section 83(2). No attempt was made by BT in evidence or argument to explain to me why the terms of the £1 agreement were reasonable. Further, the words of section 83(2)(b) are that the authority must comply "with any requirement that is *reasonably necessary* for the protection of the apparatus or for securing access to it." [emphasis added] Thus it would not have been enough for BT to show that the terms of the £1 agreement were reasonable: BT would have to show that the execution of the £1 agreement was "reasonably necessary". From 1995 to 2001 BT was able to do perfectly well without a £1 agreement for re-levelling boxes after resurfacing works. I was not given any evidence about some circumstances or event pointing up a need to change the position. In my judgment BT failed to show that execution of the £1 agreement was reasonably necessary for the protection of the apparatus or for securing access to it.

77. I would go further: it seems to me that what section 83 is directed to is physical measures to protect apparatus or secure access to it, not the imposition of contractual terms by one party on another. Mr Latimer submitted that the words of section are unlimited. I agree, but they have to be read in context. In my judgment it would be surprising if Parliament intended to give BT the power unilaterally to impose warranties and indemnities on a street authority, and if that was the intention one would expect clear words to be used. Further, I do not see how the imposition of such contractual terms can be judged by a standard of what is "reasonably necessary". It might be desirable for BT to have the advantage of warranties and indemnities, but I do not see how it could be necessary. Further, warranties and indemnities, even if they could be said to be necessary for BT's financial well-being, are not necessary for the protection of apparatus or for securing access to it. An indemnity would entitle BT to make a money claim in the event of a claim against BT; it would have nothing to do with the condition of the apparatus. Some warranties might have an effect on the physical condition of the apparatus, because an authority might warrant that if there was a defect in the works it would if required redo the work, but it still could not be said that it was "necessary" for the protection of the apparatus or securing access to it that the work should be redone by the authority, rather than BT.

78. I therefore conclude that section 83(2) of NSWRA does not entitle BT to require a street authority either to sign up to any particular terms or to pay for re-levelling works.

79. I turn to section 81. BT is under an obligation to maintain its apparatus to the reasonable satisfaction of the Council as regards the safety and convenience of persons using the street (s 81(1)(a)). For this purpose maintenance includes works rendered necessary by street works which are not major works (where sections 84 and 85 apply) (section 81(2)). Resurfacing works are street works which are not major works. Where resurfacing is carried out which raises the level of the highway, it is agreed that the frames and covers need to be re-levelled. This is work rendered necessary by street works and it is therefore within the meaning of maintenance. It follows that if the Council raise the level of the highway surrounding BT's box, BT is liable under its duty to maintain its apparatus to re-level the frame and covers.

80. Mr Latimer submitted that work could not be maintenance unless it was necessary to keep the apparatus in efficient working condition, as opposed to keeping the street in efficient working condition. In my judgment this is not correct: first, section 81(1)(a) directs the authority to have regard to the safety and convenience of road users in determining whether it is satisfied with the state of maintenance; secondly, the purpose of frames and covers, unlike the cables, is a dual one. The purpose of the covers and frames is to protect the cables and to maintain a surface for highway users to use. If, for example, there was a large hole in one of the covers which made the road unsafe, the apparatus itself, ie the cover, would not be in efficient working condition. Thirdly the use of the word, "includes" before the words, "work rendered necessary by other works in the street" in my judgment indicates that the earlier definition of maintenance is being extended. For these reasons Mr Latimer's attempt to restrict the definition of maintenance by reference to the *Goodes* case is in my judgment misconceived.

81. Mr Latimer submitted that this could not be right, because the Council would have created the problem. While in one sense that is true, the Council would only create the problem by the performance of its statutory duty to maintain the highway. If the works were major highway works (and Kay LJ pointed out the generous scope of the definition) then the provisions of sections 84 and 85 would apply, and the Council would be responsible for the majority of the costs of BT's consequential works. In my judgment there is nothing unreasonable or surprising in the costs of consequential works, where the works are not major works, lying with the undertaker. Parliament clearly intended there to be a distinction between the treatment of the costs of consequential works according to whether or not the works were major works. In my judgment the distinction is that works consequential on major works are dealt with under sections 84 and 85, whereas other consequential works are the responsibility of each statutory undertaker.

82. I should add that I do not consider that this was an unreasonable apportionment of responsibility. While I do not think that it is helpful to analyse BT's statutory right to maintain its apparatus in and under the highway as a privilege, it does not seem to me to be unreasonable to view the public right of passage as the primary purpose of the highway, to which the purposes of other undertakers are necessary subsidiary. However, this is perhaps immaterial since in my judgment the words of section 81 are clear.

83. I conclude that if the Council had uncovered BT's boxes after completing resurfacing works, the Council would have been entitled to require BT to re-level the frames and covers at its own expense under section 81 NRSWA.

84. That is sufficient to dispose of the underlying dispute. However, what the Council actually did was to leave BT's boxes buried 40 mm beneath the surface of the highway. It is therefore necessary for me to turn to deal with the causes of action asserted by BT as a result.

Causes of Action Asserted by BT and the Defences

85. As indicated above, these are four in number, namely

(1) breach of statutory duty;

(2) negligence;

(3) conversion; and

(4) trespass to goods

86. The Council denies liability, and in addition asserts three defences: first, statutory authority, secondly consent and thirdly contributory negligence. The last of these defences would not apply to conversion or trespass to goods. The other two would apply to all BT's stated causes of action.

Breach of Statutory Duty

87. BT's case is that that the duty under section 83(2) to give facilities for monitoring and to comply with reasonably necessary requirements necessarily imports a duty to give notice in advance of works; that that duty was broken; that breach of that duty is actionable by BT; and that by reason of the breach, BT has suffered damage.

88. In my judgment BT has not established any breach of duty on the part of the Council. Section 83 does not in express terms impose any duty on the Council to give prior notice of works. Mr Latimer submits that it is necessarily implicit in the duty to give facilities that BT should inform any undertaker likely to be affected by the works that the works are going to be undertaken. As the sanction for failure to give facilities is liability to prosecution for a criminal offence, I am far from convinced that this is correct, but I shall assume that it is correct. In my judgment the notice which would be required would be a sufficient indication of the nature and location of the works for BT to be able to ask for facilities for monitoring or to impose any requirement for protection or access. I cannot see that a detailed specification or precise dates would be necessary. In my judgment the letters dated 26 June 2002 and 17 September 2002 gave adequate information to BT for BT to be able to ask for facilities for monitoring or to impose a requirement for protection or access. In the circumstances, if there was an actionable statutory duty, as I have assumed, it was not broken.

89. Section 83 provides a criminal sanction for breach, but not for civil liability. Mr Latimer argued that civil liability was established by reference to *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289 at paragraph 42. I read that paragraph as indicating when a duty of care will be imposed, rather than a direct liability for breach of statutory duty. Nonetheless I of course accept that the well-known passage in the speech of Lord Diplock's words in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185 provides BT with an argument that the duty here was owed to such a small class of persons as to be directly actionable. On the other hand Mr Keyser QC pointed to the fact that, for example, section 79(4) NRSWA explicitly creates both criminal and civil liabilities. It would have been very easy for Parliament to use similar words in section 83, but they are not present. As the *Thames* case shows, Part II of NRSWA was intended to be a comprehensive code. If

civil liability is expressly included in some provisions, then when it is omitted in other provisions the omission must, in my judgment, have been deliberate. I conclude that BT could not sue for breach of statutory duty.

90. Mr Latimer submitted that this could not be right because the value of BT's equipment was such that a criminal sanction was grossly insufficient. However, this submission fails to take account of the fact that BT has its rights as owner of the apparatus. Mr Latimer further submitted that the parallel liability of the Council to enforcement proceedings and civil liability under the Highways Act 1980 supported his position. I accept Mr Keyser's submission that in view of the special legislative history set out in the *Goodes* case these parallel duties do not assist BT in a different context. Accordingly, if there was a breach of statutory duty, in my judgment it would not sound in damages.

91. If there was a breach of statutory duty it lay in failing to give adequate notice to BT of the nature of the works which the Council proposed to undertake. I will deal with the amount of damages below. However I should note at this point that if BT succeeded on liability on this basis the damages would not be the costs of re-levelling the boxes, since I have held that the Council was entitled to throw that loss on to BT: the measure of damage would be the extent to which, if at all, the costs of re-levelling were increased by lack of notice.

92. I turn to the defence of statutory authority. Mr Keyser QC cited *Geddis v Proprietors of the Bann Reservoir* (1878) 3 App. Cas. 430 at 438 (Lord Hatherley LC) and 455-6 (Lord Blackburn). He also referred to *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 K.B. 284 (especially the dictum of Jenkins LJ at 309), *Allen v Gulf Oil Refining Ltd* [1981] A.C. 1001 and *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 A.C. 509. These cases establish that if an act which causes damage is done under statutory powers, the doer of the act will be liable only if the statute provides for compensation, or if the act is done negligently. The *Thames* case shows that there is no provision for compensation. In my judgment, therefore, this cause of action adds nothing to the claim in negligence, which I will deal with below.

93. In my judgment the defence of consent must fail. The Council knew that BT did not permit the Council to raise its boxes without execution of a £1 agreement. The Council decided to go ahead and lay a layer of tarmac over BT's boxes because its officers believed that it was entitled to do so. I do not accept that any officer of the Council believed that BT agreed to this course. The Council did it because of the belief that it had power to do so, not because of any belief that BT consented. If the Council was right it was justified. If the Council was wrong, then it was unjustified in what it did.

94. I will deal with contributory negligence below.

Negligence

95. As a threshold objection Mr Keyser QC took the point that there had been in this case no physical damage to BT's frames and covers; and therefore any

duty of care – absent a special relationship of proximity – could not have been broken, since absent such a special relationship there is normally no duty to avoid pure economic loss. I reject this argument. Tarmac has adhesive qualities. Mr Morgan said that it would be removed from the covers by the use of wire brushes and solvents. As a matter of first impression, that is physical damage and not pure economic loss. The test between physical damage and pure economic loss cannot be whether the damage is permanent, since many kinds of damage are remediable; as I see it the question is whether there has been some alteration in the physical state of the thing alleged to have suffered damage. In *Blue Circle Industries v Ministry of Defence* [1999] Ch 289 contamination with plutonium was held to be physical damage for the purposes of a claim for breach of statutory duty under section 7(1)(a) of the Nuclear Installations Act 1965. If an item of clothing was stained by ink or paint, in my judgment that would be physical damage and not pure economic loss; and this would be the case whether the ink or paint could be removed by cleaning or not.

96. In this case the physical condition of the frames and covers had been changed. They were not merely buried under tarmac, but left there for the tarmac to cool and set. In my judgment the physical condition of the covers had been altered by the adhesion of tarmac. It follows that there was physical damage. The application of the tarmac to the BT covers was therefore in my judgment physical damage and within the scope of a duty of care without any issue as to special proximity. The physical damage did not consist of the change in the level of the road surface, nor of the consequent need, as I have held it, for BT to re-level its frame and covers. The damage consisted of the need to clean or replace the frame and covers.

97. That brings me to the question whether the Council was in breach of a duty of care to avoid physical damage. I answer this question in the negative. The Council was under a statutory duty to maintain the highway. The Council was not authorised to re-level BT's frame and covers, because it did not execute the £1 agreement, which BT was not entitled to require it to execute. The Council was not obliged to pay BT's costs of re-levelling the frames and covers, in advance or at all. In the circumstances it carried out the maintenance in the normal way, namely by covering over the BT boxes. While there would have been, as I have held, some physical damage, it was the minimum possible, and, on the evidence, remediable. The Council gave reasonably prompt s 81 notices to BT. The fact that BT discovered that the boxes had been covered in tarmac piecemeal by its own inspections and did not action two of the three notices is not the Council's fault.

98. It was suggested that the Council could have applied some protective layer between the covers and the tarmac. Mr Williams and Mr Morgan said that such a layer was never applied, and would lead to a dangerous lack of adhesion of the tarmac if it was. I found this evidence convincing.

99. I find that the Council carried out their resurfacing works by using the only method which BT had left open, and that they did so in such a manner as to minimise the loss.

100. In the circumstances I find that there was no negligence on the part of the Council.

101. It follows that the defence of statutory authority is also made out.

102. If I am wrong and the Council was negligent, the damage consists of the costs of cleaning or replacing the frame and covers only.

103. If I had found the Council liable in negligence I would have rejected the defence of contributory negligence. The Council devised its own response to BT's change of policy. BT did not mislead the Council in any way. If the Council exceeded the bounds of its statutory authority then it did so of its own free will. What is more, the Council did not give BT the notice under section 83 which it intended to give. In my judgment BT was not negligent.

Conversion and Trespass to Goods

104. Mr Latimer submitted that these causes of action must be made out on any view, since NRSWA does not purport to amend or exclude the Torts (Interference with Goods) Act 1997. He also submitted that

"(there is no material difference between (a) touching the frames and covers without the Claimant's permission and (b) detaining or denying access to them beneath a layer of tarmac)."

105. Mr Latimer submits, in effect, that it would be a tort for any of the Council's employees to touch a BT cover or frame without BT's permission. This ignores the facts that

(1) BT's covers and frames are in the highway; and

(2) The Council is the authority which is under a statutory duty to ensure that the highway is safe.

106. In my judgment the defence of statutory authority applies to these causes of action as well as to the claims for breach of statutory duty and negligence.

107. In *Transco* the defendant's employee who turned off the gas had no authority, let alone duty, to do so. His job was to do work to the water system, not interrupt the gas supply. The defendant was therefore liable. In this case the Council was under a duty to maintain the highway. In the absence of cooperation from BT the Council did so in the usual way. In my judgment the Council is not liable.

108. Mr Latimer submitted that NRSWA did not abolish property rights. I agree. I do not regard either the Highways Act 1980 or NRSWA as abolishing property rights. However where BT's property is in a highway, and the Council has the duty and powers to carry out works, the defence of statutory authority may operate to diminish BT's enjoyment of its property rights. If BT's property rights override the Council's duty to maintain the highway then that would give BT, and all other undertakers maintaining apparatus in a

highway an absolute power to veto road works. I do not see how such a power can coexist with the Council's duty to maintain.

109. Mr Latimer submitted that it would be wrong if BT and other undertakers had to prove negligence against those who sever their cables in the course of street works. I do not see that this would be unfair. The existence of pipes and cables is well known, and it is for those undertaking works to take care to avoid damage. Any street works authority or utility which severed a cable or pipe would bear an evidential burden to show that there was not negligence, and I think that it would not be easy to discharge that burden.

110. My conclusion is that the claims in conversion and trespass to goods fail. If, however, I am wrong in my conclusion that the Council was not negligent, the Council would be liable in conversion and trespass to goods as well as in negligence, since in that case the defence of statutory authority would not be made out.

Quantum

111. In view of my findings on liability, the issue of quantum does not arise. However this is a matter which may well go further, and I will therefore deal briefly with quantum in order to avoid the possible expense of a remission.

112. In the face of criticism from Mr Keyser QC of the quality of the evidence in relation to quantum, Mr Latimer submitted that if I was not satisfied with the evidence I should direct an assessment of damages. While I accept that I have the power to do so, in my judgment I should not exercise that power. This case was listed for a trial of the whole claim, that is to say liability and quantum, and it was for the parties to produce such evidence as they required for the disposal of those issues. It would be unfair on the Council to allow BT a second chance to produce quantum evidence, when I have not been given any excuse or explanation for the present state of the evidence; it would also be unfair on other litigants who are waiting for hearing dates. While the issues of liability may well have an importance far greater than the amounts at stake suggest, the quantum issues are specific to the particular amounts claimed, and the sums involved are small. I do not think that a separate quantum hearing would be proportionate.

113. Mr Keyser QC submitted that if the quantum evidence was inadequate I should simply award nominal damages. However in my judgment the proper general approach if I am satisfied that a loss has been suffered, but find it hard to determine the amount because of the inadequacy of the evidence, is to award substantial damages, but on a conservative basis, so that I can be confident that I am not compelling the Council to overcompensate BT: see *Latimer v Carney* [2006] EWCA Civ 1417, [2006] 50 EG 86 at paragraphs [26] to [29], [40] to [44] and [49] to [53].

114. As I have indicated, BT claims amounts paid to Wrekin Contractors together with 16.43% in respect of "profit and overheads". In opening Mr Latimer told me that BT had established its right to make this claim in a test case in the High Court. In closing he referred me to, among other authorities, *British*

Telecommunications plc v Geraghty & Miller International plc (unreported, 29 July 2004), a decision of His Honour Christopher McGonigal sitting in the Leeds Mercantile Court. In that case, in a judgment of 187 pages, and after hearing expert accountancy evidence, the learned judge at paragraphs 17.4 to 17.5 summarised his conclusions as to the uplift for administrative expenses to be applied to contract costs for work to remedy negligent damage to BT's apparatus. He had identified a number of specific sums which he held were properly attributed to the repair of negligent damage, for example, £112,008 for planning, £3,262 for computing and so on. The total was £168,437, which was 16.43% of the total of contract works costs in 1998/9. Accordingly he allowed 16.43% as a mark up on the costs of the works carried out to remedy the damage caused by the defendant.

115. That case, like the earlier cases referred to in paragraph 1 of the judgment (*BT v Bell Cablemedia (Leeds) Limited* (19 September 2000) and *BT v Cable & Wireless* (13 May 2003) was a test case to establish principles. It would not as a matter of evidence establish figures for succeeding years, because in each year the figures would be likely to vary. It would obviously be inappropriate to fight every case in the amount of detail that was gone into in that case. However, it cannot be right that not merely the principles applied in that case, but also the figures and calculations, should be applied without qualification in every other case, especially because the figures in that case related to an incident in January 1999, whereas the present case relates to December 2002, nearly 4 years later.

116. In the *Geraghty & Miller* case, the judge said the following:

> "3.4.4 In my judgment the correct approach is that encapsulated in the conclusion of Judge Hart QC in BT(NI) v Morrow as set out and adopted by Nicholson LJ in BT(NI) v Sinton, namely that:
>
> "a plaintiff is entitled to recover such overheads as the court accepts were caused by repair work provided that he establishes that the amounts claimed for overheads have been reasonably and properly calculated"
>
> provided one understands what is meant by "caused by repair work[6]."
>
> 3.4.5 The issues for a court faced with a claim for overheads are therefore:-
>
> (a) what overheads were caused by the repair work; and
>
> (b) have the overheads caused by the repair work been reasonably and properly calculated?
>
> 3.4.6 Issue (b) is a matter which depends on the evidence. Normally overheads are claimed as a percentage markup and the court will need to be satisfied in relation to each sum that makes up that markup that

[6] In paragraph 3.4.7 the judge indicated that an overhead is caused by repair work when a particular resource with a particular cost is used to repair damage instead of in BT's normal business activities.

(a) such sum relates to an overhead cost that is cause by the repair work; and

(b) if it does, that it has been correctly calculated."

117. I am satisfied that BT must have suffered some loss in terms of administrative time, but I have no evidence to enable me to decide what it was. In those circumstances my choice lies between rejecting the overheads claim in its entirety and making a conservative allowance. Since BT was a party to the *Geraghty & Miller* case the lack of brief evidence to deal with the issues identified in the passage which I have quoted is striking. However, in my view the just course would be to make a conservative allowance. In all the circumstances I would have allowed 7.5%. In arriving at this figure I am taking into account the uncertainty as to whether overheads have already been taken into account. This arose from the evidence of Mr Unwin in cross-examination where he said in relation to page [1/296] that the rate of £37.51 included overheads.

118. I turn to the costs of the works themselves. Where works are carried out by a constructor one would normally expect the following documents to have come into existence:

(1) some form of quotation or tender;

(2) an order;

(3) an invoice;

(4) some document evidencing payment.

If the works were going to take any significant period of time there might also be documents relating to stage payments.

119. I will describe the documents which are in evidence in this case by reference to Ants Hill. They are BT's documents claiming works costs from the Council [1/294], with annexures, a BT document signing off work [1/305], a method statement [1/341] and the documents at [1/343] and [1/346]. There is no document at all emanating from the contractors.

120. The limitations of the documents were explored by Mr Keyser QC in cross-examination of Mr Unwin, who, except where otherwise stated, agreed with the following propositions:

(1) the document at [1/294] stated a claim of over £49,000, though BT only claimed £5,353.51 plus overheads. (I comment that there was no breakdown to explain how the smaller figure was calculated from the total). This point applied to Ants Hill only: in relation to Gelli Gatti and Forest Lodge the equivalent documents related solely to works covered by the BT claims;

(2) Page [1/295] stated that labour rates were attached; the rates were at page [1/296]. Some of the rates were for BT employees, eg grades

Technical Officer C3 and Project Engineer D1. Others of them presumably were for Wrekin employees. There was no indication in the document as to which were BT rates and which were contractor rates. There was no schedule of hours worked.

(3) Pages [1/1343-4] described the work done. They used what Mr Unwin accepted was a "catch all" expression "Raise/Renew/Lower" for the work done to the frames and covers. He accepted that this was a "catch all" expression because no frames and covers had to be lowered, and that there was no indication as to whether the frames and covers had to be repositioned, or replaced with new covers. In relation to the instruction for Gelli Gatti [1/335] he also indicated that he could not tell whether new boxes were supplied and if so what they cost.

(4) Mr Unwin accepted that if a box was reusable it would be reused. However, he also said that where a box had been covered he took the view that it should be replaced. This was based on the fact that excavation might damage the box (or it might already be damaged) so that careful excavation would be wasted. He had particularly in mind an experience of a box in Mid-Wales where there had been difficulty in excavating it. There was no indication how long this box had been covered.

(5) Later in his evidence Mr Unwin pointed out that breaking out a BT frame might cause a hairline crack. This by its definition could not be seen. The prudent course would therefore always to replace a frame which had been buried, because unlike a frame left uncovered there would always be uncertainty as to whether the frame had been compromised during the process of breaking out.

(6) Mr Unwin pointed out that BT, coming after the Council works, would not have been in the same position as the Council in that the Council could have removed the tarmac while it was hot, which BT could not do.

(7) In re-examination Mr Unwin said that labour was usually more expensive than parts.

121. Mr Morgan was asked in cross-examination about two of the Wrekin costings as recorded by BT. He thought page [1/325] was high for labour only and would need a detailed breakdown (which was not available) to express a firm view. His view was that it was "quite possible" that the figure in [1/305] was reasonable if it included the work and all materials.

122. Although the evidence is sparse I find as a fact that BT replaced all the frames and covers which were buried. I do so because Mr Unwin, whom I accept as an honest witness, said that that is what he would have done.

123. In my judgment this was reasonable in all the circumstances. I am assessing damages on the footing that the Council was not entitled to bury the BT boxes under tarmac. In my judgment from BT's point of view it was not

unreasonable to take the view that the risk of hairline cracks outweighed the possible savings from reusing the existing frames and covers. That is because they were not coming to exposed frames, nor to frames with hot tarmac which could be brushed away, but to frames which had been buried under the roadway for at least weeks, so that there was a risk that the work of excavation would damage the frames.

124. If the proper measure of damage is the cost of remedial works, then the table set out above would state the claim, with the recalculation of the claim for profit and overheads. That, however, is subject to this point, which is that in relation to Ants Hill the sum claimed is a fraction of a larger sum in circumstances where the basis for the apportionment is not in evidence. In that case in my judgment it is appropriate for me to apply a discount in order to arrive at a fair figure for compensation. I assess the discount as 20%. I therefore conclude that the amounts which I should have found as the costs of the works, if I had found for BT on liability, are as follows: -

Claim No	Location	Amount of Claim	
8CF02149	A484 between Woodlands and Gelli Gatti	Wrekin charges	£6,972.17
		Profit & overheads (7.5%)	£552.91
		Total excluding interest	£7,495.08
8CF02155	A4066, Antshill, Laugharne	Wrekin charges	£5,353.51
		Profit & overheads (7.5%)	£401.51
		Subtotal	£5,755.02
		Discount by 20%	£4,604.02
		Total excluding interest	£4,604.02
8CF02156	A484 between Forest Lodge and Cenarth Bridge	Wrekin charges	£3,562.92
		Profit & overheads (7.5%)	£267.22
		Total excluding interest	£3,830.14
Total		£15,929.24	

125. This is my finding as to the total cost to BT of re-levelling the boxes.

126. Damages will only be awarded to BT if my findings on liability are wrong and paragraphs 127 to 131 are based upon the assumption that those findings are wrong.

127. If I am wrong about the underlying dispute, and BT was entitled to charge the Council for the entire cost of re-levelling the boxes, then £15,929.24 is the sum to which BT would be entitled.

128. If I am right about the underlying dispute, then BT could not charge the Council with the labour costs of re-levelling the boxes. However, since I have held that BT reasonably replaced the buried frames, then BT would be entitled

to recover the cost of replacing the frames, since (on the basis that the Council is liable in tort) the Council could have exposed them at the end of the works and required BT to raise them. In that case on the evidence BT would not have had to replace the frames, since the risk of impact with the frames on BT excavation would have been eliminated.

129. The evidence of Mr Unwin in re-examination was that labour was generally more expensive than parts. On this basis, I would be limited to awarding the cost of the parts. Bearing in mind that the lack of evidence is BT's fault and that I must be fair to the Council I would do my best by awarding 40% of the total as the cost of labour.

130. That would amount to £6,371.70.

131. Subject to submissions I would of course have awarded statutory interest on the amounts which I have set out above.

Conclusion

132. In view of my findings above I dismiss the claim.

James Thom QC

Recorder