensation to customers and other losses totalling about £174,000. Butterfield J held at paragraphs [10] to [19] that because both undertakers were in a relationship of proximity the Defendant owed the Claimant a duty of care, and the damage which had been suffered was properly characterised as direct loss resulting from interference with the Claimant's property and not as consequential loss, and accordingly the Claimant was entitled to succeed. At paragraphs [20] to [24] Butterfield J held that the Claimant was also entitled to succeed on an alternative claim for wrongful interference with goods or trespass to goods.

64. The question whether the Claimant in that case had sufficient possession to maintain a claim for conversion or trespass to goods does not appear to have been argued, though in paragraph [21] the submissions of Mr Field for the Defendant are recorded in terms which suggest[4] that he expressed doubt as to whether the pipes and valve were chattels. Rather the argument was that because all that the Defendant's employee had done was turn off the valve, there was no damage to the pipe or valve, and thus no trespass. In my judgment the *Transco* case is not binding authority that a statutory undertaker has sufficient possession of his apparatus to maintain an action for conversion or trespass to goods, because the point was not argued and so was not decided.

65. Nevertheless in my judgment BT did retain sufficient possession of its apparatus for BT to be able to maintain a claim in conversion or trespass to goods. Clearly the quality of BT's possession, and the nature of the acts which could amount to conversion or trespass to goods, must be affected by the position of the apparatus: the top surface of the cover is part of the highway, and so BT could not complain if cars drove over the covers; BT would have to accept that in a busy street arrangements would have to be made to divert traffic before work could start. But BT has the right of access to its cables, and no other person has possession of them. Although there are physical limitations on BT's exercise of its possession, in my judgment those limitations do not prevent BT from having possession.

The Underlying Dispute

66. In order to explain the underlying dispute, I should begin by setting out the two key sections of the NRSWA. They are sections 81 and 83 which appear in Part III of the Act. Section 81 provides as follows:

"81 **Duty to maintain apparatus**

(1) An undertaker having apparatus in the street shall secure that the apparatus is maintained to the reasonable satisfaction of—

(a) the street authority, as regards the safety and convenience of persons using the street (having regard, in particular, to the needs of people with a

[4] The passage reads, "The goods remained (if they are goods) ..."

disability), the structure of the street and the integrity of apparatus of the authority in the street, and

(b) any other relevant authority, as regards any land, structure or apparatus of theirs;

and he shall afford reasonable facilities to each such authority for ascertaining whether it is so maintained.

(2) For this purpose maintenance means the carrying out of such works as are necessary to keep the apparatus in efficient working condition (including periodic renewal where appropriate); and includes works rendered necessary by other works in the street, other than major highway, bridge or transport works (as to which, see sections 84 and 85 below).

(3) If an undertaker fails to give a relevant authority the facilities required by this section—

(a) the street authority may in such cases as may be prescribed, and

(b) any other relevant authority may in any case,

execute such works as are needed to enable them to inspect the apparatus in question, including any necessary breaking up or opening of the street.

(4) If an undertaker fails to secure that apparatus is maintained to the reasonable satisfaction of a relevant authority in accordance with this section—

(a) the street authority may in such cases as may be prescribed, and

(b) any other relevant authority may in any case,

execute any emergency works needed in consequence of the failure.

(5) The provisions of this Part apply in relation to works executed by a relevant authority under subsection (3) or (4) as if they were executed by the undertaker; and the undertaker shall indemnify the authority in respect of the costs reasonably incurred by them in executing the works.

(6) A relevant authority who execute or propose to execute any works under subsection (3) or (4) shall give notice to any other relevant authority as soon as reasonably practicable stating the general nature of the works.

(7) Nothing in subsection (3) or (4) shall be construed as excluding any other means of securing compliance with the duties imposed by subsection (1)."

Section 83 provides as follows:

"83 **Works for road purposes likely to affect apparatus in the street**

(1) This section applies to works for road purposes other than major highway works (as to which see section 84 below).

(2) Where works to which this section applies are likely to affect apparatus in the street, the authority executing the works shall take all reasonably practicable steps—

(a) to give the person to whom the apparatus belongs reasonable facilities for monitoring the execution of the works, and

(b) to comply with any requirement made by him which is reasonably necessary for the protection of the apparatus or for securing access to it.

(3) An authority who fail to comply with subsection (2) commit an offence in respect of each failure and are liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(4) In proceedings against an authority for such an offence it is a defence for them to show that the failure was attributable—

(a) to their not knowing the position, or not knowing of the existence, of a person's apparatus, or

(b) to their not knowing the identity or address of the person to whom any apparatus belongs,

and that their ignorance was not due to any negligence on their part or to any failure to make inquiries which they ought reasonably to have made."

67. BT contends that when the Council wishes to undertake street works which will affect BT's apparatus, then BT is entitled to make a requirement under section 83(2)(b). So much is undisputed. However, BT goes on to contend in its written closing speech that requiring the Council to sign the £1 agreement (and presumably carry out the work free of charge) is a "requirement made by [BT] which is reasonably necessary for the protection of the apparatus or for securing access to it." In fact, according to Mr Morton's evidence, at the time of the works giving rise to these proceedings, BT would in practice have demanded payment in advance of the cost of having the frames and covers re-levelled by its own contractors.

68. The Council contended that it was entitled, and indeed under a statutory duty, to raise the level of the carriageway. If it did so, it could then require BT to re-level its frames and covers under section 81(1) on the basis that re-levelling was work "rendered necessary by other works in the street, other than major highway, bridge or transport works" within section 81(2) because the Council's resurfacing works were street works which were not major highway, bridge or transport works, and it was the Council's resurfacing works which

made the re-levelling necessary. Hence in this case the Council served notices under section 81 after the resurfacing had been completed.

69. Section 81 refers to sections 84 and 85. Those sections provide, in summary, that for major highway works the costs will be borne by the authority and the undertaker "in such manner as may be prescribed", ie prescribed by regulations. Those sections, and the regulations, the Street Works (Sharing of Costs of Work) Regulations 1992 were considered by the Court of Appeal in *Thames Water Utilities Ltd v London Underground Ltd* [2004] EWCA Civ 615. The issue in that case was whether sections 84 and 85 and the regulations applied to work carried out for the purposes of construction of the Jubilee Line extension. The argument for TWUL was that private Acts required LUL to indemnify TWUL in respect of works required to TWUL's sewers notwithstanding the terms of sections 84 and 85. LUL argued successfully before the trial judge (Douglas Brown J) and the Court of Appeal that section 101 of NRWSA overrode the private acts because the works, albeit major transport works, were also "street works" within the meaning of Part III of NRSWA: see paragraphs [10] to [18]. TWUL had argued that street works and major works were mutually exclusive categories.

70. Mr Keyser QC relied upon two passages in the judgment of Kay LJ, with whom the other members of the Court of Appeal agreed. First, at paragraph [10] Kay LJ accepted that, "The purpose of Part III of the 1991 Act was to provide a comprehensive code applicable to the activities which it covers in place of what had become the shambolic operation" of the previous statute. Secondly, in attempting to draw the distinction between major works and street works, Counsel for TWUL had argued that section 69 provided for compensation for street works, whereas sections 84 and 85 provided for compensation for major works: see the submission recorded as made fifthly in paragraph [8]. At paragraph [12] Kay LJ said:

> "In reaching this conclusion, I also reject the submission that 'street works' attract one compensation scheme via s 69 and 'major works' another via ss 84 and 85. Indeed I do not accept that s 69 provides a compensation scheme at all." After quoting from section 69, which applies between undertaker and undertaker and is worded in exactly the same way as section 83, except that that applies as between street authority and undertaker, Kay LJ continued. "It would be stretching the wording of s 69(1)(b) to impermissible limits and beyond to find a procedure or mechanism for compensation in relation to works that are not major. However, this is to ignore the generous definition of "major highway works" to which I have referred.[5] Moreover if s 69 had been intended to embrace a compensation mechanism I would expect it to include a provision equivalent to s 85."

71. Mr Keyser QC submitted that I should bear in mind that Part III of NRSWA is intended to create a comprehensive code for dealing with street works; and that if section 69 was not a compensation provision, then nor could section 83, which is worded identically, provide compensation; and, he submitted, BT's

[5] Major highway works include installing a speed hump or cattle grid: paragraph [10]

argument in effect used section 83 as a compensation provision, which was not appropriate.

72. In his closing submissions Mr Latimer took three points, which he argued made the *Thames* case irrelevant to my decision:

(1) what Kay LJ said in paragraph [12] was obiter rather than the ratio of the decision.

(2) that case concerned compensation after the event for damage that had been done and not whether Thames Water could ask for an advance payment from London Underground before works started (unlike the present case where the Claimant argued that its reasonable requirements under s.83(2)(b) included signing the £1 agreement);

(3) it is not clear from the judgment whether Kay LJ was aware that what he said in reply to an argument about s 69 could affect s 83 of the 1991 Act.

73. Mr Latimer concluded that reference to this case was an unnecessary diversion. I do not agree. First, I do not agree that the words of Kay LJ which I have quoted were obiter. In my judgment they were an essential part of the reasoning, in that they dealt with the fifth submission of Lord Kingsland QC for TWUL. As to the third point, I would be surprised if Kay LJ was not aware that section 81 was worded identically to section 69, given that he regarded Part III as a comprehensive code and was looking at the detail of section 81's near neighbours sections 84 and 85. However, even if Kay LJ was not aware of the possible impact on section 81, I do not think that that would entitle me to disregard his construction of section 69. In addition, in my judgment it would be wrong for me to ascribe different meanings to sections 69 and 83 when they are identically worded, and when they are sections in a comprehensive code, as Part III of NRSWA has been held to be.

74. Mr Latimer's second point requires further examination. In one sense it is wrong, because actually this case, like the *Thames* case is a claim for compensation for things done. However, at least in relation to the underlying dispute, it can be said that there is a factual difference between an undertaker stating a requirement *before* the street works (BT's case in the underlying dispute) and an undertaker claiming compensation *after* the works.

75. The question for me is whether this factual difference is a relevant distinction. In my judgment it is not. Kay LJ held that section 69 does not provide for compensation. It cannot matter whether the demand is made before or after the event giving rise to the compensation; no compensation is payable. If, as in my judgment I should, I hold that section 83 should be interpreted in the same way, the same must apply. It follows that BT's practice of sending an estimate for the costs of re-levelling was not justified by section 83 NSRWA.

76. As I have indicated, in BT's closing submissions, BT put forward the requirement to sign the £1 agreement as a reasonable requirement under