Neutral Citation Number: [2019] EWHC 308 (Admin)

Case No: CO/3161/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2019

Before :

MR JUSTICE DOVE

- -

Between :

Calor Gas Limited	**Claimant**
- and -	
Norfolk County Council	**Defendant**

- -
- -

Nathalie Lieven QC (instructed by **Knights PLC**) for the **Claimant**
Robin Green (instructed by **nplaw**) for the **Defendant**

Hearing dates: 11th/12th December 2018

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove:

Background

1. The Claimant are the UK market leader in the supply of liquefied petroleum gas ('LPG'). Part of their activities includes the installation on new housing estates of what are often described as "metered estates", a terminology which will be deployed for the remainder of this judgment. A metered estate involves the installation of pipe work in common areas of a development so as to provide each of the residential properties in it with an LPG supply. The pipe work or gas mains supplying each of the homes is connected to gas tanks which are installed by the Claimant and which provide the supply for the entire estate. Metered connections are provided for the homes for the purposes of billing. There have been numerous installations in housing developments of this kind.

2. At the end of 2016 a dispute emerged between the Claimant and the Defendant in relation to one of the Claimant's installations. The Claimant had reached an agreement with Persimmon Homes to install the infrastructure necessary for a metered estate at their development at Chalk Lane, Narborough in Norfolk. An approach was made by Persimmon Homes to seek to have the highways within the development adopted through the common process of a developer entering into an agreement under Section 38 of the Highway Act 1980, following which the highways in the estate are to be adopted by the highway authority under Section 228 of the 1980 Act. A Mr Worsfold, an officer employed by the Defendant as an Assistant Engineer, wrote on the 22nd November 2016 explaining why the Defendant would not, as highway authority, be prepared to adopt the highway. He expressed himself as follows:

> "Thank you for recent e-mails and confirming the presence, route and ownership of the gas supply for the proposed development.
>
> To enable the Highway Authority to adopt a proposed estate road, any utility apparatus laid underneath should be the responsibility of a statutory undertaker. Furthermore, whilst not uncommon for private land lateral connections to be laid within the highway, the Highway Authority do not allow private apparatus to be laid longitudinally along the highway.
>
> From the information supplied by Jacob a private gas supply has been laid which runs longitudinally under the roads/footways and which will be the responsibility of a private company. Consequently, in this instance the Highway Authority will no longer consider the proposed estate roads for adoption which will therefore remain private."

3. On the 9th December 2016 the same position in relation to the Defendant's unwillingness to adopt estate roads with a private gas mains running longitudinally through them was confirmed by Mr Worsfold in respect of another site. Following this on the 3rd January 2017 a representative of the Claimant, Mr Digby, queried why the Defendant was taking this approach when in relation to other sites (details of

which he provided) roads had been adopted containing LPG pipework installed by the Claimant as part of a metered estate. The Defendant's engineer Mr Willeard responded on 4th January in the following terms in two emails which, for simplicity, are set out as a single quotation below:

> "Private companies and individuals do not have the same rights and responsibilities granted to statutory undertakers to enable them to maintain their apparatus when it is located in the highway. As a consequence, Norfolk County Council does not allow private apparatus to be laid longitudinally within the highway, except for exceptional circumstances. Only lateral connections and crossings of the highway are permitted, when unavoidable.
>
> With regards the 3 developments listed below we were unaware that similar LPG system owned by Calor Gas had been installed, as we have not historically required utility plans to be provided prior to granting technical approval to a developer's design. Therefore I do not consider this sets a precedent. As you will no doubt be aware, we have also recently refused to adopt the new residential estate at Chalk Lane, Narborough once we had knowledge of it including a similar system.
>
> …
>
> I am not aware of the policy of other local authorities, so cannot comment on their approach. However, to the best of my knowledge Norfolk have never knowingly allowed private apparatus to be laid in the highway on new developments and certainly not in the 13 years I have been involved in the technical vetting of new roads and footways being offered for adoption. However, as stated below we have not previously requested utility plans for developers, with the exception of the sewers that are the only utility to normally be laid in the carriageway.
>
> Whilst you may require the same statutory powers as other utility providers to be included as a clause in house sales, this would clearly not provide you with any of the same powers to undertake work in the highway. Therefore, unless it can be demonstrated that Calor can be considered as a statutory undertaker with the same powers and responsibilities to maintain and carry out repairs in the highway, it would remain our view that your apparatus should not be included within the public highway, with the exception of any necessary crossings."

4. The correspondence continued, and on the 29th March 2017 Mr Digby made reference to a policy found on the Defendant's website in the section entitled "Highway Advice for Developers". The policy provides as follows:

> "Private longitudinal apparatus (pipes, wires or cables)
>
> Developments should be designed to avoid the need for private longitudinal apparatus such as pipes, wires or cables to be placed on, in or under the highway.
>
> The placing of private apparatus on the highway may sometimes be allowed under Section 50 of the New Roads and Street Works Act 1991. However, as a highway land is meant to be for the benefit and use of the public, apparatus of this nature will only be allowed if the following criteria are met:
>
> - There is no impediment to highway use
> - There is a genuine public need for the apparatus
> - It is not possible to locate the apparatus on neighbouring land (financial constraints are not a valid reason)."

5. On the 13th June 2017 the Claimant wrote to the Defendant's Managing Director drawing attention to the fact that any installation which would be undertaken by the Claimant would accord with the various Codes of Practice and Guidance provided in relation to the installation of LPG piping systems, and expressing concern as to the Defendant's attitude and the impact which it would have upon the Claimant's business. On 12th July 2017 the Defendant's Managing Director Dr Thomson responded to the Claimant's letter, and, having set out the Defendant's policy, she advised as follows:

> "The policy position seeks to ensure the integrity of roads and footways put forward to the Council County for adoption as public highway. I understand we have explained our policy in some detail and also offered advice on possible options to address matters, for example, how to apply for a licence from the Secretary of State so your company can be considered a statutory undertaker. However unfortunate, without this in place, Calor Gas Ltd must be treated as the same as all other private companies and meet the standard requirements for a Section 50 licence, which currently is not the case.
>
> Further to this, following discussions with yourselves and Persimmon Homes Ltd regarding a similar issue at another site in Norfolk, a proposal was put forward that met the requirement of laying the LPG mains/pipes clear of the highway, which could have been considered acceptable at that particular site notwithstanding the large number of lateral crossings of the highway. However, for reasons not explained, Persimmon Homes ultimately installed a system by FloGas that did not require the laying of any LPG mains or connections in the adopted highway. This would suggest that it is eminently possible to locate the apparatus on neighbouring land, as required by our policy."

6. Subsequent to this the Claimant's solicitor's wrote to Dr Thomson on 22nd December 2017. This letter was responded to by Mr Nick Tupper the Defendant's Assistant Director of Highways on the 22nd May 2018. Mr Tupper's response provided further detail as follows:

> "The Council as street works authority has had a policy in place for a number of years. This policy is reflected in the application form, the notes for guidance for applicants and the Section 38 adoption requirements. The policy seeks to avoid private longitudinal apparatus in the highway. Such apparatus may be permitted if:
>
> 1) There is no impediment to highway use. Although a private gas supply to a private dwelling would not directly cause an impediment to highway use, it may cause an impediment to utilities and contractors excavating the public highway.
>
> 2) There is a public need. It is accepted that a gas supply to a private dwelling is a public need.
>
> 3) It is not possible to locate the apparatus on neighbouring land outside the highway. In the case of essential services such as water the Council may allow private apparatus in the highway if services in private land would be prohibitively expensive. In the cases you refer to location in private land would be possible.
>
> Longitudinal private apparatus in the highway causes administrative and safety issues. Statutory undertakers and others with powers to open the road cannot know by visual inspection that such apparatus is in the highway and may damage it, which in the case of gas is clearly dangerous. There is no effective mechanism for those opening the road to be notified of private apparatus. The Council may look more favourably on private apparatus which crosses the highway since its entry and exit points either side of the road are more likely to be evident by inspection. The Council notes that schedule 3 of the 1991 Act provides a right of appeal against the refusal of permission for crossing apparatus, but not for longitudinal apparatus. The inherent problems arising from longitudinal apparatus are therefore recognised in the legislation.
>
> Whilst your client company is substantial there is still a possibility of insolvency and subsequent issues of maintenance, responsibility and safety of private equipment. The Councils powers to alter or remove apparatus is a poor solution for house owners and the tax payer. By contrast the Council can have confidence that statutory undertakers equipment will remain within solvent ownership."

7. Following this there was an exchange of letters before the claim leading to these proceedings being issued on 30th July 2018. Whilst the detailed basis of the Claimant's case is examined below, in essence the Claimant contends that the Defendant's approach is contrary to the statutory scheme of the New Roads Street Works Act 1991 and, as elaborated in particular at the hearing, that the policy is one which is Wednesbury unreasonable and perverse.

The evidence in the claim

8. Both the Claimant and Defendant lodged evidence in respect of this application. The Claimant's evidence, in addition to covering matters which had been set out by way of background above, describes what occurred at a site in Terrington in late 2016 as a consequence of the dispute which had emerged between the Claimant and Defendant. That site was also being developed by Persimmon, and Persimmon had instructed the Claimant to install a metered estate for LPG usage. As a result of the dispute with the Defendant, Persimmon proposed the creation of a service strip beyond the highway boundary and in the frontages of the domestic properties forming the estate. The Claimant concluded that there would be health and safety concerns if that solution was adopted to overcome the Defendant's concerns.

9. Whilst this was under consideration Persimmon approached one of the Claimant's competitors, Flogas Britain Limited ("Flogas"), who agreed to undertake the metered estate installation running the gas main across the front lawns of the properties and therefore outside the highway boundary. Within the evidence provided by Mr Alastair Lovell he expresses the concern that the risks to health and safety that this installation presents arise from the concern that there is a danger of the pipe work being lost, damaged or rendered unsafe, and that a future resident could become confused with where their boundary ended and any service strip containing the pipes started, and as a consequence they could dig down and strike the LPG supply pipe. Works such as installation of a driveway, a wall or a conservatory or fishpond could give rise to such a situation.

10. In response to this evidence the Defendant lodged a witness statement from Mr John Williams of Flogas. In his evidence he refutes the suggestion that there are any risks to health and safety as a consequence of the installation which Flogas constructed at Terrington. He contends that the installation of a distribution main in the manner undertaken at Terrington complies with the UKLPG Code of Practice 25: 2018. He further identifies that the LPG pipe installation at Terrington has been undertaken in a service strip running adjacent to the adopted footpath and maintained by a management company. In accordance with the UKLPG Code of Practice 25: 2018, and other material published by the Institution of Gas Engineers Managers ("IGEM"), the service strip is subject to a wayleave referenced in the land registry documentation in respect of the legal title to the dwellings. Mr Williams contends that deep excavation would be most unlikely in circumstances where the service strip is adjacent to the public highway and the land is owned by a management company.

11. In addition to the evidence of Mr Williams, Mr Tupper also provides a witness statement on behalf of the Defendant explaining that although the Defendant maintains a record of private apparatus installed within the highway, the accuracy of that record is dependent upon the Defendant being notified of the presence of the apparatus by those who have installed it. He notes that this had not happened in

respect of the other housing developments which contain metered estates and that the Defendant only became aware of the existence of LPG systems within the highway in those estates when the developments were raised as precedents by the Claimant.

12. Mr Tupper provides further explanation in relation to the rationale of the policy as follows:

> "13. In applying the Council's policy, one of the factors taken into account is whether the proposed installation is passive or non-passive. Passive installations are those networks which involve apparatus such as potable or waste water. If this type of passive pipe is excavated in error then there is little risk of danger to the operatives. Non-passive installations are those networks such as 11KV electric cables and gas pipes. If this type of non-passive pipe is excavated then there is a very real danger of injury or death to the operatives.
>
> 14. In the financial year 2017/18, the Council received 234 section 50 private apparatus licence applications. All applications were approved other than five where additional information required to complete the application was not forthcoming or were for a different highway authority area. Of those 229 that were approved, 199 resulted in a section 50 licence being made and agreed to by the licensee. The remaining 30 approved applications were not finalised by the applicant or licensee (i.e. depending on the stage in the process).
>
> 15. Of the above 229 applications that were approved, 30 related to longitudinal apparatus. All but one of these related to passive installations: e.g. drainage pipes. Only a single longitudinal non-passive installation was processed. This was for two high voltage cables where the section 50 licence was made conditional on the apparatus being adopted by a statutory undertaker. In all, the Council allowed 14 instances of non-passive installations which crossed the highway rather than run along it.
>
> 16. Calor contends that by using conditions the Council can suitably manage the installation of apparatus, including LPG, within a highway. I do not agree that all of the Council's concerns can be addressed by simply adding conditions to a section 50 licence. Given the frequency of highway works for highway and non-highway purposes, it is far more likely that apparatus will be accidentally damaged by third party excavations if that apparatus is placed in the highway, as opposed to it being placed in private land. The use of a condition on the licence cannot address this issue.
>
> …
>
> 19. To provide some idea of the risk of damage from works in the highway, during the financial year of 2017/18 the Council's records show that it received 45,863 permit applications required by the Traffic Management (Norfolk County Council) Permit Scheme Order 2014.

> These applications related to registerable activities within the highway, of which about 36,705 involved excavatory works. Each year the number of section 50 licences that the Council processes has increased, and there are a significant number of private apparatus present in the highway network. An extremely high number of excavations take place in those roads each year by utilities, the Council and private works contractors. The risk of damage to underground apparatus is therefore very real.
>
> …
>
> 21. Before commencing work, each promoter should complete plant enquiry searches on the owners of apparatus in that highway. This is achieved largely by the works promoter contacting the statutory undertakers direct or by contacting companies like 'Linesearch' who help identify which statutory undertakers may have placed their apparatus in the street in question. There is, though, no effective mechanism in place for section 50 private apparatus to be included in these searches. Generally, that does not cause a problem when the apparatus crosses the highway because it is usual for chambers or valves to be provided at each end of the crossing point. These covers would be apparent by promoters intending to excavate at that location. It is not so straightforward with longitudinal apparatus which can run for hundreds of metres but with no chambers or valves provided. It therefore can be difficult for promoters to know the presence of longitudinal apparatus before commencing work, and as stated above the Council experiences each year a high number of excavatory works.
>
> 22. The Council balances the risk of not knowing the presence of buried apparatus against the risk of danger if that apparatus were to be accidentally damaged during the excavation work. Consequently, depending on the circumstances the Council may allow passive apparatus to run longitudinally in the highway, but ideally the apparatus would be adopted by a statutory undertaker. The Council considers the risk too great for non-passive apparatus, such as LPG pipes, to be laid along the highway if they were still to be privately owned once commissioned (i.e. made live)."

13. Mr Tupper goes on to provide further information in relation to guidance from the Health and Safety Executive at HSG47 and concludes in his evidence:

> "27. HSG47 section on 'Planning the work' (starting at page 10) explains how work should be safely planned, but it does not capture the presence of private LPG apparatus.
>
> 28. Within the 'Planning the work' section of HSG47 some guidance on LPG networks is provided (at paras. 32 and 33). The guidance recognises that some properties may be fed from bulk-stored LPG and that contact details for the LPG supplier can be found at the bulk storage vessel compound or segregated area above any underground

> tanks. In practice though this is ineffective. This is because such compounds are on private land and their presence will not always be known or reasonably foreseen by operatives about to commence work in the highway. It is not uncommon for the compound to be in a different street to where the works are due to take place and out of sight. The risk of operatives not being aware of the presence of buried LPG pipes is therefore high.
>
> 29. HSG47 recognises the reduced risk to gas pipes that are laid in private land compared to those laid in the highway (re: para. 146). It states that pipes laid under the carriageway normally have a depth of cover of 750 mm, which can be reduced to 600 mm under the footway where the loading is less. However, on private property the depth of cover can be reduced to 375 mm. I therefore do not understand why Mr Lovell says in his witness statement (at para. 38) that Calor considered placing the pipes at 750 mm depth but decided this was too risky.
>
> 30. In the Grounds of Claim it is alleged that the Council's policy wholly frustrates the scheme of the NRSW Act 1991 and that it has no justification on the basis of Calor's individual circumstances (re: para. 32). I do not consider that to be the case. The Act gives street authorities a discretion whether to grant or refuse a licence under section 50. If it had been thought that licence conditions are capable of overcoming all concerns, the Act would presumably have required a street authority to grant a licence subject to whatever conditions it thinks fit. Not only does the Act give street authorities a wide discretion in the matter, the right of appeal in paragraph 9 of Schedule 3 to the Act is confined to applications concerning apparatus that crosses a street. Plainly the decision of the street authority, which I believe is best placed to assess the potential risks presented by apparatus laid along the highway, is intended to be final, subject to review by the courts."

14. The Claimant provided evidence in response to this material from the Defendant in the form of witness statements from Mr Henry Betts, Mr Colin Crane, Mr Paul Baker and Mr Trevor Haystead. Mr Betts, was involved in the preparation of technical documentation published by IGEM and UKLPG in relation to the design of LPG installations. The evidence which he gives along with Mr Crane and Mr Baker is directed towards providing an understanding of the guidance provided by IGEM, the National Joint Utilities Group ("NJUG") and UKLPG. Importantly, Mr Betts commences his evidence by explaining his approach to the evidence given by Mr Tupper and Mr Williams in particular in relation to the installation at Terrington. At paragraph 8 of his witness statement he states as follows:

> "8. With respect to the evidence given by Mr Tupper and Mr Williams, particularly in relation to the question of the installation of an LPG infrastructure at the Terrington Development, the evidence is not in my view addressing the key issue as regards as regards health and safety. There is no dispute about the technical possibility of installing LPG mains and service pipework in private land (including such private

> land being in the ownership of a management company) with an appropriate easement having been granted. Such an installation is possible and the relevant UK LPG Codes of Practice and IGEM Recommendations do not prohibit this. The real question, to my mind, is whether there is any rational justification from a health and safety perspective in the stance taken by NCC."

15. Against this background it is necessary to summarise the effect of the principle recommendations of the various sources of guidance put before the court in relation to the installation of metered estates and LPG mains. Each of the elements of the guidance, some general and some specific to pipelines for LPG, need to be read together and commonly cross-refer to each other at particular points.

16. Starting with the guidance published by the HSE in HSG47, this guidance is prepared for a wide variety of pipes including gas pipes. It addresses situations such as planning for work which may involve the potential for disturbing underground services. In particular, the guidance addresses the need to obtain information about the location of underground services including gas pipes prior to work being commenced. In one of the examples provided by the guidance in relation to the specific situation of installing infrastructure in a new housing development the guidance provides as follows:

> "Underground services within the confines of partly completed housing developments are especially prone to damage from ongoing construction work. Each utility company should keep to its agreed position; *see Guidelines on the positioning of underground utilities apparatus for new development sites Volume 2*. A common trench may help to control the position and separation of underground services. Special arrangements may be necessary to restrict vehicle and mobile plant crossings to locations where temporary protection for the services has been provided.
>
> Where new services such as electrical or gas supplies are being installed, it may be possible to reduce risks by not installing or commissioning them until other groundworks and work on the installation have been completed. This should be considered early in the design process to allow the works to be sequenced accordingly.
>
> Close liaison should be maintained between the developers, their contractors and the utilities. The builder/ developer should keep a marked-up plan of the estate showing the up-to-date position of underground services (including any variations from planned routes) on site for the information of those excavation and groundwork."

17. Turning to the NJUG Guidelines, these are also of general application to the use of underground utilities apparatus and, in their own terms, "should therefore be adhered to wherever practicable". These guidelines provide for a system of colour coding in

relation to the various utilities installations and provide recommendations for the minimum depth of the installation of the various types of utility. In particular, a diagram is provided which illustrates (incorporating the colour coding scheme) a cross section through a two metre wide footway showing the disposition of the utilities underground at various depths within the corridor of the footway. This diagram is supported by detailed text in relation to the various minimum depths to which different types of utility should be installed.

18. The guidance addresses the particular topic of trench sharing. It provides the following in respect of that approach to the installation of underground utilities apparatus:

> "6. TRENCH SHARING
>
> Trench sharing may be beneficial in reducing disruption to both vehicular and pedestrian traffic, as well as offering cost savings in construction methods and reinstatement liability for utilities. Trench sharing can also be useful in maximising the limited available space in the highway.
>
> Wherever practical and appropriate trench sharing should be considered.
>
> When trench sharing is an option it is essential that early consultation takes place with representatives from relevant authorities and all other interested parties.
>
> Agreement on the positioning of apparatus within a shared trench together with the reinstatement specification should be made between all interested parties (including the relevant authority) as early as possible as part of the planning process."

19. In his evidence Mr Betts points out that the installation of LPG pipework within a common utilities trench goes "a considerable way to addressing any concerns around detection". This is on the basis that if all underground utilities are buried in a similar location within a common trench then the detection of that underground apparatus is rendered far more likely. Mr Betts also points out the reference within HSE documentation (in "Safety in the Installation and Use of Gas Systems and Appliances") to following the advice within that Code of Practice as a means of ensuring compliance with the law. Failure to follow the Code of Practice (which incorporates reference to a document to which I am about to turn, namely the Codes of Practise published by UKLPG) would need to be justified if prosecution is to be avoided.

20. The UKLPG Code of Practice 25: 2018 is published specifically for the LPG industry. It contemplates at paragraph 1.5.3 that licences under Section 50 of the 1990 Act can be obtained, and does not contemplate any in principle opposition to the grant of licences in respect of LPG installations. At section 2 of the document, and in particular paragraph 2.2.1, the approach of the NJUG guidance in relation to deploying the pipework within a common trench is adopted. The document provides as follows:

> "2.2.1 Ease of access
>
> The survey of the proposed routing of the pipework should, for ease of access, normally seek to lay the mains:
>
> - In common ground;
> - At the front of the premises;
> - In a position so as to facilitate maintenance;
> - Parallel with other utility services (normally using the 'National Joint Utilities Group guidelines on the Positioning of Underground Apparatus for New Development Sites' see Figure 1)."

21. IGEM produce Guidelines denoted TD/3 relating to pipelines for gas distribution. These note at paragraph 4.2.3.3 that pipeline operators are required by the 1990 Act to make records of their apparatus and inform other utility operators of the location of pipelines. Once more at paragraph 6.4.5 of the IGEM Guidance a common trench is referred to as an appropriate means for installing pipelines or mains. The IGEM Guidance essentially replicates the material contained within other guidance alluded to above in respect of the installation of gas pipelines within a footpath at differing recommended levels. At paragraph 6.4.5.4 the Guidance recommends that the location of pipes should be recorded by suitable administrative records so as to enable them to be located if there are to be works in their vicinity. In further IGEM Guidance denoted as TD/4 more material is provided in relation to the installation of gas pipelines. In particular the following is provided in respect of service installation:

> "P.3.7.2 For a new service, consideration should be given to installing suitable service ducts or common utility trenching to facilitate its installation.
>
> P.3.7.3 Any service, service regulator, associated PRI and meter installation should be positioned so as to avoid undue risk of accidental damage.
>
> …
>
> P1.3.7.10 Wherever possible, the route should avoid:
>
> - Areas already congested with underground apparatus."

22. In his evidence, in addition to dealing with the technical guidance already referred to, Mr Baker addresses the question of the availability of information in relation to LPG installations undertaken by the Claimant. He points out that the Claimant maintains a database and individual files relating to every LPG installation that it has undertaken in accordance with IGEM TD/3. He notes that in the event of developers submitting a Section 38 application for adoption of any highway within a new development the adoption agreement should record pipework in place in the highway, including any LPG installation undertaken by the Claimant. Furthermore, the Claimant has engaged an independent company (Cornerstone Projects Limited) who complete applications

made by the Claimant under section 50 of the 1990 Act and who are also paid a retainer in order to ensure that details of the Claimant's installations are provided to third parties when they undertake searches of Cornerstone Projects Limited in respect of buried utility infrastructure. Against the background of Mr Baker's evidence the Claimant submits that there is an appropriate system of available information as to the location of any underground pipework apparatus installed by the Claimant which can be investigated by anyone proposing works which might be affected by the existence of the apparatus.

The Law

23. Pursuant to section 1 of the Highways Act 1980 the Defendant is the highway authority for local roads and footways of the kind that are involved in the construction of a new housing development. Under section 38 (1) of the 1980 Act a local highway authority may enter into an agreement with a person who is liable by reason of tenure to maintain a road (such as the developer of a new housing development) to provide that the highway becomes a highway maintainable at public expense, and under section 38 (6) any such agreement may contain provisions as to the dedication of such a road or way as a public highway. In short, therefore, the legal mechanisms provided by Section 38 of the 1980 Act enable a developer to pass the liability for maintaining the highway to the local highway authority in return for the public obtaining the dedication of the road as a public highway with all of the rights and benefits to which that gives rise.

24. A remedy is provided under Section 37 in the event that a person has given notice that they wish a road or way to become a highway maintainable at public expense and the local highway authority do not consider this proposal justifiable. The section enables application to be made to a Magistrates' Court to address the refusal in certain circumstances. Whilst this provision was raised by the Defendant as a basis upon which they contended that there was an appropriate alternative remedy to this application for judicial review, in the light of the way in which the case was ultimately put by the Claimant this point does not arise. Under Section 130 of the 1980 Act the highway authority is under a duty to "assert and protect the rights of the public to the use and enjoyment of any highway" for which they are responsible. In particular under Section 130 (3) of the 1980 Act the highway authority is under a duty "to prevent, as far as possible, the stopping up or obstruction of" a highway for which they have responsibility.

25. The legislative regime for dealing with works being undertaken in the public highway is provided by Part III of the 1991 Act. Section 48 (1) of the 1991 Act defines a "street" as including any highway, road, lane, footway, alley or passage. Section 48 (3) and (4) provide definitions of "street works" and "undertaker" for the purposes of the remainder of P art III of the Act as follows:

> "48 (3) In this part "street works" means works of any of the following kinds (other than works for road purposes) executed in a street pursuance of statutory right of a street works licence-
> (a) placing apparatus, or

> (b) inspecting, maintaining, adjusting, repairing, altering or renewing apparatus, changing the position of apparatus or removing it.
>
> …
>
> (4) In this part "undertaker" in relation to street works means the person by whom the relevant statutory right is exercisable (in the capacity in which it is exercisable by him) or the licence under the relevant street works licence, as the case may be."

26. Section 50 of the 1991 Act provides a power for a street (or, so far as this case concerns, highway) authority to grant a licence to permit a person to undertake street works. The relevant provisions are set out as follows:

> "50 Street works licences
>
> (1) The street authority may grant a licence (a "street works licence") permitting a person-
>
> (a) to place, or to retain, apparatus in the street
>
> …
>
> (2) A street works licence authorises the licensee to execute the works permitted by the licence without obtaining any consent which would otherwise be required to be given-
>
> (a) by any other relevant authority in its capacity as such or,
>
> (b) by any permission in his capacity as the owner of apparatus affected by the works;
>
> but without prejudice to the provisions of this Part as to the making of requirements by any such authority or person or as to the settlement of a plan and section and the execution of the works in accordance with them.
>
> (3) A street works licence does not dispense the licence from obtaining any other consent, licence or permission which may be required; as it does not authorise the installation of apparatus for the use of which the licence of the Secretary of State is required, unless and until that licence has been granted.
>
> (4) The provisions of Schedule 3 have effect with respect to the grant of street works licences, the attachment of conditions and other matters.
>
> (5) A street works licence may be granted-

> (a) to a person on terms permitting or prohibiting its assignment, or
>
> (b) to the owner of land and his successors in title;
>
> and references in this Part of the licensee are to the person for the time being entitled by virtue of the licence to do anything permitted by it."

27. Section 51 of the 1991 Act provides effective enforcement of the requirement for a licence by making it a criminal offence for a person to undertake works of placing apparatus in a street or breaking up or opening a street without a street works licence being in place. Section 59 of the 1991 Act creates a general duty on a street authority in the following terms:

> "59. General duty of street authority to co-ordinate works
>
> (1) A street authority shall use their best endeavours to co-ordinate the execution of works of all kinds (including works for road purposes) [and then carrying out the relevant activities] in the streets for which they are responsible-
>
> (a) in the interest of safety,
>
> (b) to minimise the inconvenience to persons using the street (having regard, in particular, to the needs to people with disability), and
>
> (c) to protect the structure of the street and the integrity of apparatus in it."

28. Section 79 of the 1991 Act provides for a duty upon undertakers to record the location of every item of apparatus belonging to the undertaker as soon as reasonably practicable after it has been installed or located in the street and to make those records available for inspection by any person having authority to execute works of any description in the street or otherwise appearing to have a sufficient interest in that information.

29. It will be recalled that the provisions of Section 50 made reference to Schedule 3 of the 1991 Act. Paragraph 3 of Schedule 3 addresses the attachment of conditions to a Section 50 licence in the following terms:

> "A street authority may attach to a street works licence such conditions as they consider appropriate—
>
> (a) in the interests of safety
>
> (b) to minimise the inconvenience to persons using the street (having regard, in particular, to the needs of people with a disability), or

(c) to protect the structure of the street and the integrity of apparatus in it."

30. It is to be noted that whilst paragraph 9 of Schedule 3 of the 1991 Act grants a right of appeal in relation to a disappointed applicant for a licence, that right of appeal does not apply to an application for a licence to place or retain longitudinal apparatus.

31. Pursuant to Sections 79 and 104 of the 1991 Act, the Secretary of State for Transport has made the Street Works (Records) (England) Regulations 2002 which by virtue of regulation 3 make specific prescription as to how the records in relation to every item of apparatus belonging to an undertaker are to be held.

32. In her submissions on behalf of the Claimant, Ms Nathalie Lieven QC emphasises the significance of section 48 (4), which treats a licensee as being equivalent to a person with a statutory right to exercise street works: they are both defined for the purposes of the legislation as an "undertaker". In his submissions on behalf of the Defendant, Mr Robin Green draws attention to the fact that the provisions in relation to street works licences under Section 50 of the Act only apply to persons who are not statutory undertakers with statutory powers to undertake street works. In particular in relation to the gas industry under paragraph 1 of Schedule 4 of the Gas Act 1986 a person who is a gas transporter for the purposes of that act may execute works including the opening or breaking up of any street by virtue of that legislation. Thus, a gas transporter would not require a Section 50 licence given the powers which a gas transporter obtains from having the benefit of a licence to be such pursuant to section 7 of the 1986 Act, which authorises Ofgem to licence persons as gas transporters subject to the standard conditions of those licences provided for by Section 8 of the 1986 Act.

33. The court was provided at the hearing with a copy of the Standard Conditions attaching to a Gas Transporters Licence (1st January 2017 edition). There are 48 standard conditions, including conditions restricting the licensee to only conducting the transportation business, and other conditions addressing the need for the licensee to have available resources to ensure that at all times it is able to properly and efficiently carry on its gas transportation business and ensuring it has an appropriate credit rating. Restrictions are also placed upon the licensee's ability to mortgage, charge or pledge its assets. In short, the Standard Conditions are designed to ensure that a licensee is at all times financially sound and will remain so. Under the Energy Act 2004 there are special provisions for energy administration orders in relation to energy licensees such as persons licenced under the 1986 Act. The objective of such an administration order is to ensure that the distribution system of the company subject to the order continues to be maintained and developed.

34. Whilst statutory undertakers do not require a Section 50 licence in order to undertake street works, the Defendant has used powers under the Traffic Management Act 2004 to introduce a Permit Scheme in relation to certain identified types of work which are not licenced under Section 50 of the 1991 Act. These works are defined as including activities involving the breaking up or resurfacing of any street or opening of the carriage way of certain streets at certain times. For works falling within the definition of the scheme it is necessary for a person to apply for a permit, but there are very limited grounds upon which such a permit could be refused. For the purposes of this judgment it suffices to note that refusal of a permit could only be imposed on the

grounds of issues associated with the coordination of the works with other works. This reflects the fact that the purpose of the permitting regime is to enable some degree of control over the disruption to the use of the public highway caused by works in the street, and through the permitting procedure to seek to regulate and control that disruption so as to minimise it. The permitting regime respects the statutory entitlement of a statutory undertaker to undertake street works but simply seeks to coordinate them in order to minimise disruption.

35. As identified above, the Claimant's case proceeds, firstly, on the basis that the policy operated by the Defendant is contrary to the statutory scheme. Founded upon the long established principle set out in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 it is submitted that the Defendant's policy in relation to Section 50 licences is contrary to the policy and objects of the 1991 Act. Ms Lieven submits, for the reasons set out in greater detail below, that the policy applied by the Defendant, which effectively precludes in her submission the installation of any longitudinally disposed LPG pipework apparatus underground in the highway, is contrary to the policy and objects of the 1991 Act which provides a regime for permitting, not precluding, organisations such as the Claimant undertaking street works as if they were a statutory undertaker.

36. By way of further illustration of the principle Ms Lieven draws attention to the case of R (on the application of Rights of Women) v Lord Chancellor and Secretary of State for Justice [2016] EWCA Civ 91; [2016] 1 WLR 2543. That was a case which concerned very different subject matter, namely regulations in relation the provision of legal aid for the victims of domestic violence and the criteria which would be applied in order to grant applications for legal aid. The Court of Appeal held that a requirement for documentary verification of domestic violence within the 24 month period prior to the legal aid application being made was a requirement which was not rationally connected with the statutory purpose of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and therefore should be quashed. Since part of the statutory purpose of the 2012 Act was to ensure that those who suffered domestic violence had legal aid made available to them it was irrational to apply a 24 month rule which would exclude very many of those who needed the benefit of legal aid to protect themselves from domestic violence in accordance with the purpose of the legislation. The restriction identified would operate "in a completely arbitrary manner". Ms Lieven submitted that this principle applied equally to the policy in respect of section 50 licences operated by the Defendant.

37. In the course of his submissions Mr Green drew attention to the case of British Oxygen Company Limited v Minster of Technology [1971] AC 610 in which the House of Lords accepted that where a decision maker was granted a statutory discretion to exercise there was nothing unlawful in the decision maker developing a policy to be applied in guiding the exercise of that discretion, provided that the policy was not applied inflexibly and the decision maker gave consideration to the facts and matters raised by the applicant in its application. In R (West Berkshire DC) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441; [2016] 1 WLR 3923 Laws and Treacy LJJ, when dealing with a submission as to a policy being inconsistent with a statutory regime, identified two important principles in respect of the making of a policy as follows:

> "It is important first to notice a distinction in this area of the law which is at the core of the debate in this appeal. It is between these two principles. (1) The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception. See British Oxygen [1971] AC 610, in which Lord Reid and Viscount Dilhorne cited the classic authority of R v Port of London Authority ex p. Kynoch Ltd [1919] 1 KB 176 per Bankes LJ at 184.
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> But (2): a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. As is stated in De Smith's Judicial Review (7th edn.) paragraph 9-013,
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> "a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy… but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself."
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> Both of these principles – the rule against fettering discretion, and the liberty (generally) to express policy without acknowledging exceptions – apply whether or not the policy-maker and the decision-maker are the same or different persons. If it were otherwise, neither would have any integrity as a principle. We have expressed them in general terms; their application in the planning field's statutory context requires further elaboration"

Submissions and Conclusions

38. On behalf of the Claimant, Ms Lieven submits that the Defendant's policy unlawfully imposes a presumption against private or non-statutory undertakers' longitudinal apparatus which is inconsistent with the scheme of the statute. That arises because, as she submits un-controversially, the three criteria set out in the policy all have to be satisfied before the grant of a licence would be consistent with the policy, and it is difficult to envisage circumstances in which the third criterion ("it is not possible to locate the apparatus on neighbouring land") could be satisfied so as to render the installation of longitudinal apparatus in the highway consistent with the policy. She submits that the clear purpose of the legislation is to provide for the licensing of street works by non-statutory undertakers so as to facilitate the installation of their apparatus in the highway. The impossibility of compliance with the policy specifically undermines that statutory purpose.

39. Ms Lieven further submits that the justification for the existence of the policy offered by the Defendant has materially changed over time. In particular, the evidence provided by Mr Tupper in relation to a distinction to be drawn between passive and non-passive private apparatus finds no expression either in the policy, or in any of the explanations provided by the Defendant for the existence of the policy, prior to the

issuing of these proceedings. That, she submits, undermines the coherence of the justification for having the policy at all.

40. Moreover, she submits that the policy is wholly inconsistent with all of the advice and guidance provided by the HSE, NJUG, IGEM and UKLPG which has been rehearsed above. All of that guidance consistently supports the provision of gas mains apparatus being installed within a common trench for all services, and none of the guidance provides any support for any contention that private gas mains apparatus should be provided outside a common service trench and on private land. Nothing in that material supports the Defendant's position that it is safer to put the Claimant's infrastructure on private land. Placing it in a common service trench would be a safer approach and more consistent with the guidance.

41. On the basis of the evidence provided by the Claimant's witnesses Ms Lieven contended, firstly, that a far greater risk to public safety arose from the installation of the LPG infrastructure in an unpredictable location beyond the highway boundary as compared to its provision within the highway boundary in a predictable common service trench. Secondly, she draws attention to the ability of the Defendant to condition any Section 50 licence, and also their ability to retain records of the Claimant's apparatus to ensure that any subsequent works were informed by the location of the Claimant's infrastructure. Furthermore, she draws attention to the record keeping undertaken by the Claimant as a means of ensuring that the existence and location of the Claimant's infrastructure would come to the attention of any person subsequently undertaking street works.

42. In his submissions on behalf of the Defendant, Mr Green draws attention to the very widely drawn discretion afforded to the Defendant under section 50 of the 1991 Act. Further, he submits that the scheme and policy of the Act is, in particular, to be found in the terms of section 59 of the 1991 Act, which emphasises that the Defendant as a street authority has a general duty to coordinate the execution of street works "in the interests of safety" and so as "to minimise the inconvenience to persons using the street". Thus, he submitted, there was no error in the approach taken by the Defendant in focusing upon those aspects when settling upon the need to have a policy in relation to Section 50 licences of the kind which they had promulgated.

43. He submitted that the reason why the right of appeal against the refusal of a section 50 licence was limited to works which ran latitudinally to the street, and not longitudinally, was related to the fact that longitudinal infrastructure was recognised by the statutory regime as causing more potential disruption to the street than apparatus which ran latitudinally. He submitted that the first policy criterion (that there was "no impediment to highway use") was a reference both to issues related to safety, and also issues related to the integrity of the street and minimising disruption to its use. So far as the third criterion was concerned that was a reinforcement of the need specified at the start of the policy to design developments so as to avoid the need for private longitudinal apparatus in or under the highway.

44. The issue of safety was submitted to be clearly relevant on the basis of the evidence submitted by the Defendant. In particular, given the large number of applications for licences under section 50 and for permits under the scheme, it was clear that highway land was a very frequent focus of disruptive works, and the inclusion of the Claimant's private apparatus within the street on a longitudinal axis would increase

the risks involved in particular where, as Mr Tupper explained, there was not an effective mechanism for ensuring that the Claimant's apparatus would be included in any searches undertaken by people engaged in street works. He submitted that the reference to passive or non-passive types of infrastructure was relevant to the criteria in respect of "impediment to highway use", as it was under this criteria that a realistic appraisal of the impact on safety needed to be undertaken. He further submitted that the Defendant was entitled to take a different approach to non-statutory undertakers in circumstances where the Defendant could be confident that the existence of standard conditions on a gas transporters licence, for instance, would ensure both financial stability and the continued maintenance and support of the statutory undertaker's infrastructure.

45. In respect of the various items of guidance relied upon by the Claimant Mr Greene submitted that none of this guidance was directed to how the Defendant should exercise its discretion under section 50 of the 1991 Act but was, rather, directed towards how organisations such as the Claimant should conduct their installation works. There was nothing within the guidance either to suggest that it was wrong to discourage the provision of private longitudinal apparatus in the highway, or wrong for an LPG pipe main to be laid outside the highway in a privately owned and managed maintenance strip. The language of the guidance was not mandatory and in many instances suggested, for instance, that a common service trench should be considered, not that it was required. It was, Mr Green submitted, notable that Mr Betts accepted that it was technically acceptable and in accordance with the guidance for an LPG mains pipe to be installed on private land, and it was not suggested that the Flogas installation at Terrington was inconsistent with the industry guidance which the Claimant relied upon.

46. Prior to turning to my conclusions in relation to these submissions it is important to record that firstly, as set out above, the argument in relation to there being an appropriate alternative remedy under Section 37 of the 1980 Act was not pressed by Mr Green, in circumstances where the Claimant through Ms Lieven made plain that the challenge mounted was solely to the policy. Secondly, and in a related manner, the argument raised by the Defendant in relation to delay (in so far as it survived the granting of permission by Lang J) was again not a point ultimately pressed by Mr Green on behalf of the Defendant. Since the challenge is solely related to the policy, that policy will continue to be applied to Section 50 applications, and thus any argument in relation to delay does not realistically arise bearing in mind that the policy is one which is of continuing application.

47. The first point which in my view it is important to note is that the discretion afforded by section 50 of the 1991 Act to the street authority is one which is widely expressed and, in substance, to be guided by the general duties specified in section 59 of the 1991 Act. In my view Section 59 of the 1991 Act articulates the purpose of providing the regulatory regime contained within Part 3 of the Act and, within the three criteria provided at section 59 (1) (a) to (c), provides the coordinates for the exercise of the powers provided by Part 3 of the Act. Further, there can in my view be no doubt that the Defendant is entitled to publish a policy setting out the way in which it will approach applications for street work licences under section 50 of the 1991 Act. The issue which then arises is as to whether or not the policy which the Defendant has promulgated is one which reflects the policy and purpose of the legislation. In the

light of the submissions made there are perhaps two questions which fall to be examined in relation to the policy. The first is whether the policy has rendered the provision of private longitudinal apparatus within the highway an impossibility; the second is whether the policy promulgated by the Defendant is justified, in particular, in the light of the industry guidance to which reference has been made. Before addressing these questions it is sensible to address the Claimant's contentions in relation to what they submit has been the shifting justification for the policy.

48. There can be no doubt that there are clear differences in the explanations for the need for the terms of the policy between the explanations provided in late 2016 by Mr Worsfold and those provided by Mr Tupper in his witness statement in the present proceedings. A clear and key difference is Mr Tupper's reliance upon the distinction between what he describes as passive and non-passive installations. However, at one level it is unsurprising that those distinctions should exist. In Mr Worsfold's correspondence he was not being called upon to provide a detailed justification for the policy and was simply explaining the Defendant's approach. By the time Mr Tupper came to write his witness statement, the justification for the policy had come under close forensic scrutiny, and it is therefore to be expected that a more detailed and sophisticated exposition of the reasons for the policy would be provided. True it is that the level of detail provided by Mr Tupper is not reflected in the letter dated 12th July 2017 from Dr Thomson, but again that was not a letter written in the context of an application for judicial review in which the legality of the policy was being challenged in detail. Ultimately, whilst I accept that there is force in the submission made by Ms Lieven that the explanation for the policy has changed and become far more detailed as these proceedings have unfolded, it does not appear to me that much turns upon this point in terms of the substance of the issues between the parties. The lawfulness of the policy depends on the substantive issues as to whether or not it is a policy which is consistent with the purpose and policy of the legislation and rational, rather than whether or not the explanation of the need for it may have evolved over time (albeit that question could in some circumstances have some implications in respect of the rationality of a policy). I do not consider that the point is in any way dispositive of the issues in this case.

49. I turn to examine the contention that the policy is in a form which renders it impossible for longitudinal private apparatus to be installed within the highway, and therefore that it is inconsistent with the policy of the legislation to provide for non-statutory undertakers to undertake street works and thereby install their apparatus. It is, of course, obvious that the policy is very restrictive when it comes to the installation of private longitudinal apparatus. However, the policy has to be approached bearing in mind the second of Laws LJ's principles, namely that it is not necessary for a policy maker to spell out the fact that the policy allows for the possibility of exceptions. It was, no doubt, in recognition of this principle that Ms Lieven presented her submissions in the context of the policy providing for a presumption against longitudinal apparatus. It already becomes clear, therefore, that the policy does not render the installation of private longitudinal apparatus impossible, but rather it would require a clear and specific justification for its installation as an exception to the policy.

50. However, in my view the position does not simply depend upon the existence of exceptions to the policy. It needs to be born in mind that this policy applies in all

situations where private longitudinal apparatus may need to be installed, including the retro-fitting of such apparatus into existing urban areas. Within those areas there may be circumstances in which there is no available private land between the frontage of housing and the public highway. Such a situation would engage the third criteria and provide a justification for the installation of the apparatus within the highway, given that the need for compulsory acquisition of land in private ownership would raise legal as well as a financial constraints on the design. It is also possible to conceive of a greenfield development site which may have within it some very significant planning or environmental constraint in relation to the layout of development which would again engage the third criterion. Thus, whilst undoubtedly very restrictive in respect of the vast majority of cases involving design of development on un-constrained residential land, that restriction is consistent with the objective of the policy set out in its introduction, namely that it seeks to ensure that at the design stage the need for private longitudinal apparatus in the public highway is designed out. Bearing in mind that the Defendant is afforded a broad discretion under section 50 in relation to the grant of licences I can see nothing wrong in principle with the Defendant having a restrictive policy of this kind subject to the consideration of the second question, namely whether it is consistent with the policy of the legislation in terms of the safety justification which is provided by Mr Tupper, along with the implications for the convenience of highway users.

51. It is clear beyond doubt that public safety is part of the purpose and policy of the 1991 Act as articulated in section 59. The Claimant's case is that there could be no safety justification for this restrictive policy on the basis that the safety of the installation will be far better safeguarded by compliance with the various elements of industry guidance to which reference has been made, and in particular by the installation of the Claimant's apparatus within a common service trench in the public highway. The Claimant submits that bearing in mind the raft of such guidance, and its consistent approach, that it is simply not open to the Defendant to contend that safety would be imperilled by the installation of private longitudinal apparatus within the public highway. Thus, it is submitted that the very restrictive policy in respect of this kind of installation is one which is inconsistent with the policy of the legislation in that it does not procure the safest outcome consistent with the guidance which has been provided to the industry.

52. In my view there are a number of points which need to be made in relation to these submissions. Firstly, in the light of Mr Betts' evidence that an installation on private land is possible and not prohibited by the various elements of industry guidance it is not open to the Claimant to contend that the only means of securing a safe installation is for it to be undertaken in a common service trench. However, as Mr Betts observes, that is not the end of the debate. The question then arises as to whether or not the Defendant's approach to safety (and their policy which is based upon it) is one which has a rational connection with the substance and policy of the legislation. I accept that the explanation provided by Mr Tupper in his evidence provides in and of itself a sound basis, rooted in safety concerns, for the production and application of the policy. Placing private apparatus in the street longitudinally brings with it the risk that it will not be readily discoverable, both as a consequence of the manner in which searches for such apparatus are commonly undertaken and also as a consequence of the absence of physical features in the highway disclosing the presence of the apparatus (see paragraph 21 of Mr Tupper's evidence set out above). When that risk is

combined with the additional risk of danger from disturbance of non-passive apparatus the safety case for the policy is reinforced. The significant number of applications for permits involving works of excavation are also a material part of the justification for the policy, in terms of the number of occasions when these concerns may arise.

53. For the reasons which Mr Tupper explains, the position in relation to records and notifications in respect of non-statutory undertakers is less robust than that which pertains to statutory undertakers. That is not in any way to criticise or gainsay the clear evidence in relation to the arrangements which the Claimant has put in place, but it is understandably a part of the justification for the policy which applies to all non-statutory undertakers. Bearing in mind the breadth of potential installations and installers which the policy needs to address, the concerns provided generally by Mr Tupper are in my view a reasonable response to the issues. In short, the Claimant's reliance on an installation being in accordance with the industry guidelines is not a complete answer to the Defendant's concerns, which are based not simply on the detailed design of the installation but also upon the nature of the installation (i.e. whether it is passive or non-passive), coupled with the prospect that the installation of longitudinal infrastructure brings with it further opportunities for disruption or damage to potentially hazardous installations and consequential danger, and the additional concerns related to the ability to discover the existence of the apparatus prior to works commencing. I am unable to conclude that the policy operated by the Defendant in relation to section 50 licences is one which has no rational connection with the policy of the legislation to protect public safety.

54. Further, and again bearing in mind the breadth of organisations which may seek to install their private infrastructure in the pubic highway, there is in my judgment justification in the arrangements made by the policy for treating non-statutory undertakers differently from statutory undertakers when approaching whether or not to grant a licence under section 50. That question is not affected by the fact that once a licence has been granted they both are to be treated as equivalent under section 48 (4) of the 1991 Act. Prior to the grant of the licence it is clear from all the legislative arrangements discussed above that a statutory undertaker inhabits a very different legal context to a non-statutory undertaker. As set out above, a statutory undertaker will by virtue of the licence which has been granted to it be subject to a strict regulatory regime not only as to the manner in which it conducts its business, but also in respect of its financial stability by virtue of, for instance, the conditions on the licence. Whilst it was contended by Ms Lieven that the ability to impose conditions on section 50 licences could provide a mechanism for addressing the Defendants concerns in relation to these differences I do not consider that is a realistic suggestion. In substance the statutory regime reflects the fact that there will be some statutory undertakers who have rights to undertake street works granted at least in part because of their special status as a licenced statutory undertaker on the one hand, and a variety of other non-statutory undertakers who are controlled in relation to whether or not they are permitted to undertake street works through the section 50 process on the other. It is not realistic to suggest that through the section 50 licencing regime some proxy for the detailed regulatory regime applied to statutory undertakers could or should be implemented. The distinction between statutory and non-statutory undertakers provides further justification for the Defendant's policy.

55. In short, the material provided by Mr Tupper explaining the reasons for having the policy demonstrate that it is in my judgment clearly a policy consistent with the policy and objects of the 1991 Act. It is also, in the light of that material, a policy which is rationally connected with the policy of the 1991 Act.

56. It follows from the above that having considered the issues raised by the Claimant in this application for judicial review I am not satisfied that the policy operated by the Defendant in relation to applications for street works licences under Section 50 of the 1991 Act is unlawful. As a consequence this claim must be dismissed.