ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA29

(following a hearing held in London on 17 February 2016)

Hearing Chair John Hewitt

The Parties

For Govia Thameslink Railway Ltd ("GTR")

John Beer	Head of Access & Regulatory
David Innis	Commercial Director
Andrew Smith	Observer
Sandra Bregger	Observer

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Sarah Williams	Customer Relationship Executive - GTR
Michael Conn	Senior Programme Commercial Manager, Thameslink Programme
Clare Dwyer	Legal Director, Addleshaw Goddard LLP
Jayne Hemingway	Observer
Glenn Godfrey	Observer

In attendance

Tony Skilton	Secretary

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1 Introduction and procedural history of the dispute

1.1 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

"CWM" means carriage washing machine
"ADA" means Access Dispute Adjudication
"DfT" means Department for Transport
"FCC" means First Capital Connect Ltd
"ORR" means the Office of Road and Rail (formerly Office of Rail Regulation)
"Rule" refers to the Access Dispute Resolution Rules
"Secretary" is the Committee Secretary of the Access Disputes Committee
"TAA" or "TAC" means Track Access Agreement/Contract

1.2 This dispute arises out of the refusal of Network Rail to accept entitlement on the part of GTR to be paid compensation for costs incurred as the result of Network Change NC/G1/2013/TLP/003 ("NC Notice 2") being implemented to provide additional train stabling capacity at Cricklewood Sidings. The Network Change had been established (in accordance with the procedure set out in Part G of the Network Code) on 7 January 2014, at which time FCC, GTR's predecessor franchised passenger train operating company, held the TAA with Network Rail for the relevant train service operations.

1.3 Following service by GTR of a Notice of Dispute with Network Rail dated 16 November 2015 pursuant to Condition G11.1 of the Network Code, the Parties completed a Procedure Agreement on 2 December 2015 in which they agreed to refer the dispute in the first instance to an ADA. The Procedure Agreement defined the issue to be put to the ADA as being the principle regarding whether Network Rail is liable to compensate GTR for costs, direct losses and expenses incurred as a consequence of the implementation of the Network Change; at no point during the process has there been any intention that the amount of any compensation found to be payable should be determined by this particular ADA.

1.4 In view of the Procedure Agreement being silent regarding any right of appeal against this ADA determination, either Party has a right of appeal to arbitration (Rule G67).

1.5 I was appointed as Hearing Chair on 2 December 2015. Mindful of the approaching Christmas/New Year holiday period, I exercised my powers as contained in the Rules to adjust the standard timescales laid down for the ADA process; the Parties were informed on that day of the dates by which their various documents were to be served and after consultation between the Secretary and the Parties, 17 February 2016 was subsequently set as a convenient hearing date.

1.6 GTR served its Statement of Claim on 18 December 2015. Network Rail served its Statement of Defence on 12 January 2016 and GTR served its response statement on 19 January 2016.

1.7 Being made aware of the unavailability of Network Rail's appointed legal representative within the normal timeframe, I granted an extension of the time initially set for service of legal submissions and Network Rail served its legal submissions on 2 February 2016. GTR had no legal representations to make in addition to those contained in the statements already provided.

1.8 My own review of the material provided to the hearing (as required by Rule G9(c)) did not identify any points of pure law as arising in this dispute, the issue as presented turning on the correct and proper interpretation and construction of various written instruments; this was advised to the Parties on 5 February 2016.

1.9 Having thoroughly read and understood the Statements and submissions served by the Parties, I concluded that I possessed the relevant railway knowledge necessary for reaching a fair determination of the dispute and, as permitted by Rule G3, I ordered that no Industry Advisors were to be appointed for this ADA. The necessary knowledge of law is not expected from within the pool of Industry Advisors retained by the Access Disputes Committee. In contrast,

my former legal practice in commercial and property litigation and my current service as a Judge of the First-tier Tribunal (Property Chamber) has included consideration of matters directly relevant to the issues raised in this dispute; namely the proper interpretation and construction of statutes and written instruments.

1.10 The hearing took place on Wednesday 17 February 2016. The Parties each gave opening statements, responded to my questioning and made closing statements. During the course of the hearing Network Rail handed in a print of an image said to show the north and south Cricklewood sidings and location of the CWM area pre-2013, and also a copy of a licence dated 2 October granted by Network Rail to GTR relating to sidings at Cricklewood. GTR did not object to these documents being handed in or referred to.

1.11 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarized in the course of this determination.

1.12 In my consideration of the parties' submissions and my hearing of the dispute, I was mindful that, as provided for in Rule A5, I should reach my determination "on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

2 Jurisdiction

2.1 I am satisfied that the matters in dispute raise issues which should properly be heard and determined by an ADA duly convened in accordance with Chapter G of the ADRR to hear a dispute arising in relation to Conditions G2 and G11.1.

3 Submissions made and outcomes sought by the parties

3.1 GTR's principal submission was as follows:-

3.1.1 The Transfer Scheme (effective 14 September 2014) expressly transferred to GTR all rights and liabilities which then vested in FCC by virtue of its TAC dated 9 February 2006. That is reinforced by clause 19.1(c)(ii) of the new TAC dated 26 July 2015 granted to GTR. This included all such rights as FCC had (or may have had) arising from the Network Change notice dated 15 October 2013 which was accepted by FCC on 30 December 2013.

3.1.2 GTR based its claim on the effect of the NC Notice 2 (the "Network Change") In doing so, GTR accepted that notice to determine the FCC CWM licence dated 25 July 2012 had been given to FCC on 19 December 2013 for that licence to determine on 26 January 2014.

3.1.3 In concluding its written submission, GTR sought a determination that confirmed Network Rail's obligation to compensate GTR for the costs, direct losses and expenses reasonably incurred as a consequence of the implementation of the Network Change.

3.1.4 Additionally, in view of the difficult and protracted discussions experienced with Network Rail regarding the principle of compensation for losses resulting from the implementation of the Network Change (and which eventually led to this ADA hearing), GTR asked for the ADA to informally clarify the contractual and legal framework within which the Parties should work to agree such a quantum in the event that the ADA determines in favour of GTR.

3.2 Network Rail's principal submissions were as follows:

3.2.1 FCC had the benefit of a licence to use the CWM at Cricklewood; the licence was personal to FCC and the licence was terminated with effect on 26 January 2014, so that as at the franchise transfer date of 14 September 2014 there was no licence or

right to use the CWM vested in FCC or in GTR. On that basis GTR is not entitled to compensation for hand washing its trains for the period September 2014 to October 2015 when it was granted a licence to use new CWM facilities at the depot.

3.2.2 Under the Transfer Scheme to GTR and the FCC TAC, GTR had the right to "stable" trains but that right did not extend to a right to the use of any CWM facility as may have been available at the depot.

3.2.3 In its written submission, Network Rail sought determination that Network Rail was not obliged to pay compensation to GTR for the costs, direct losses and expenses claimed by GTR for arranging for trains to be hand washed from 14 September 2014 onwards, or at all.

3.2.4 Additionally, Network Rail wished the ADA to recognise it to be inappropriate for it to "informally clarify" or otherwise clarify for the Parties "the contractual and legal framework within which the Parties should work to agree such a quantum" for the compensation claimed if, contrary to Network Rail's defence, the ADA determines in principle that Network Rail is obliged to pay the compensation which GTR claims.

3.3 Paragraph 4.1 of GTR's Statement of Claim stated that the dispute *"was ... the obligation to compensate GTR for the costs incurred as a result of the implementation of a Network Change."*

Paragraph 5.1 revealed the amount of £976,023.84 to be in contention up to Period 6 of industry year 2015/16 incurred in hand cleaning of rolling stock during the works and vehicle movements to enable commissioning of the facilities enabled by the Network Change.

As noted in para 3.1.3 above, GTR's Statement of Claim (at paragraph 6.1) requested that the ADA confirmed NR's obligation to compensate it for the costs, direct losses and expenses reasonably incurred as a consequence of the implementation of the Network Change.

Determination of the amount of any compensation is outside the remit of this ADA, but I have noted this amount only for the purpose of ensuring that the conduct of the ADA was suitably proportionate to the sum involved as well as for reaching a determination in a timely manner consistent with the nature and complexity of the dispute (as required by Rule A15).

4 Oral exchanges at the hearing and my findings of fact

4.1 At the hearing the Parties' respective representatives verbally provided a little further evidence and they also made a number of submissions and observations in the course of various exchanges.

4.2 My findings of fact and observations on them are as follows:

4.2.1 **9 February 2006** NR and FCC enter into a TAC. Since that time it has been the subject of a number of Supplemental Agreements. I was told that for the purposes of this ADA those down to and including the Forty Eighth Supplemental Agreement dated 12 March 2014 were relevant but none of them contained any changes to the TAC which are material to what I have to decide.

4.2.2 **25 July 2008** NR grants to FCC a licence (the "Licence") permitting it to install and use a CWM at the Cricklewood sidings.
The annual licence fee is £1.
The notice period is defined to be one month (14 days in case of emergency).
Clause 3.2 provides that the Licence is personal to FCC and is not transferable.
Clause 3.4 states that the Licence is a temporary measure to enable limited facilities to be brought into use pending the possible implementation of a Light Maintenance Depot.
Clause 3.5 expressly provides that the licence will neither grant nor imply a right of rail access and that rail access is to dealt with under a separate TAC.

Clause 4.9 expressly provides that the licensee is not to provide services to any other party and the privilege granted by the Licence is solely to service the licensee's own rail vehicles.
Clause 5.1 enables either party to terminate the Licence by giving written notice of not less than the notice period.
Evidently FCC installed five CWMs but over time several were cannibalised for spare parts in order to keep one remaining CWM operational.
GTR acknowledged that the Licence was terminated with effect on 26 January 2014 and that the Licence did not transfer to GTR under the Transfer Scheme.

4.2.3 **24 August 2012** NR issues the First Network Change Notice (Ref: NC/G1/2012/TLP/009) ("NC Notice 1"). This referred to proposed works at the North Cricklewood Sidings, providing additional stabling capacity to support the Class 700 rolling stock cascade.

4.2.4 **26 September 2013** DfT issues an Invitation to Tender in respect of the new Thameslink, Southern and Great Northern Franchise ("TSGN Franchise"). The document stated, amongst other matters, that bidders should assume that the franchisee will inherit a TAC from FCC at the start of the franchise which will include the necessary rights to operate the December 2014 Timetable but that a new unified TAC will need to be negotiated to cover the full extent of the new franchise with effect from July 2015.

4.2.5 **September 2013** A Data Room was opened to bidders for the TSGN Franchise.

4.2.6 **15 October 2013** NR issues NC Notice 2.

4.2.7 **19 December 2013** NR gives notice to FCC to terminate the Licence with effect on 26 January 2014. I find as a fact that the Licence was terminated as a direct result of NR's issue of NC Notice 2 which necessitated the closure the CWMs permitted by the Licence; I make this finding because I prefer GRT's submissions on it which were not opposed and it follows common sense and logic.

4.2.8 **30 December 2013** FCC accepts the Network Change.

4.2.9 **7 January 2014** NR confirms establishment of the Network Change as defined in Part G of the Network Code.

4.2.10 **6 February 2014** FCC submits to NR a claim for costs in accordance with Network Code Condition G2.2. The claim was expressly stated to be in respect of additional costs incurred as a result of the planned removal of the CWM at Cricklewood sidings. FCC asserted that as the site was the mainstay of its exterior cleaning arrangements for its Thameslink route services it was necessary to make changes to its external carriage cleaning commitments in order to maintain its standards of train presentation. I also find that by this date FCC had ceased to use the CWM and that by mid-February 2016 the remaining working CWM had been decommissioned and dismantled.

4.2.11 **8 May 2014** NR and FCC meet and NR agrees in principle to pay compensation to FCC. In its written opening submissions – paragraph 5 – NR submitted that the Licence was personal to FCC and that NR was entitled to terminate it on giving one month's written notice and that NR was entitled to do so without payment of compensation. During the course of the hearing NR acknowledged that FCC made a claim under Network Code Condition G2.2, that NR agreed to make and had made a payment of a sum of money to FCC but NR was unable or unwilling to explain on what basis (if any) the sum of money was paid to FCC. All that NR was prepared to say was that 'NR does not admit a sum was paid to FCC pursuant to G2.2." It would have been helpful to me if NR had been clear as to the basis on which it had paid the sum of money to FCC. Since it chose not to do so, as NR acknowledged at the hearing, I am left no alternative but to draw inferences.

Since it has been stressed by NR that it was entitled to terminate the Licence without payment of compensation I infer the payment was not made pursuant to any provision in the Licence. I find I am then left with three possibilities:

(a) It was paid pursuant to the Network Code Condition G2.2 claim for compensation;
(b) It was paid a result of a mistake; or
(c) It was paid gratuitously, perhaps as a gift.

On the balance of probabilities, I find that it was paid pursuant to the G2.2 claim for compensation made by FCC. My reasons are as follows:

(a) FCC made a formal claim for compensation under G2.2;
(b) On 8 May 2014 NR and FCC met to discuss that claim and at that meeting NR agreed in principle to pay compensation to FCC;
(c) NR is a sophisticated organisation and I consider it to be unlikely that a sum of money will have been paid as a result of an error or mistake; and if it had been it is more likely than not that such an error or mistake would have been revealed to me at the hearing, by way of an explanation for the payment;
(d) NR is obliged to carry out certain statutory functions and in all probability there will be clear guidance and structure as to the proper use of the funds provided to it. It seems to me to be unlikely that NR is entitled to make such gratuitous payments. Certainly NR did not submit any evidence that it was so entitled. Again if it is entitled to do so and did in fact do so, I find it more likely than not that NR would have revealed that to me at the hearing.

It seems to me that the explanation which makes the most sense is that the sum was paid pursuant to the G2.2 compensation claim which FCC had lodged with NR. It also seems to me that if I am in error about that NR can hardly complain because it chose not put forward any positive case as to the basis of the admitted payment of a sum of money.

4.2.12 **14 September 2014 at 01:59am** FCC's franchise expired.

4.2.13 **14 September 2014 at 02:00 am** GTR's franchise commences and GTR begins to operate the TSGN Franchise.

4.2.14 **14 September 2014** The Secretary of State for Transport makes a Transfer Scheme in favour of GTR.

4.2.15 **14 September 2015 onwards** GTR undertakes handwashing of carriages at Cricklewood at those part of the sidings not under redevelopment as a result of the Network Change and also undertakes additional carriage washing at Bedford.

4.2.16 **26 March 2015** GTR submits to NR a claim relating to costs said to have been incurred in handwashing carriages at Cricklewood sidings. The claim was made pursuant to Condition G2.2 of the Network Code. I have not seen the detail of the claim and I do not know if it includes costs of additional washing of carriages at Bedford.

4.2.17 **19 June 2015** NR rejects the above claim. NR argued that it did not consider it appropriate for Network Change compensation to automatically transfer from FCC to GTR. NR asserted that the TSGN Franchise data room was populated between June and September 2013 and data included specific reference to the subject NC Notice 1. NR further asserted that NC Notice 2 was available in October 2013 prior to tender submissions in December 2013 and 'should have informed bidders of the possibilities in this area'.

4.2.18 **26 July 2015** NR and GTR enter into a TAC.

4.2.19 **28 September 2015** GTR starts using the new Cricklewood sidings including the CWM facility.

4.2.20 **2 October 2015** NR grants to GTR a licence. The privileges granted by the licence are: *"The right to enter Network Rail's land known as the Cricklewood Passenger Light Maintenance Depot (**'the Premises'**) to carry out Light Maintenance activities (as defined in s82 of the Railways Act 1993)."*
The licence start date was defined to be 5 October 2015 and the licence end date was defined to be 18 October 2015. The licence fee is £1 and the period of notice is defined to be five working days.
In paragraphs 8 and 9 of its written opening submissions NR refer to 'a series of licences to use Cricklewood Passenger Light Maintenance Depot' but I was only handed the one dated 2 October 2015.

NR asserted, and GTR did not argue, that section 82 Railways Act 1993 defined 'light maintenance services' as follows:
"In this Part—
"light maintenance services" means services of any of the following descriptions, that is to say—
(a) the refuelling, or the cleaning of the exterior, of locomotives or other rolling stock;
(b) ..."

It may also be noted that 'Light Maintenance Depot' is defined in section 83 of that Act as follows:
""*light maintenance depot"* means any land or other property which is normally used for or in connection with the provision of light maintenance services, whether or not it is also used for other purposes;"

4.2.21 During the course of the hearing GTR asserted that during the bidding process for the new TSGN Franchise, bidders would have assumed an entitlement to continue to receive compensation arising from the Network Change, which among other things, resulted in the CWM's being out of service. In response to that I enquired whether the Licence was in the data room, whether GTR had access to it and whether GTR (or any other bidder) raised any question with DfT as to whether they would continue to have the benefit of the Licence. The GTR representatives present did not have the answers to these questions to hand. Following a short adjournment GTR sought permission to adduce evidence on both what GTR and other bidders assumed when they submitted their bids, what the custom and practice was and whether any express questions were raised with DfT along the lines indicated. It became apparent that it would take some time for written evidence on these matters to be prepared and served and for NR to be able to consider it and respond to it. Thus, if permission was granted it was clear it would result in an adjournment of the hearing and that there would be cost consequences.

The application was opposed by Network Rail for several reasons including:
1. It was not clear what evidence goes towards custom and practice;
2. The point was only raised for the first time during the course of the hearing;
3. The evidence was not needed and even if GTR could prove the point it did not bind Network Rail and whatever may have passed between the bidders and DfT when the bids were being prepared was not material to the proper construction of the material documents; and
4. Rule A10 was engaged - the point was raised late, too late and the indulgence requested should be refused.

On consideration and reflection, I preferred the submissions made on behalf of NR and refused the application. I was satisfied that the proposed evidence, even if available, would not assist me with the correct interpretation of the material documents.

5 Analysis and consideration of issues and submissions

5.1 The facts underlying this dispute are straightforward and described in sections 3 and 4 above. The refusal of Network Rail to accept liability for paying compensation to GTR then becomes a matter of the correct and proper interpretation and construction of various written instruments.

5.2 The material documents are:

5.2.1 **The Transfer Scheme** dated 14 September 2014. The Transferor was FCC and the Transferee was GTR. By clause 2 with effect from 02:00 on 14 September 2014 "the property, rights and liabilities of the Transferor designated as Primary Franchise Assets by notice to the Transferor dated 10 September 2014 (as attached to the Schedule of this Transfer Scheme) shall be transferred to, and vest in, the Transferee. By paragraph 14 of Schedule 2 there was transferred:

"Track Access Agreement

The property, rights and liabilities of the Franchise in respect of the Track Access Contract (Passenger Services) dated 9 February 2006 between Network Rail Infrastructure Limited and the Franchisee (as amended from time to time including the by the 48th Supplemental Agreement)." "

It was not in dispute that the Transfer Scheme effected a transfer of the benefits and burdens of the FCC TAC to GTR by operation of law.

5.2.2 **Track Access Agreements.** The parties were agreed that TACs were an industry template imposed by ORR and thus they were not individually negotiated at arms-length by two commercial organisations. The parties were also agreed that the both of the subject TACs, Clause 19.1 was in these terms:

"19 Transition

19.1 Corresponding Rights

In relation to any Corresponding Right:

(a) ...
(b) ...
(c) Any consultations undertaken, notices served, matters referred to dispute resolution agreements reached or determinations made which:

(i) are made in accordance with Parts D, F, G or H of the Network Code under Previous Access Agreements in relation to ... Network Change ... and
(ii) relate to a right under the Previous Access Agreements which is the subject of a Corresponding Right.

shall

(A) cease to have any effect under the Previous Access Agreements as from the Transition Date; and
(B) be deemed to have effect under this contract as from the Transition Date

(d) ..."

"Transition Date" is defined in Clause 19.2 as meaning "*the date on which this contract comes into effect for all purposes*", i.e. 14 September 2014.

5.2.3 **Network Code Part G - Network Change.** I need not quote passages from the Code but I record that by Condition G2.1 an access beneficiary may respond to a notice of a (proposed) Network Change in certain circumstances, including if it considers it should be entitled to compensation from Network Rail for the consequences of the

implementation of the change. The amount of compensation to which the access beneficiary is entitled is governed by the principles set out in Conditions G2.2, G2.3 and G2.4.

5.3 The general approach to construction or interpretation of the instruments was not in dispute. I have reminded myself of the relevant principles and the guidance given by the authorities which I have summarised in Annex 'A' to this determination.

5.4 The principle submission of GTR was that the Transfer Scheme operated to vest in GTR all of the property, rights and the liabilities which vested in FCC which included the TAC. I agree with that submission. GTR submitted that it stood in the shoes of FCC. I do not accept that submission. I find that the Transfer Scheme gave rise to a new contract, by operation of law, as between Network Rail and GTR but that new contract was on the same terms and conditions as the FCC's TAC dated 9 February 2006. This was Network Rail's submission, which I prefer.

5.5 What the Transfer Scheme also did was to pass to GTR the property, rights and liabilities which vested in FCC immediately prior to the Transition Date. Both parties accept that the expression 'property, rights and liabilities' is not defined in any of the material documents. In accordance with the guidance given in the authorities I have to approach the interpretation of that expression applying first the results achieved by the words used in context. The TAC is a very detailed and complex document which has been adopted by the ORR for wide use within the rail industry. I have little doubt that prior to its adoption it was the subject of extensive consultation with interested parties and stakeholder groups. Where substantial commercial organisations have adopted a document as the basis for a legal relationship courts and others are entitled to assume the parties meant what they say in it and the courts will be slow to interfere with the words. It may also be noted that the Railways Acts of 1993 and 2005 use the expression 'property, rights and liabilities' in connection with provisions concerning Transfer Schemes but those Acts do not provide any helpful definition from which I can derive any assistance as regards the dispute before me.

5.6 The TAC adopts a wide number of detailed definitions set out over 7 or so pages. The subject expression 'property, rights and liabilities' is not one of them. This leads me to believe that the expression was not intended to be a term of art or to have specific rail industry meaning. They are general words which should be given a general meaning.

5.7 In very simple terms the purpose of the Transfer Scheme was to pass from one franchisee to another franchisee such rights and obligations as the outgoing franchisee had to enable the incoming franchisee to hold the fort, to take over and operate the timetable until such time as Network Rail and the incoming franchisee were able to execute a new TAC in favour of the incoming franchisee. In that context it seems to me that the expression 'property, rights and liabilities' was intended to be the bundle of various rights and obligations which the outgoing franchisee had at the moment of transfer.

5.8 It was not in dispute the Licence was not one of rights which passed on transition because that licence had been terminated some nine months previously in January 2014.

5.9 It was a major plank of Network Rail's case that GTR never had any rights under the Licence and never had use of the CWM and thus had not suffered any losses as result of the CWMs not being available to it.

5.10 In my judgment the focus is on what bundle of rights were vested in FCC and which transferred to GTR by reason of the Transfer Scheme.

5.11 As at the Transition Date the position was that:

5.11.1 Network Rail had issued NC Notices 1 and 2;

5.11.2 Network Rail had given notice to and had terminated the Licence;

5.11.3 FCC had accepted the NC Notices;

5.11.4 Network Rail had confirmed the establishment of the Network Change;

5.11.5 FCC had submitted to Network Rail a Network Code Condition G2.2 claim for compensation arising from the Network Change; and

5.11.6 Network Rail and FCC had met to discuss that claim and Network Rail had agreed in principle to pay compensation to FCC.

5.12 I find that one of the bundle of rights which vested in FCC at that time (and which transferred to GTR) was the right to pursue a G2.2 claim for compensation arising directly from the Network Change. Evidently FCC only pursued its claim for losses incurred up to the Transition Date because, I assume, after that date it did not suffer any further losses as a consequence of the Network Change.

I am reinforced in this finding by the fact that if the franchise had not changed hands on 14 September 2014 FCC would have continued to suffer losses as a result of the Network Change and would have been entitled to seek compensation for those further losses. The fact that it is a different party which has suffered those losses does not, in my judgment, detract from the fact that the losses stem from the consequences of the Network Change. I do accept that FCC and GTR may have different resources and different CWM facilities available to them so that the quantum of losses suffered by the one may not be same as those suffered by the other but that is a matter of quantum, not principle.

5.13 One of the criticisms levelled at Network Rail by GTR was that it proved difficult to get NR to give a proper or fully reasoned explanation of its refusal to agree GTR's compensation claim and that the main plank Network Rail relied upon - namely that the Licence was terminated in January 2014 - was an argument which was deployed for the first time during the course of the ADA process. The only comments I make about those criticisms is that as to the former, it is a matter for Network Rail as to how it conducts its business, but there may be costs consequences where a valid claim is advanced and no full or proper reason to reject is put forward. As to the latter, generally where a claim is advanced the recipient of it is not bound by the reasons for rejection originally advanced. No estoppel arises. It is quite common for a party to define or refine its case as the proceedings progress and move forward and this often happens if a fresh pair of eyes (or external advisers) are deployed to review the proceedings. In the context of the present case I would reject both criticisms.

5.14 Calculation of compensation payable

5.14.1 Originally GTR sought clarity on the timescale and an agreed route for agreement on the quantum of a compensation claim under Network Code Condition G2.2. That is outside the scope of this ADA.

In the event the Parties did not require this ADA to determine the quantum of any compensation which might be payable in the event of the dispute being determined in favour of GTR. That is quite sensible because GTR claims losses and expenses of £976,023.84 incurred in hand cleaning of rolling stock as a result of the Network Change and vehicle movements to enable commissioning of the facilities enabled by the Network Change. That said no evidence as to how that sum has been arrived has been put forward. In ordinary circumstances such evidence would need to be provided by a claimant in some detail to enable the party against whom the claim is made to understand it and test it. Accordingly, I leave this aspect of the case to now be negotiated and settled between the Parties; in the event of their being unable to reach agreement, the Rules provide routes by which a disputed sum can be determined.

6 Costs

6.1 Neither party indicated a wish to be awarded costs in the event of its position being supported by this ADA determination.

6.2 Rule G55 states that

"An order for costs may only be made where the Hearing Chair is satisfied that either

(a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or

(b) the conduct of the relevant Dispute Party before or during the references was such as to justify an award of costs being made against it (or them)."

6.3 The bar for making a costs award is set very high by Rule G55 and I consider that it would be inappropriate for me to make any order regarding award of costs in connection with this ADA hearing.

7 Determination

Having considered carefully the submissions and evidence as set out in sections 3 and 4, and based on my analysis of the legal and contractual issues as set out in section 5,

I DETERMINE:

7.1 That one of the rights which passed to GTR pursuant to the Transfer Scheme was a right to make and pursue a claim for compensation under Network Code Condition G2.2 arising from the consequences of Network Change Notices 1 and 2.

I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.

John Hewitt
Hearing Chair

8 **March 2016**

ANNEX "A"

The Construction of Written Instruments

1. The general legal principles.

   Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201E, that

   '...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

2. The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of interpretation.

   '***The principles may be summarised as follows:***

   (1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

   (2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.*

   (3) *The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are inadmissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

   (4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.*

   (5) *The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had...'*

3. Lord Hoffman added a slight qualification to these principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

'The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.'

4. Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

'Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.'

5. Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

'In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions, the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.'

6. Regard may be had to the general background as part of the factual matrix in order to help construe words in a document – see *Partridge & others v Lawrence & others* [2003] EWCA Civ 1121.

7. Similarly obvious mistakes can be corrected by construction in order to give effect to the written intention of the parties. Once corrected, the instrument is interpreted in and has effect in its corrected form. See for examples *St Edmundsbury v Clark (No.2)* [1975] WLR 468 and *Littman v Aspen Oil (Broking) Limited* [2005] EWCA Civ 1579; [2006] 2 P & CR 2

8. In *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38 the House of Lords held that although a court would not easily accept that linguistic mistakes had been made in formal documents, if the context and background drove a court to conclude that something had gone wrong with the language of a contract the law did not require it to attribute to the parties an intention which a reasonable person would not have understood them to have had; and where it was clear both that there was a mistake on the face of the document and what correction ought to be made in order to cure it, in that it was clear what a reasonable person having all the background knowledge which would have been available to the parties would have understood the parties by using the language in the contract to have meant, the court was entitled to correct the mistake as a matter of construction. The House went on hold that a material definition in the contract was ambiguous and obviously defective as a piece of drafting and to interpret the the definition in accordance with the ordinary rules of syntax made no commercial sense.

9. In *Multi-Link Leisure Developments Limited v North Lanarkshire Council* [2010] UKSC 47 Lord Hope cited with approval (at paragraph 21) the words of Lord Steyn in *Deutsche Genossenschaftsbank b Burnhope* [1995] 1 WLR 1580:

"The Court must not try to [divine] the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background."

Although this was a Scottish case Lord Clark noted (at paragraph 45) that he *"detected no difference between the principles applicable to the construction of a lease in Scotland and in England."*

10. In *Rainy Sky S.A. and others v Kookmin Bank* [2011] UKSC 50 the Supreme Court took the opportunity to review the modern approach to interpretation. At paragraph 21 Lord Clarke (with whom the other four members of the Court agreed) said:

"21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

11. The subject was before the Supreme Court again in 2015 in *Arnold v Britton and others* [2015] UKSC 36 in which Lord Neuberger said:

14. Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900.

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

12. Lord Neuberger went on to counsel focus on the words used and that 'commercial common sense' should not undervalue the importance of the language. He made seven points which may conveniently be summarised as follows:

- 'Commercial common sense' and 'surrounding circumstances' should not be invoked to undervalue the importance of the language used. The task is to interpret the provision identifying what the parties meant through the eyes of a reasonable reader of the words used.
- The less clear the words are, or put another way, the worse the drafting is, the more ready the court can depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning of words used.
- Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.
- A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed.

- When interpreting a contractual provision, the court can only take into account facts or circumstances which existed at the time the contract was made and which were known or reasonably available to both parties.
- In some cases a subsequent event occurs which was plainly not intended or contemplated by the parties, judging by the words. In such a case, if it is clear what the parties would have intended the court will give effect to that intention. The judge cited an example of the court doing that in *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, where the Court concluded that '*any … approach*' other than that which was adopted *"would defeat the parties; clear objectives"*, but that conclusion was based on what the parties had *"had in mind when they entered into"* the contract.
- Reference was made in argument to service charge clauses being construed 'restrictively'. Lord Neuberger was not convinced by that notion or that service charge clauses are subject to a special rule of interpretation. He said that even if a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue how one interprets the contractual machinery for assessing the tenant's contributions. He considered the origin of the adverb is to be found in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14. What he was saying, quite correctly in Lord Neuberger's view was that the court should not *"… bring within the general words of a service charge clause anything which does not clearly belong there…"*.