

Neutral Citation Number [2003] EWCA Civ 1524  
**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM QUEEN'S BENCH DIVISION**  
**The Hon Mr Justice Gray**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 4<sup>th</sup> November 2003

**Before:**

**LORD PHILLIPS OF WORTH MATRAVERS, MR**  
**LORD JUSTICE KENNEDY**  
and  
**LORD JUSTICE JACOB**

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**Between:**

<b>TRANSCO plc</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>LEICESTERSHIRE COUNTY COUNCIL</b>	<b><u>Respondent</u></b>

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**Javan Herberg** (instructed by **Osborne Clarke, Bristol**) for the Appellant  
**James Ramsden** (instructed by **County Solicitor, Leicestershire County Council**) for the  
Respondent

Hearing date: 15<sup>th</sup> October 2003  
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**JUDGMENT**

## Lord Phillips MR:

1. No-one who drives through London, or any of our other towns and cities can fail to be aware of the frequency with which one's progress is impeded by road works, caused by public utilities digging up the road to gain access to their plant beneath. Statutory provisions have been introduced to encourage those who carry out road works to complete them with reasonable dispatch. Under those provisions charges fall due if road works are not completed within a reasonable time. This appeal raises the question of precisely how those provisions work. We are told that many millions of pounds turn upon the answer to that question.
2. In these proceedings a local highway authority, Leicestershire County Council ("LCC") seeks to recover from a statutory undertaker ("Transco") charges alleged to have become due in respect of the late completion of under-street works to gas pipes on six separate occasions. The total amount claimed is £111,500. The present appeal relates to the findings of Gray J in a judgment delivered on 7 April 2003, [2003] EWHC 709 (QB), on two preliminary issues. Those issues are as to the construction of the relevant Regulations. It follows that the facts of the six individual cases are immaterial, save insofar as they provide practical illustrations of the problems raised by these issues of construction.
3. In order to understand the nature of the preliminary issues, it is necessary to set out the relevant Regulations and place them in their statutory context.

## The Statutory Provisions

4. The statutory provisions are long and complex. At times I have been inclined to wonder whether they are the product of a demented computer. They are to be found in the New Roads and Street Works Act 1991 as amended by the Transport Act 2000 ("the 1991 Act") and the Street Works (Charges for Unreasonably Prolonged Occupation of the Highway) (England) Regulations 2001 ("the Regulations") made pursuant to that Act.

## The 1991 Act: the crucial provisions

5. The following provisions of the 1991 Act bear directly on the issues that we have to resolve:

### **"S.74 Charge for the occupation of the highway where works unreasonably prolonged**

(1). The Secretary of State may make provision by regulations requiring an undertaker executing street works in a maintainable highway to pay a charge to the highway authority where-

- a. the duration of the works exceeds such a period as may be prescribed, and
- b. the works are not completed within a reasonable period.”

The Act goes on to make detailed provisions for regulations governing the determination of a reasonable period.

“(5B) The regulations may make provision for the determination of the duration of the works for the purposes of the regulations.

(5C) And they may, in particular, make provision for works to be treated as beginning or ending on the giving of, or as stated in, a notice given by the undertaker to the highway authority, in the prescribed manner, in accordance with a requirement imposed by the regulations.

(7B) The regulations may create in respect of any failure to give a notice required by the regulations a criminal offence triable summarily and punishable with a fine not exceeding level 3 on the standard scale.”

Level 3 on the standard scale is £1,000.

### **The 1991 Act: other relevant provisions**

6. The following provisions of the 1991 Act are of assistance in understanding the statutory scheme: S.55 requires an undertaker to give at least 7 days notice (or such other notice as may be prescribed) of the commencement of street works involving breaking up a street.

S.66 requires an undertaker to complete such road works:

‘with all such dispatch as is reasonably practicable.’ Failure so to do is an offence punishable with a fine not exceeding level 3.

S.70 provides:

“(1) It is the duty of the undertaker by whom street works are executed to reinstate the street.

(2) He shall begin the reinstatement as soon after the completion of any part of the street works as is reasonably practicable and shall carry on and complete the reinstatement with all such dispatch as is reasonably practicable.

(3) He shall before the end of the next working day after the day on which the reinstatement is completed inform the street authority that he has completed the reinstatement of the street, stating whether the reinstatement is permanent or interim.

(4) If it is interim, he shall complete the permanent reinstatement of the street as soon as reasonably practicable and in any event within six months (or other such period as may be prescribed) from the date on which the interim reinstatement was completed; and he shall notify the street authority when he has done so.”

S.72(3) provides:

“The street authority may by notice require an undertaker who has failed to comply with his duties under this Part with respect to reinstatement to carry out the necessary remedial works within such period of not less than 7 working days as may be specified in the notice”

## **The Regulations**

7. The Regulations which give rise to the preliminary issues are as follows:

### **“4 Notices**

(1) An undertaker executing street works (other than minor works) in a highway to which these Regulations apply shall give the highway authority notice in writing of the beginning of those works specifying by reference to the National Street Gazetteer the street or streets in which the works are to be carried out (“actual start of works notice”) not later than the end of the day following the day on which the works begin.

(3) When an undertaker has completed interim reinstatement of a highway and has removed all remaining spoil and unused materials together with all signing, lighting and guarding, and has returned the highway fully to public use he shall give the highway authority notice thereof in writing (“works clear notice”) not later than the end of the day following the day on which the highway was returned fully to public use.

(4) When an undertaker has completed permanent reinstatement of a highway and has removed all remaining spoil and unused materials together with all signing, lighting and guarding, and has returned the highway fully to public use he shall give the highway authority notice thereof in writing (“works closed notice”) not later than the end of the day

following the day on which the highway was returned fully to public use

## **5 Prescribed charges and prescribed periods**

(1) A highway authority shall, subject to paragraph (8), require an undertaker to pay the prescribed charge where the duration of street works carried out by the undertaker in a maintainable highway to which these Regulations apply exceeds the prescribed period or a reasonable period, whichever is the longer.

(3) The duration of street works includes any period during which an undertaker is carrying out remedial works required by an authority.

5(4) sets out a scale of daily charges that an undertaker will be required to pay where the duration of street works exceeds the longer of (1) the prescribed period or (2) a reasonable period. The maximum on this scale is £2,000 per day. The Regulation continues:

“(5) Works shall be treated as beginning, for the purposes of paragraphs (4) and (7), on the date given in the actual start of works notice or the first daily whereabouts notice, as the case may be.

(6) Works shall be deemed to continue for the purposes of paragraph (3) until a works clear notice or a works closed notice (as the case may be) has been given in respect of those works.

(7) The prescribed period shall be 3 days starting on the day on which the works begin.

(8) A highway authority may reduce the amount, or waive payment, of a charge in any particular case, in such classes of case as they may decide, or in all cases other than a particular case or such class of case as they may decide.

(9) Charges may only be made in respect of works of which notification has been given by notice pursuant to the Act relating to such works that they are to be executed in a street or streets identified as that street or those streets are identified in the National Street Gazetteer.

(10) Charges are only payable in respect of street works where the highway authority have given the undertaker, not later than six months after receipt of a works clear notice or a works closed notice (whichever is the earlier), an account in writing setting out the charge payable.”

8. Regulation 9 provides:

“An undertaker who without reasonable cause fails to give any notice required by these Regulations commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

## **The Code**

9. Ss.56, 59 and 60 of the 1991 Act each make provision for the Secretary of State to approve a Code for specified purposes. The purpose under s.56 is to give guidance in relation to the timing of street works so as to avoid disruption. The purpose under s.59 is to give guidance in relation to the co-ordination of street works. The purpose under s.60 is to give guidance as to co-operation of undertakers in the manner in which street works are carried out.

10. Pursuant to those sections there was published in April 2001 a ‘Code of Practice for the Co-ordination of Street Works and Works for Road Purposes and Related Matters’. Some parts of this purport to explain the manner in which the 1991 Act and the Regulations operate. The following passages are material:

### **“7.7 Reinstatements**

7.7.1. Under section 70(3) of the Act an undertaker must inform the street authority that he had completed reinstatement before the end of the next working day after the reinstatement was completed. This notification may be done electronically using the data set described in Appendix E.

7.7.2 The notification referred to in paragraph 7.7.1 must be followed up by the registration of the reinstatement (which must include the dimensions of the reinstated areas) within 7 working days.

7.7.3 It follows that, where the dimensions of the reinstatement are known before the end of the next working day after the reinstatement was completed, the registration may be done immediately, fulfilling the requirements of both paragraphs 7.7.1 and 7.7.2 in the same notification.

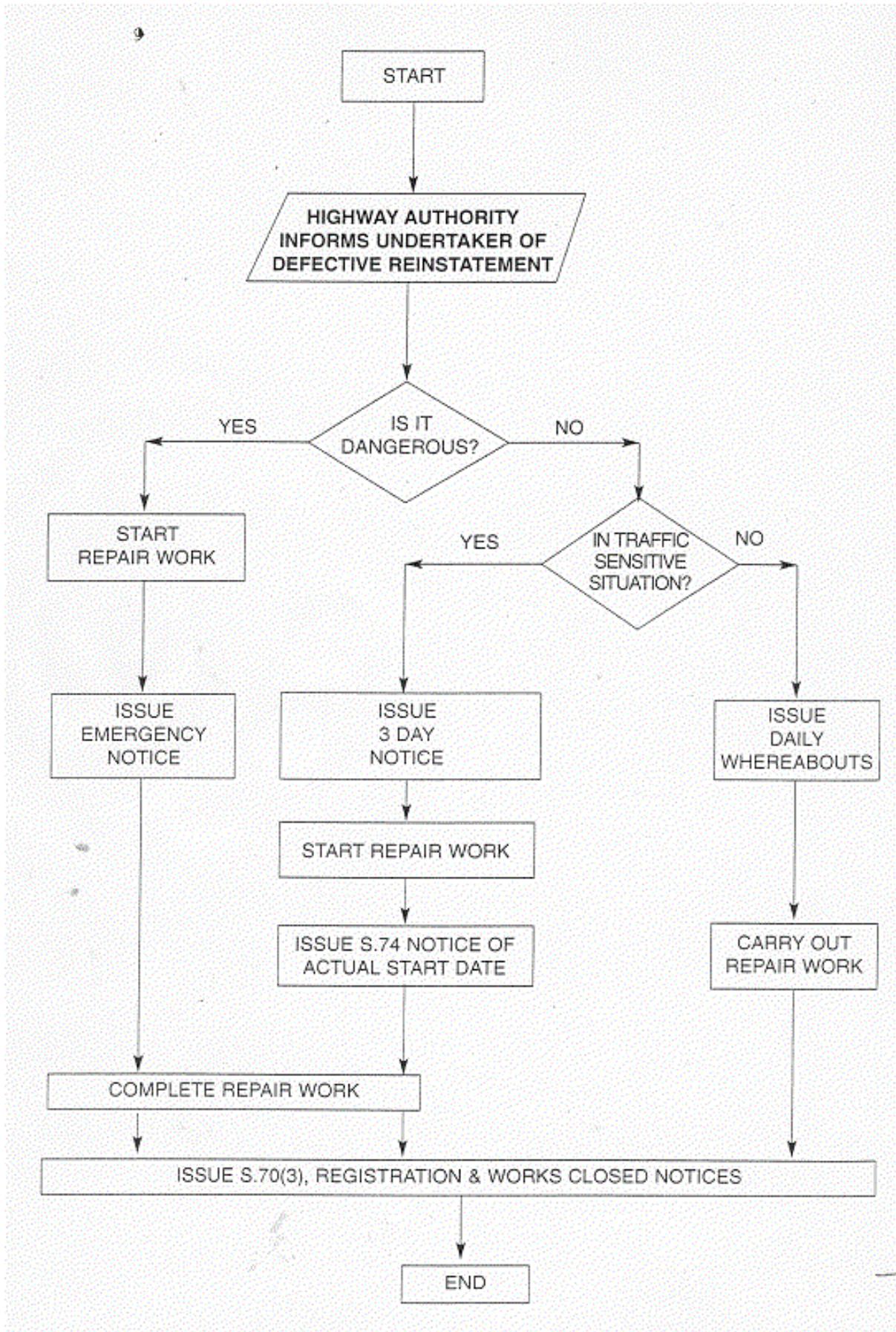
### **Defective reinstatement**

7.7.6 Under section 72 of the Act, a street authority has certain powers in relation to defective reinstatements, i.e. those not meeting the requirements detailed in the Code of Practice entitled “Specification for the Reinstatement of Openings in Highways” and the Street

Works (Reinstatement) Regulations 1992 S.I. 1992 No.  
1689.

**Procedure**

- 7.7.7 The procedure for defective reinstatements can be found in the Inspections Code of Practice.
- 7.7.8 The flow chart (Figure 2) on the following page illustrates the procedure.”



## **8.2 Duration of Works**

8.2.1 The duration of a works is measured from the date when any street works activity starts on any site in the works until the date when all street works activities are completed on all sites. Typically, the first activity will be setting out signing, lighting and guarding. It should be noted that works have not finished until all spoil, unused imported materials and any unused stores are cleared from all sites, and all signing, lighting and guarding is removed.

### **Interrupted Works**

8.2.2 If permanent reinstatement cannot be completed on first pass, then the works will be regarded as two separate works for the purposes of section 74 charging. The first is from the start of works until the completion of interim reinstatement and the clearance of all sites. The second is from the start of permanent reinstatement until its completion and the closure of all sites.

8.2.3 If remedial works are required at any site, then they will be regarded as new works for the purposes of section 74 charging, but the level of charges will relate to the definition of the original works, not to the size of the remedial works.”

## **The Facts**

11. Little time was devoted in argument to the facts giving rise to the preliminary issues, as they are not strictly relevant. In essence they are as follows.
12. LCC have raised charges against Transco in relation to six separate sets of road works. In one case Transco contend that they never even commenced to carry out the works. In the other 5 cases they complied with the requirements of Regulation 4(1) as to giving of notices in relation to the commencement of the works. They contend that they completed the works within the ‘reasonable period’ allowed by regulation 5(1). They failed, however, to give any ‘works clear notice’ or ‘works closed notice’, as required by Regulations 4(3) and 4(4). Some days after completion of the works in each case they gave a registration notice in accordance with the requirement of 7.7.2 of the Code.
13. In each case LCC has treated the registration notice as a “works closed notice”. They contend that, by reason of Regulation 5(6), the works are irrebuttably deemed to have continued until the notices in question were given. On this basis they have levied the charges for failure to complete the works within the “reasonable periods” allowed.

14. Transco deny that Regulation 5(6) has the effect alleged. They contend that it is open to them to demonstrate that they completed the works within the “reasonable periods” allowed, and on this basis, to avoid liability to the charges. Indeed, they contend that LCC is well aware that they completed the works within these “reasonable periods”.

### The Preliminary Issues

15. It was ordered by Master Eyre by consent that there should be a trial of two preliminary issues. Those issues are:
- (a) whether the deeming provision contained in Regulation 5(6) has any application to works which are not remedial in nature; and
  - (b) whether even if (contrary to the above) Regulation 5(6) is applicable, the deeming effect of the provision is conclusive or rebuttable.

### The approach to construction

16. So far as the first issue is concerned, the parties have adopted the common approach of interpreting Regulation 5(6) having regard to (i) the wording actually used and (ii) the desirability of giving that wording a sensible meaning. I consider that this is the appropriate approach.
17. So far as the second issue is concerned, the parties are agreed that it is not possible to decide from the wording of Regulation 5(5) and 5(6) whether the presumptions imposed are rebuttable or irrebuttable. The choice between the two depends upon which better accords with the overall scheme. While Mr Herberg for Transco referred us to certain authorities, which he suggested were relevant to this issue, I did not find them of any assistance.

### The First Issue

18. Mr Herberg drew attention to the “stark contrast” between Regulation 5(6) which is stated to apply “for the purposes of paragraph (3)” and the wording of the provision dealing with the commencement of works, namely Regulation 5(5), which is stated to apply “for the purposes of paragraphs (4) and (7)”. He submitted that while paragraph 5(5) deemed all works, whether initial works, reinstatement works or remedial works, to begin on the date of the “start of works notice”, paragraph 5(6) only operated where remedial works were being carried out.
19. On this basis Mr Herberg advanced two alternative meanings for paragraph 5(6). His primary case was that paragraph 5(6) in effect provided that, *where a notice to carry out remedial works had been given under Section 72(3) of the 1991 Act*, the prior

works were deemed to have been completed when the “works clear notice” or the “works closed notice” had been given.

20. His explanation for this interpretation was as follows. Paragraph 5(3) addresses the situation where reinstatement works are found to be unsatisfactory so that a notice to carry out remedial works has to be given under section 72(3). Paragraph 5(3) provides that, in those circumstances, the time taken in carrying out the remedial works has to be added to the time already taken on the prior works when considering whether, and to what extent, the “reasonable period” has been exceeded. Paragraph 5(6) is needed in order to make it plain that time between the conclusion of the prior works and the commencement of the remedial works is not to count.
21. I was not persuaded by this reasoning for the following reasons. (1) Paragraph 5(3) itself makes it plain that the addition to the overall duration of the works is only in relation to the period *‘during which an undertaker is carrying out remedial works’*. There is no need for an additional paragraph to make this clear. (2) The wording of paragraph 5(6) is not really apt if its object is to provide that time between conclusion of the prior works and the commencement of remedial works is not to count. (3) The reference to a “works clear notice” in paragraph 5(6) is not appropriate because, as I understand the position, a Section 72(3) notice will not be given until an undertaker has purported to have completed *permanent* reinstatement and given a “works closed notice”.
22. Mr Herberg’s alternative submission was that paragraph 5(6) applies, and applies only, to the remedial work itself that has been ordered under Section 72(3). This submission was made in response to a suggestion from the Court that this would fill a gap in the notice provisions, in that there is no other provision for the giving of a notice on the completion of remedial works. There are, however, problems with Mr Herberg’s alternative submission. If all that had been intended was a requirement to give a notice on completion of remedial works, this could have been simply stated. But the paragraph includes a ‘deeming’ provision which, on this construction, does not apply to any other completion notice. Furthermore, although counsel submitted that there might be circumstances in which a ‘works clear notice’ would be given in relation to remedial works, it seems to me that this would be most unlikely in practice. Certainly the flow chart that illustrates the relevant part of the Code makes no provision for this.
23. The approach of attempting to make perfect sense of paragraph 5(6) and paragraph 5(3) is one that I approach with reservation. This is because the draftsmanship of the Regulations is so appalling. I have included in the paragraphs of Regulation 5 set out above 5(9) and 5(10) simply to demonstrate this fact. 5(9) is gibberish. Nor is 5(10) felicitous. The qualification “whichever is the earlier” makes little sense when applied to two notices which must, inevitably, be given in the same sequence. Accordingly, my approach to the question of construction is to seek a meaning which makes sense and which can, at least, be reconciled with the words used. This approach leads to an obvious solution.

24. The Regulations are made pursuant to Section 74. Section 74 is exclusively concerned with the imposition of charges where works are unreasonably prolonged. Section 74 (5C) provides, in particular, for the Regulations to make provision “for works to be treated as beginning or ending on the giving of ... a notice *given* by the undertaker to the highway authority, in the prescribed manner, *in accordance with a requirement imposed by the regulations.*” This leads me to conclude that, insofar as the Regulations impose obligations to give notices at the beginning or end of the works, the object of so doing is that the works should be “treated as” beginning and ending on the giving of those notices. So far as the notice to be given on commencement is concerned, Regulation 5(5) plainly achieves this. One then looks for a similar provision in relation to the notices to be given on completion of works. That, so it seems to me, is what the inept draftsman has intended to achieve by Regulation 5(6). He has muddied the waters by referring back to Regulation 5(3), but it seems to me that he has done so because this is dealing with “the duration of street works”, albeit in the context of including in that duration remedial works.
25. It would be a nonsense to restrict the deeming provision in Regulation 5(6) to works only where they are followed by a requirement to perform remedial works (Mr Herberg’s first alternative). Equally, it would be a nonsense to restrict the deeming provision to remedial works (Mr Herberg’s second alternative). My conclusion is that the deeming provision relates to all works. It relates to works ending in interim reinstatement, in respect of which a “works clear notice” has been given. It relates to works in respect of which a “works closed notice” has been given, whether these be works reinstated by the undertaker or remedial works effected pursuant to a notice under Section 72(3). Gray J. reached the same conclusion, having applied similar, if more concise, reasoning.

### **The second issue**

26. Is the deeming provision rebuttable or irrebuttable? Gray J. held that it is irrebuttable. In doing so, he accepted submissions that were repeated to us by Mr Ramsden for LCC. Mr Ramsden started by submitting that a primary object of the notice obligations in the Regulations was to facilitate the performance by Highway Authorities of their statutory obligation to co-ordinate street works. I do not accept that submission. It is true that Section 59 of the 1991 Act imposes a duty on street authorities to use their best endeavours to co-ordinate the execution of street works. It is also true that the Code, which purports to be dealing with co-ordination, gives guidance in relation to the operation of the provisions of sections 70 to 74 of the 1994 Act. But I have seen nothing to suggest that these sections have anything to do with co-ordination – indeed the Code makes the point that the notice provisions are inadequate for the purpose of co-ordination of works. It is possible that today, with the aid of modern computerisation, information supplied by way of notices under the Regulations is used for the purpose of co-ordination, but that is not the statutory purpose of those notices. At the end of the day, however, I do not think that it matters whether, as I believe, the notices are simply intended to facilitate the imposition of charges where execution of road works is dilatory or whether they also assist in co-ordination of such works. In either event it is obviously important that the notices are accurate.

27. This brings me to the next point made by Mr Ramsden. He submitted that the presumption that works begin and end when the notices are given is essential in order to ensure that notices are served promptly. If undertakers are permitted to avoid charges by proving that completion notices were given late, they will have insufficient incentive to ensure that notices are timeous. This submission proceeds on the assumption that the deeming provision is intended to impose a sanction against tardy giving of notices. I cannot accept this. Section 74 (7B) permits the Regulations to make it an offence to fail to give a notice required by the Regulations, the penalty for which is restricted to level 3. Regulation 9 does just this. It would be improper for the draftsman to have inserted other provisions designed to impose an additional sanction, particularly one on a vastly greater scale, for failure to give timeous notices.
28. Finally Mr Ramsden submitted that, if notices are not irrebuttable, an inordinate administrative burden will be placed on Highway Authorities. Instead of levying charges on the basis of the notices received, they will have to conduct factual enquiries into when works were actually completed, whenever an undertaker contends that his notice was not given timeously.
29. Once again I was not persuaded by this submission. Undertakers will commit a criminal offence if they do not give notices on time and this, it seems to me, should incline them to do so. Indeed, if they act honestly, they will have no motive to do otherwise. Whether the notices are irrebuttable or not, Highway Authorities will either have to trust the undertakers to act honestly, or they will have to carry out checks as to whether commencement notices are being given tardily, or completion notices prematurely. It seems to me that the system of notices is largely based on trust, for there is no other viable basis upon which the charges can be imposed. If undertakers can be trusted to act honestly when giving notices, it is hard to see why they cannot be trusted when they contend that they have overlooked giving a notice and provide particulars of when the works were completed. If a particular undertaker develops a track record for such conduct, the Highway Authority can enforce the criminal sanction and carry out checks on that individual undertaker.
30. For these reasons, I do not consider that LCC have made out a cogent case for giving the deeming provision irrebuttable effect. I now turn to the reasons for not doing so, which I consider compelling. In the first place, to do so is liable to result in undertakers being faced with disproportionate financial penalties for administrative oversights. The times when Transco actually finished the various works that are the subject of these proceedings do not seem to be in doubt. It is arguable that they failed to give end of works notices altogether. Certainly I understand that LCC contend that, in treating the registration notices as works closed notices, they have been making a concession pursuant to Regulation 5(8). I think that the sums they are claiming are still disproportionate. I do not accept Mr Ramsden's argument that the discretion conferred on Highway Authorities by Regulation 5(8) is the answer to the point that, if the deeming provision is irrebuttable, the result can be draconian.
31. The next point, and one made forcibly by Mr Herberg, is that, if the deeming provision is irrebuttable, this can lead to absurd results. If completion notices are

irrebuttable, the same must be true of start of work notices. Assume that an undertaker overlooks for seven days the giving of a start of work notice. It would be absurd if this irrebuttably entitled him to an extra seven days to disrupt the traffic without charge. Equally, we were told, and I can well believe, that on occasion undertakers give a works closed notice prematurely, not deliberately but because of a misunderstanding of the true position. Again it would seem very odd if this relieved them of the obligation to pay the charges that would otherwise be due.

32. Mr Ramsden sought to meet this argument by contending that a notice not given timeously was not a notice within the Regulations and could be disregarded. This cannot be right. If it were, there would be no need for any deeming provision, for the only notices to which it could apply would be those given when the works were in fact commenced or concluded.
33. For these reasons, I differ from the judge on the second issue. Works are deemed for purposes of charging to have been begun and concluded in accordance with notices that have been given, but it is open to both Highway Authorities and undertakers to prove that this was not in fact the case. Section 74 (5B) and (5C) of the 1991 Act contemplate a scheme under which notices will have to be given by undertakers and Highway Authorities will be entitled to charge on the basis of such notices. Such a scheme has been put in place. It seems to me that, in the vast majority of cases that scheme will operate without difficulty. Where, however, it can be shown that a notice was given early or late, the charges to be paid will reflect the reality and not a fiction.
34. Kennedy LJ and Jacobs LJ have reached a different conclusion to mine on the first issue. They share my conclusion on the second issue. In these circumstances, it seems to me that the first issue is of minimal, if any, significance. Under the decision of the majority there is no express ‘deeming’ provision in relation to a “works clear notice” or a “works closed notice” that relates to works other than remedial works. Nonetheless such notices are, in practice, likely to be treated as determining when works are completed unless there is evidence to rebut this presumption.
35. In the result, the appeal will be allowed and the finding of the judge on each of the preliminary issues will be reversed.

### **Lord Justice Kennedy**

36. As explained in the judgment of the Master of the Rolls there were two preliminary issues considered by the trial judge, who found in favour of the respondents in relation to both issues. The first issue was whether the deeming provision contained in Regulation 5(6) of the Street Works (Charges for Unreasonably Prolonged Occupation of the Highway) (England) Regulations 2001 (SI/1281) has any application to works which are not remedial in nature. In order to resolve that issue it seems to me to be necessary to look at the structure of part of the New Roads and Street Works Act 1991, and of the Regulations made thereunder, because that reveals the problem

which Parliament was considering and the way in which it considered that the problem should be resolved.

37. Part III of the 1991 Act deals with street works in England and Wales, and it begins by in section 48(3) defining street works in a way which clearly includes the sort of conventional street works activities upon which at the material times Transco were engaged. For a maintainable highway the Highway Authority is made the street authority (section 49) and for work other than emergency work a statutory undertaker such as Transco must give not less than 7 working days notice to the street authority (section 55). If he starts work without giving the requisite notice he commits an offence, and is liable on summary conviction to a fine not exceeding level 3 on the Standard Scale (section 55(5)). All of that, as Mr Ramsden for the respondents submits, is designed to enable the Street Authority to have notice of and to co-ordinate street works so as to minimise disruption. Section 66 requires an undertaker executing street works which involve breaking up or opening the street to carry on and complete the works with all such dispatch as is reasonably practicable. If he fails to do so he commits an offence and is, once again, liable on summary conviction to a fine not exceeding level three on the Standard Scale.
38. Sections 70 to 74 deal with reinstatement. The undertaker is required to reinstate as soon as is reasonably practicable, and by section 70(3) -

“He shall before the end of the next working day after the day on which the reinstatement is completed inform the Street Authority that he has completed the reinstatement of the street, stating whether the reinstatement is permanent or interim.”
39. If the reinstatement is interim the undertaker must, as required by section 70(4)-

“... complete the permanent reinstatement of the street as soon as reasonably practicable and in any event within six months (or such other period as may be prescribed) from the date on which the interim reinstatement was completed; and he shall notify the Street Authority when he has done so.”
40. Failure to comply with any provision of section 70 constitutes an offence for which the offender is liable to be dealt with in the same way as the other offences to which I have already referred (see section 70(6)).
41. If an undertaker is found not to have complied with his obligations in relation to reinstatement the Street Authority can by notice require him “to carry out the necessary remedial works within such period of not less than 7 working days as may be specified in the notice” (section 72(3)).
42. The Statute then moves on to deal in sections 74 to 78 with charges, fees and contributions payable by undertakers, but for present purposes only section 74 is

material. Subsection (1) enables the Secretary of State to make provision by regulations requiring an undertaker executing street works in a maintainable highway to pay a charge to the Highway Authority where -

“(a) the duration of the works exceeds such period as may be prescribed, and

(b) the works are not completed within a reasonable period.”

43. Prescribed means prescribed by the Secretary of State by regulations (see section 104(1), and by section 74(2) -

“A reasonable period means such period as is agreed by the authority and the undertaker to be reasonable or, in default of such agreement, is determined by arbitration to be reasonable, for completion of the works in question .....

44. Section 74 goes on to stipulate what may be covered by the Regulations, but I need not recite those sub sections because it is not suggested in the present case that the Regulations with which we are concerned, and which were made under section 74, were in any way *ultra vires*.

45. Those regulations are the 2001 Regulations to which I have already referred. Regulation 4 deals with notices and, as Mr Ramsden explained, it has to be read against a background of electronic communication. So far as material it provides –

“(1) An undertaker executing street works (other than minor works) in a highway ... shall give the Highway Authority notice in writing of the beginning of those works ... (“actual start of works notice”) not later than the end of the day following the day on which the works begin.

(2) An undertaker executing minor works in a highway ... shall give the Highway Authority a daily notice in writing of those works ... (“daily whereabouts notice”), the first such notice to be given not later than the end of the day before the day on which the works begin.

(3) When an undertaker has completed interim reinstatement of a highway and has removed all remaining spoil and unused material, together with lighting and guarding, and has returned the highway fully to public use he shall give the Highway Authority notice thereof in writing (“works clear notice”) not later than the day following the day on which the highway was returned fully to public use.

(4) When an undertaker has completed permanent reinstatement of a highway and has removed all remaining spoil and unused materials together with all signing, lighting and guarding, and

has returned the highway fully to public use he shall give the Highway Authority notice thereof in writing (“works closed notice”) not later than the end of the day following the day on which the highway was returned fully to public use.”

46. That brings me to Regulation 5 which deals with prescribed charges and prescribed periods. Paragraph (1) provides –

“A Highway Authority shall, subject to paragraph (8) require an undertaker to pay the prescribed charge where the duration of street works carried out by the undertaker in a maintainable highway to which these Regulations apply exceeds the prescribed period or a reasonable period, whichever is the longer.”

47. Paragraph (8) enables the Highway Authority in their discretion to reduce or waive the amount which would otherwise be payable.

48. Paragraph (2) deals with certain works to which paragraph (1) does not apply, and Regulation 5 continues -

“(3) The duration of street works includes any period during which an undertaker is carrying out remedial works required by an Authority pursuant to section 72(3) of the Act.”

49. The purpose of that paragraph seems to me to be plain. It is to ensure that for the purposes of paragraph (1) an undertaker does not obtain extra time by doing badly the planned street works to which the period originally prescribed or agreed as a reasonable period applied. He has to bring into the reckoning the time during which he “is carrying out remedial works”, but not of course the time before those works are required or begun.

50. Paragraph (4) sets out how the prescribed charge is to be calculated, on a daily basis. For present purposes the details are not material. Regulation 5 continues –

“(5) Works shall be treated as beginning, for the purposes of paragraphs (4) and (7), on the date given in the actual start of works notice or the first daily whereabouts notice, as the case may be.

(6) Works shall be deemed to continue for the purposes of paragraph (3) until a works clear notice or works closed notice (as the case may be) has been given in respect of those works.

(7) The prescribed period shall be 3 days starting on the day on which the works begin.”

51. It seems to me that where remedial works are required after the service by the undertaker of a works clear notice or a works closed notice, the undertaker would be obliged by Regulation 4(1) or (2) to serve either an actual start of works notice or a daily whereabouts notice when he began to execute the remedial works. Of course Regulation 5(5) applies to all works, not just remedial works, but Regulation 5(6), as it seems to me, is confined to remedial works, because the Highway Authority needs to know in respect of those works when they have come to an end, and the obligations in Regulation 4(3) and 4(4) only apply to interim and permanent reinstatement, not to remedial works. So, unlike the trial judge, I would resolve the first issue in favour of the appellants. The judge shared my view as to the proper construction and interpretation of Regulation 5(3), but considered that “works” in Regulation 5(6) “should be construed as applying to street works generally not withstanding the later reference to paragraph (3)”. That seems to me to be unacceptable because it is clear from the wording of paragraph (6) that it only exists to further the interpretation of paragraph (3).
52. Mr Ramsden submitted that Regulation 5(6) should be read as applying to street works of all kinds, not just remedial works, which to my mind can only be achieved by impermissibly deleting from the paragraph the words “for the purposes of paragraph (3)”. Mr Ramsden submits that such an interpretation is necessary to enable Highway Authorities effectively to enforce the obligations of statutory utilities to give notice at the proper time. But that fails to give proper weight to Regulation 9 which provides –
- “An undertaker who without reasonable cause fails to give any notice required by these Regulations commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”
53. We were told that the criminal sanction has not been used, and it was suggested to us that the maximum penalty is inadequate, but that is the sanction which Parliament has provided, and, as I have indicated, it echoes the sanctions provided in relation to other parts of the legislation.
54. Mr Ramsden also drew our attention to the second edition of the Code of Practice for the Co-ordination of Street Works and Works for Road Purposes and Related Matters, approved by the Secretary of State and published by the Department of Environment, Transport and the Regions in April 2001. Chapter 8 of the Code deals with section 74 of the 1991 Act, and at paragraph 8.2.3 the Code states that “if remedial works are required at any site then they will be regarded as new works for the purposes of section 74 charging ...”. Mr Ramsden told us that the practice is to follow that paragraph of the Code. If remedial works are required a wholly new period is agreed between the Highway Authority and the statutory undertaker as the “reasonable period” for completion of those remedial works, and only if that period is exceeded will a *prima facie* liability to over run charges be considered to arise. Remedial works are not included in the original duration of the works, nor are they added to the duration for the purposes of calculating any section 74 charge. In my judgment the wording of paragraph 8.2.3 and the practice as explained by Mr Ramsden are wrong in

law because they are based on a misreading of the statute and the Regulations. Regulation 5(3) in particular seems to me to have been overlooked.

55. On behalf of the respondents it was submitted that if we were to resolve the first issue in the way that I believe that it should be resolved that would undermine the statutory scheme because the incentive to give notice at the appropriate time would be weakened, and to a serious extent the burden on Highway Authorities would be increased. I did not find that submission persuasive. As I have already explained, the Highway Authorities already have a criminal sanction, and if they are not notified that works have been completed by the end of the prescribed period or the agreed reasonable period then Regulation 5(1) entitles them to call upon the statutory undertaker to pay the prescribed charge. If the works are remedial works the Highway Authority could also rely upon the wording of Regulation 5(6) which deems the works to continue until an appropriate notice is served, but, having regard to the nature of the statutory scheme, which is largely dependent on the provision of notices, it may be debatable whether the wording of Regulation 5(6) adds much to the inference which would arise from the absence of a notice in any event.
56. As to the second preliminary issue I agree with the Master of the Rolls that, for the reasons he has given, the presumption created by the words of Regulation 5(6) is rebuttable, and I do not wish to add anything in relation to that part of the appeal.

### **Lord Justice Jacob**

57. I am in complete agreement with the Master of the Rolls in relation to the second point and for the reasons he has given. I cannot see how the system could be practical if all types of notice (“actual start”, “works clear”, “works closed”) are anything other than prima facie evidence of the actual state of affairs. If that were not so the whole notice system would, or could be purely academic. The notices must be subject to reality checks, whether by the highway authority or the statutory undertaker. I think the draftsman, in his muddled way, assumed that to be so – hence his total failure to make any express provision for erroneous notices to be put right.
58. As regards the first point, I agree with Lord Justice Kennedy for the reasons he has given and also for the following further reason. I think there is a relationship between the two questions. Once it is accepted that all types of notice are rebuttable, then the question arises as to why the words of reg.5(6) “shall be deemed to continue” are there and apparently only in the context of remedial works. It is going too far to suppose that the draftsman had a precise idea in mind – no one who wrote these regulations even as a first draft could have thought that clearly. So what I look for is some sort of problem which he was trying to deal with which relates just to remedial works. There potentially is such a problem. Reg. 5(3) is obviously there to ensure that a statutory undertaker does not get more time if he botches a job and is required to carry out remedial works. But that is not enough: a contractor who is required to do remedial works will normally, prior to that requirement, act as though he has done the job properly. That means he will have served a works clear or works closed notice. What is to be done about these? They need to be treated as though they do not count

for the purposes of the remedial works. The draftsman's solution, so it seems to me, is by implication to assume that such notices can be given at the end of remedial works (as to which there is no express provision) and, by putting in the rebuttable deeming provision, to put notices in relation to these works in the same position as notices for other works.

59. I reach this conclusion with no great confidence – but it seems to me preferable than to say that the words “for the purposes of paragraph (3)” should simply be treated as absent.