IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN APPEAL AGAINST THE DETERMINATION IN ACCESS DISPUTE ADJUDICATION NO. 30
AND IN THE MATTER OF AN ARBITRATION PURSUANT TO CHAPTER "F" OF THE ACCESS DISPUTE RESOLUTION RULES
ARBITRATION OF DISPUTE REFERENCE A33
BEFORE THE HON SIR BERNARD EDER (sitting as sole arbitrator)
B E T W E E N:-

NETWORK RAIL INFRASTRUCTURE LIMITED

Claimant

- and -

(1) GB RAILFREIGHT LIMITED
(2) DB CARGO (UK) LIMITED

Respondents

AWARD OF THE HON SIR BERNARD EDER
(corrected pursuant to s.57 Arbitration Act 1996)

(A) INTRODUCTION

1. This Award is made in respect of an appeal brought by the Claimant ("NR") against a Determination of Hearing Chair, Peter Barber, sitting with Industry Advisors, John Boon and Robert Howes (the "Determination") in an Access Dispute Adjudication (bearing number 30) ("ADA 30") in connection with disputes arising under track access agreements between, on the one hand, NR and, on the other hand, the Respondents ("GBRF" and "DBC") dated respectively 29 January 2008 and 9 February 2006 (the "TAAs") which had been referred for resolution pursuant to Clause 13.1 of the TAAs in accordance with the Access Dispute Resolution Rules ("ADRR"). I should mention that various other interested parties also participated in ADA 30 although, as I understand, they were not formally parties to the proceedings.

2. The ADRR and the TAAs provided in material part as follows:

(A) ADRR

CHAPTER A – THE PRINCIPLES AND OPERATION OF THE DETERMINATION PROCEDURE

Rule A1: "*The Principles set out in this Chapter A are intended to be applied to the whole of the conduct and determination of disputes by all parties including …each Forum*[1]*.*"

PRINCIPLES

Rule A5: "*Each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including its determinations and decisions on procedure, shall be in accordance with the law.*"

Rule A6: "*Each and every Forum shall: (a) where the Access Conditions or Underlying Contract*[2] *require that a specific remedy be granted, grant that remedy accordingly; or (b) [w]here a specific remedy is provided for at law, grant that remedy accordingly; or (c) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Forum, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Underlying Contract after due consideration of all remedies and orders that could properly be made.*"

Rule A7: "*In reaching its determination, each and every Forum shall: (a) take note of relevant published ADA or TTP*[3] *determinations (and those of any predecessor bodies) and of any other relevant tribunal excluding (to the extent referred to in (b) below) the ORR*[4] *as persuasive authority but need not be bound by them; (b) be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the courts.*"

CHAPTER G – DETERMINATIVE PROCESS RULES – ACCESS DISPUTE ADJUDICATION

Rule G1: "*An Access Dispute Adjudication (ADA) under these Rules is a determinative dispute resolution process in which, with the benefit of advice from independent railway Industry Advisors, a Hearing Chair determines the*

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1 Defined in the definitions section of the ADRR as "*Each Hearing Chair of an ADA or Timetabling Panel, evaluator, mediator, arbitrator and determining expert appointed under these Rules*".

2 The Underlying Contract is defined in the ADRR as *"Any contract under which disputes are or can be referred to resolution under the [ADRR]…*" so includes the TAAs.

3 I.e. Timetabling Panel, in relation to timetabling matters.

4 I.e. the Office of Rail Regulation (and where relevant the former Rail Regulator) or any successor body or regulator.

dispute in a timely and efficient manner on the basis of the parties' respective legal rights in accordance with the evidence and argument presented to him."

Rule G9: "*The Hearing Chair: (a) has oversight of the effective case management of a dispute which has been referred to an ADA in light of the Principles*[5]*; (b) has responsibility to ensure that all procedures of the ADA (at and before ADA hearings) are being implemented fairly and effectively in respect of each dispute; … (d) will make a final determination of the dispute referred to the ADA and prepare a written determination which is legally sound, appropriate in form, and otherwise compliant with this Chapter G …*"

Rule G47: "*Subject to any other provision of the Access Conditions*[6] *and Underlying Contract, the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including, without limitation, that: (a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the Hearing Chair shall specify; (b) one Dispute Party should take or not take specified action; (c) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination; or (d) any principal sum the Hearing Chair may order one party to pay to another shall carry interest at such rate and over such period as he shall determine.*"

Rule G50: "*Except as otherwise provided in the Underlying Contract and without prejudice to Rule G67, the Dispute Parties shall comply with the terms of the determination within such period as shall be specified in the determination.*"

Rule G51: "*If a Dispute Party fails to comply with the terms of the determination, that failure will be dealt with by way of a new dispute through the appropriate mechanism.*"

Rule G67: "*Following a determination of a dispute by the Hearing Chair any Dispute Party is entitled to appeal in accordance with any relevant provisions in the Procedure Agreement. If the Procedure Agreement is silent in respect of a right of appeal*[7] *then each party shall have a right of appeal to arbitration in accordance with these Rules.*"

(B) The TAAs

"1.3…..*Indemnities provided for in this contract are continuing indemnities in respect of the Relevant Losses to which they apply, and hold the indemnified party harmless on an after tax basis.*"

"8.2 Compensation in relation to breach

5 I.e. the principles set out in Rules A5-A10.

6 In this context, the Network Code.

7 As it is in this case.

In relation to any breach of this contract, the party in breach shall indemnify the Innocent Party against all Relevant Losses."

The definition of Relevant Losses is:

"*…….all costs, losses (including loss of profit and loss of revenue), expenses, payments, damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach [of contract]*".

"*10.2 Network Rail indemnity*
Network Rail shall indemnify the Train Operator against all Relevant Losses resulting from:

(a) a failure by Network Rail to comply with its Safety Obligations;

(b) any Environmental Damage to the Network arising directly from any acts or omissions of the British Railways Board prior to 1 April 1994 and any Environmental Damage arising directly from the acts or omissions of Network Rail; and

(c) *any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by this contract arising directly from Network Rail's negligence.*"

"*11.3 Restrictions on claims by Train Operator*
Any claim by the Train Operator against Network Rail for indemnity for Relevant Losses:

(a) …

(b) shall:

(i) include Relevant Losses only to the extent that these constitute amounts which the Train Operator would not have incurred as train operator but for the relevant breach; and

(ii) give credit for any savings to the Train Operator which result or are likely to result from the incurring of such amounts."

"*11.4 Restriction on claims by both parties*
Any claim for indemnity for Relevant Losses shall exclude Relevant Losses which:

(a) do not arise naturally from the breach; and

(b) were not, or may not reasonably be supposed to have been, within the contemplation of the parties:

(i) at the time of the making of this contract; or

(ii) where the breach relates to a modification or amendment to this contract, at the time of the making of such modification or amendment,

as the probable result of the breach."

"*11.5 Limitation on liability*

Schedule 9 shall have effect so as to limit the liability of the parties to one another under the indemnities in Clauses 8.2 and 10, but:

(a) does not limit any liability arising under Schedules 4, 7 or 8 or under the Traction Electricity Rules;

(b) […] in relation to a failure to perform an obligation under the Network Code, only to the extent (including as to time and conditions) that the Network Code so provides; and

(c) subject to […] Clause 18.3.3."

"18.3.2 Exclusive remedies

Subject to Clause 18.3.3[8] *and except as expressly provided in this contract:*

(a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of this contract; and

(b) the remedies provided for in this contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available."

3. As set out in the Determination, the underlying disputes between the parties concern the obligations of NR with regard to the reinstatement and reconnection of certain railway track referred to as the Clay Cross Down Loop (the "Loop").

4. Pursuant to Rule G67 of the ADRR and in the absence of contrary agreement between the parties, the present appeal arises as of right by way of arbitration in accordance with Chapter F of the ADRR. By notice served on 13 February 2017, NR (as appellant) gave notice of appeal by way of arbitration pursuant to Rule G67. Subsequently, with the assistance of the Secretary to the Access Disputes Committee (as defined in the ADRR), the parties agreed upon the appointment of the undersigned as arbitrator herein; and I was duly appointed by notice dated 14 March 2017.

[8] Clause 18.3.3 is presently immaterial because it deals with situations where there has been fraud, death or personal injury.

5. I understand that this is (or at least may be) the first appeal ever by way of arbitration under Rule G67. In any event, it is common ground that the present appeal is to be conducted on the basis that it is, in effect, a hearing *de novo*.

6. NR originally brought this appeal by way of arbitration against two particular aspects of the Determination viz.

   6.1. The decision recorded at paragraph 7.2 of the Determination that within 30 days from the date of publication of the Determination, NR should provide to each of DB and GBRF written confirmation endorsed by the ORR that NR has duly effected a change control to the Enhancement Delivery Plan for the Sheffield to St Pancras Line Speed Improvements Project (EM001A) so as to add 20 October 2018 as the date of reinstatement and reconnection of the Loop and has thereby constituted such reinstatement and reconnection as an ORR recognised regulatory milestone (the "Regulatory Milestone Decision"); and

   6.2. The decision recorded at paragraph 7.4 of the Determination that NR should pay each of GBRF and DBC severally the sum of £50,000 as an exemplary award of damages, such award being purportedly justified by the Hearing Chair on one or more of the bases set out at paragraph 5.20 of the Determination (the "Exemplary Damages Decision").

7. Following my appointment and in accordance with a procedural order made by me, the parties duly served statements of their respective cases. In addition, NR served a signed witness statement of Mr Spencer Gibbons, Principal Programme Sponsor of the Midland Mainline/East Midlands Line dated 30 June 2017. This statement which, I should emphasise, was not before the Hearing Chair, was admitted in evidence without cross-examination or challenge by the Respondents.

8. An oral hearing took place in London on 19 July 2017 before me attended by the parties' representatives. However, before that hearing, NR gave notice of abandonment of its appeal in respect of the Regulatory Milestone Decision. It is therefore unnecessary to say anything more about that aspect other than to note that as set out below and by consent, that part of the appeal is dismissed.

9. In summary, it is NR's case that the Exemplary Damages Decision should be set aside on the grounds that it was procedurally unfair and/or wrong in law. In particular, it is NR's case that the Hearing Chair acted in breach of Rules A1, A5, A6, A7 and/or G1 and failed to determine the matter before him (i) on the basis of the parties' legal rights and entitlements, (ii) in accordance with the evidence and argument presented to him, (iii) in accordance with the law and natural justice, and (iv) having proper regard to the relevant decisions of the Courts.

(B) BACKGROUND TO THE DETERMINATION

10. The factual background to ADA 30 is fully set out in sections 1 and 2 of the Determination and is not repeated. For present purposes, it is sufficient to summarise the relevant background as follows.

11. The original disputes have a long history which were the subject of an earlier determination of the Hearing Chair in Access Dispute Adjudication No. 17 ("ADA 17 Determination") dated 3 January 2014. At paragraph 7.1 of the ADA 17 Determination, the Hearing Chair held that NR had implemented part of a Network Change (defined as the "MML Network Change") by removing the Loop from the Network (as part of so-called "Implementation Stageworks") in breach of Network Code Condition G10.3.1. The Network Code was formally incorporated into the TAAs pursuant to clause 2.1 thereof. Hence, the Hearing Chair's finding of breach by NR of Network Code Condition G10.3.1 was tantamount to a finding that NR had acted in breach of the TAAs. At paragraph 7.3 of the ADA 17 Determination, the Hearing Chair held that NR was both required and permitted "*to withdraw completely and exclude from the MML Network Change proposal the removal of the Loop from the Network*". He further held, at paragraph 7.4 of the ADA 17 determination, that NR "*is required to reinstate and reconnect to the Network the Loop in its full length … of 649 metres and in a form at least equivalent to the physical form and layout in which it stood immediately prior to the Implementation Stageworks …*"; and at paragraph 7.5 he further directed that *"[a]ny such reinstatement and reconnection shall be commenced and completed prior to the date of commencement of the Timetable coming into effect in December 2014 and Network Rail shall observe all such procedures and take all such actions as are*

required of or permitted to it under the Network Code and any relevant Track Access Agreement in order reasonably to enable or facilitate such reinstatement and reconnection, unless prior to such date Network Rail shall have duly established and implemented in accordance with Network Code Part G a new Network Change distinct from the MML Network Change, consisting solely of or comprising the removal of the Loop."

12. It is common ground that NR did not commence and complete the Loop reinstatement and reconnection works as directed under paragraphs 7.4 and 7.5 of the ADA 17 Determination or at all. Pursuant to Rule G51 of the ADRR, if a Dispute Party fails to comply with the terms of an ADA determination, "*that failure will be dealt with by way of a new dispute through the appropriate mechanism*". It is in light of this background that GBRF and DBC pursued their claims against NR during the ADA 30 process in respect of NR's failure to comply with the Hearing Chair's orders in the ADA 17 Determination.

(C) THE EXEMPLARY DAMAGES DECISION

13. It is common ground that in pursuing their claims in ADA 30, neither GBRF nor DBC ever sought an award of exemplary damages in their statements of case or in argument during the hearing before the Hearing Chair. Rather, it was the Hearing Chair himself who first raised the possibility of a "*deterrent award*" on Friday 8 July 2016 at 7:28 pm when providing a summary of issues of law to the parties. This was only 2 working days before the scheduled hearing. It is NR's case on this appeal that there was little time or argument devoted during the hearing to the issue of exemplary damages; that evidence could not have been – and therefore was not - prepared or served by NR in relation to it; and that it was procedurally unfair and contrary to the requirements of natural justice for the Hearing Chair to raise this issue so late in the day "off his own bat" and to make the Exemplary Damages Decision against NR in such circumstances. In this context, NR rely upon the evidence of Mr Gibbons.

14. The substantive reasons for the Exemplary Damages Decision are set out in Section 5 of the Determination. This contains (i) a lengthy damning criticism of NR's conduct over an extended period (some 4 years) which it is unnecessary to repeat; and (ii) a

detailed consideration of the legal basis for an award of exemplary damages by reference to an analysis of certain terms of the TAAs as well as various authorities including (in chronological order) *Addis v Gramophone Co Ltd* [1909] AC 48, *Rookes v Barnard* [1972] AC 1027, *AB v South West Water Services Ltd* [1993] QB 507, *Kuddus (AP) v Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789 and *Johnson v Unisys Ltd.* [2003] 1 AC 518. For present purposes, it is sufficient to note the main broad conclusions reached by the Hearing Chair viz.

14.1. The order made in the ADA 17 Determination against NR was in respect of a previous breach of an obligation by NR and thus NR's non-compliance with the ADA 17 order amounted to a "repeated breach" of its obligations – para 5.15.1.

14.2. The pattern of NR's corporate behaviour did not demonstrate *"…the responsible conduct of a self-professed public sector body. I find that it evidences an attitude within Network Rail of assumed impunity, resulting in carelessness, disregard and ultimately contempt for the ADRR process"* – para 5.16

14.3. *"….. Network Rail's pattern of behaviour in unauthorisedly disconnecting and removing the Loop from the Network, equivocating over whether or not it had actually done so, failing to reinstate it as specifically ordered by an ADA, equivocating again over whether, when and how it should eventually be reinstated, eventually agreeing to complete its reinstatement only some six years after it was first removed, and finally asserting its total immunity to any process calculated to compel performance of what it affects to have agreed, amounts to both oppresive and arbitrary action – as well as being manifestly contemptuous of the dispute resolution process to which it has contractually submitted…."* – para 5.19.13.

14.4. There was power to make an award of exemplary damages by virtue of one or more of the following and, on the facts found, such power could and should be exercised:

14.4.1. The general power contained in the introductory provision in Rule G47 on the basis that such an award was, on the facts, *"necessary to resolve the dispute"* within the meaning of that provision.

14.4.2. Rule G47(a) contained wording which expressly contemplated a specific power to award (in his own words) *"any kind of monetary payment"* – wording which was wide enough to include payment of a sum of money *"…whether or not characterised as "damages" and whether designated as compensatory, exemplary, deterrent, punitive or for any other purpose that does not contravene public policy…"*

14.4.3. Such an award was an "appropriate remedy" in exercising the discretion accorded to the Hearing Chair by the ADRR in the manner required by Rule A6(c).

14.5. Such powers were not circumscribed by any relevant limitations under English law. In particular, the Hearing Chair rejected NR's two main legal submissions viz (i) that an award of exemplary damages would be contrary to the law against penalties (a point no longer pursued by NR in this arbitration); and (ii) that English law permits awards of exemplary damages only in the three categories of circumstances defined in the case of *Rookes v Barnard* (often referred to as the "Devlin categories") viz (i) misconduct in public office; (ii) where expressly authorised by statute; and (iii) where the conduct was calculated by the defendant to make a profit for himself which exceeds the damages payable to the claimant – none of which categories applied in the present case. On the contrary, the Hearing Chair concluded that *Rookes v Barnard* was distinguishable; that the other main authorities in this context were "inconclusive"; and that he could find no case specifically prohibiting or outlawing as a matter of generally applicable principle the award of exemplary damages for a breach of contract as distinct from a tort, whether or not the factual circumstances of the particular breach fall within the Devlin categories. In any event, he further concluded that the facts in the present case were such as to fall within the first and/or third of the Devlin categories ie (i) misconduct in public office and/or (ii) conduct calculated by NR to make a profit for itself which exceeded the damages payable.

(D) THE RESPONDENTS' POSITION

15. Although the Respondents never themselves originally advanced any claim for exemplary damages, there is no doubt that they have sought to take the benefit of the Exemplary Damages Decision and the awards of £50,000 in their favour by both demanding payment and (at least in the case of GBRF) actually receiving payment of that sum; and they both served Statements of Defence in this arbitration seeking, in effect, to uphold the Exemplary Damages Decision.

16. However, in this arbitration, the Respondents have limited themselves to (i) relying on the reasons given by the Hearing Chair for the Exemplary Damages Decision and (ii) advancing a very broad argument that an award of exemplary damages in the present circumstances is justified in order to address what they describe as the "cyclic process" whereby (as they submit) the only available remedy, if a party disregards an Access Disputes Adjudication determination, is to bring a new dispute through the appropriate mechanism in accordance with Rule G51 of the ADRR; and that, in effect, the absence of a power to award exemplary damages in appropriate circumstances would constitute an important unsatisfactory lacuna in the remedies available. However, the Respondents have not engaged in any detail with the various specific arguments advanced on behalf of NR as to why the Exemplary Damages Decision should be set aside. The result is that the arguments advanced in this arbitration have unfortunately been somewhat one-sided although I should make plain that this is not in any way a criticism of the Respondents.

17. Against that background, I turn to deal with the two main grounds of appeal.

(E) PROCEDURAL UNFAIRNESS

18. I have already summarised the broad thrust of NR's first main complaint in relation to the Exemplary Damages Decision based on alleged procedural unfairness. In the event, it seems to me unnecessary to consider this issue further – and I decline to do so. That is so for two main reasons. First, this part of NR's case is a direct attack on the conduct of the Hearing Chair. He is not a party to this appeal (there appears to be no procedure

to enable him to be made a party) and, in any event, he has had no opportunity of responding to the allegations made against him. As such, I think it would be wrong in principle to embark on an examination of his conduct of the hearing in his absence or at least without giving him a proper opportunity to respond. At the very least, I am disinclined to carry out such an exercise unless it is necessary to do so. Second, I do not consider that it is necessary to carry out such exercise. Even on the assumption that there was procedural unfairness as alleged by NR, I could not simply set aside the Exemplary Damages Decision without going on to consider the second (substantive) ground of appeal advanced by NR. Equally, if I were to conclude that there was no procedural unfairness, I would similarly need to go on to consider that same second ground of appeal. Thus, as it seems to me, the present arbitration ultimately turns on the second ground of appeal– to which I now turn.

(F) EXEMPLARY DAMAGES

19. In my view, the Exemplary Damages Decision was flawed for at least four main reasons.

20. First, the Hearing Chair adopted what seems to me to be an impermissibly broad interpretation of his powers under Rule G47. As already stated above and at the risk of repetition, he considered that he had the power to award exemplary damages on the basis of (i) the general power contained in the introductory provision in Rule G47 i.e. that it was *"necessary to resolve the dispute"* and/or (ii) Rule G47(a) which expressly contemplated a specific power to award *"any kind of monetary payment"* – wording which was (as he stated) wide enough to include payment of a sum of money *"...whether or not characterised as "damages" and whether designated as compensatory, exemplary, deterrent, punitive or for any other purpose that does not contravene public policy..."*. However, in my view, his main conclusion that Rule G47 entitled him to order "*any kind of monetary payment*" subject only to "*invalidation by overriding public policy considerations*" has no proper contractual basis or other legal justification. In particular, as submitted on behalf of NR, his powers were not open-ended but as made plain by the opening words of G47 necessarily subject to

    20.1. The relevant provisions of the ADRR including (most importantly) A5 (any determination to be made *"..on the basis of the legal entitlements of the Dispute*

Parties and upon no other basis..”); A7 (each Forum shall be bound by *“..any relevant decisions of the courts..”*); G1 (disputes to be determined *...on the basis of the parties’ legal respective legal rights..”*); and G9 (determination is to be *“..legally sound, appropriate in form and otherwise compliant with this Chapter G…”*; and

20.2. The other provisions of the relevant TAAs including those defining or limiting the rights and remedies of GBRF and DBC in the event of a breach of contract by NR – in particular (as set out above) Clauses 1.3, 8.2, 10.2, 11.3, 11.4, 11.5 and 18.3.2.

21. Second, in light of the stated provisions of the TAAs, the parties had expressly agreed as follows:

21.1. The sole remedies for breach of contract would be those provided for in the TAAs – see, in particular, Clauses 11.5 and 18.3.2. In this context, it is also noteworthy that Schedule 9 to the TAAs contains limitations, in the form of aggregate monetary caps, on the parties’ respective liabilities under the agreements. One of the circumstances in which those limitations are disapplied is where Relevant Losses “*result from a conscious and intentional breach by a party*” (Schedule 9 Paragraph 5(a)). However, even in the event of such a conscious and intentional breach, the TAAs do not make any provision for the payment of any penal or punitive amounts by the party in breach. In that event, the remedy provided for under the TAAs remains that provided for under clause 8.2, namely, an indemnity in respect of the Relevant Losses caused by the breach, albeit ignoring any cap provided for under Schedule 9.

21.2. So far as monetary remedies are concerned, the agreed remedy was an indemnity in respect of Relevant Losses (as defined) resulting from the breach – see Clauses 1.3, 8.2 and 11.3.

21.3. The definition of “Relevant Losses” for this purpose is purely compensatory in nature and inconsistent with any notion of punitive or exemplary damages.

22. Third, it is important to recognise – and emphasise – that the claims brought by GBRF and DBC in ADA 30 were only for breach of contract viz. the failure of NR to comply with the earlier ADA 17 Determination. There were no separate claims in tort either in

the original ADA 30 or in this arbitration. It was common ground that the claims advanced by GBRF and DBC were limited to a claim for breach of contract both before the Hearing Chair – as he himself recognised in the course of the original hearing at p93 [16]-[17] of the transcript – and in this arbitration. As submitted on behalf of NR, it is, in my view, well established that, as a matter of English common law, exemplary damages are not recoverable for breach of contract. Thus, in *Johnson v Unisys Ltd* [2001] UKHL 13, Lord Steyn observed at [15], when referring to the topic of exemplary damages as dealt with in *Addis v Gramophone Ltd* [1909] A.C. 488, especially at 492, 497 and 500-501: "[in] *English law such damages have never and cannot be awarded for breach of any contract*". This dictum was applied by David Richards J. in *Abbar v SEDCO* [2013] EWHC 1414 (Ch) (a breach of contract case): see generally [229] – [233] and especially [232]:

> "*No authority was cited to me in which an award of exemplary damages for breach of contract has been made in the United Kingdom, and there is a clear statement by Lord Steyn in Johnson v Unisys Ltd [2003] 1 AC 518 at [15] that "in English law such damages have never and cannot be awarded for breach of any contract".*"

Needless to say, that decision is binding on me.

23. The general position is summarised in *Chitty on Contracts* (32nd ed.), at paragraph 26-044 (as follows:

> "*Exemplary damages are damages awarded against the defendant as a punishment, so that the assessment goes beyond mere compensation of the claimant. Such "punitive" or "vindictive" damages were permitted in some cases of tort until 1964 when the House of Lords in Rookes v Barnard severely restricted their use in such cases by specifying only two categories where they may be awarded at common law. The right to receive exemplary damages for breach of contract was, for many years before 1964, confined to the single case of damages for breach of promise of marriage, but this cause of action was abolished in 1970. Thus it appears that exemplary damages are not available when the wrong complained of is merely a breach of contract. If the defendant's conduct amounted to a tort for which exemplary damages are available, they may be awarded even though it also constituted a breach of contract.*"

As appears from a footnote in *Chitty*, it is or at least may be the case that the position in Canada is different. Be that as it may, the position in English law is as stated above.

24. Fourth, contrary to the conclusions reached by the Hearing Chair, I am unpersuaded that the present case falls within any of the so-called Devlin categories. In this context,

I heard no argument and, for present purposes, am prepared to assume that NR stands in the position of a "government servant" for the purposes of the first Devlin category. As to the facts, NR relied upon the evidence of Mr Gibbons which was summarised by NR as follows and which I accept:

24.1. NR's actions in originally disconnecting the Loop, as part of a broader Network Change relating to the implementation of the Midland Mainline Line Speed Line Improvement Project and the "plain lining" of the rails associated with that project, were carried out in consultation with the affected freight and passenger train operating companies (including but not limited to GBRF and DBC).

24.2. Immediate action was taken by NR to begin the process by which the Loop would be reinstated and reconnected following the Hearing Chair's publication of his Initial Summary of Findings on 15 November 2013, shortly prior to the publication of the formal ADA 17 determination in January 2014.

24.3. In the months that followed, NR undertook a considerable amount of design and other preparatory work in order to be in a position to proceed with the reinstatement and reconnection of the Loop. This work involved:

24.3.1. work on the "Particular Requirements Specification ("PRS") to reinstate the Loop;

24.3.2. commissioning the necessary surveys of the site of the Loop;

24.3.3. redesign of the Loop to take account of the increased line speeds and new signalling, so as to make it safe to enter and exit the Loop; and

24.3.4. consideration of the engineering access and resulting disruption to the network that would be necessitated by such access to enable the relevant works to be carried.

24.4. By early 2014, it had become clear that there would be insufficient time to reinstate the Loop by December 2014 as required by the ADA 17 Determination and NR therefore approached the freight operating companies in early February

2014 to ask if they were prepared to accept a Short Term Network Change to defer reinstatement until 2015. During the ensuing consultation, NR raised the possibility of providing additional capacity for freight and train operating companies in the area through what was referred to as the Derby Remodelling Project, so that the Loop would no longer be necessary because it would not be required to put freight trains into a loop in order to allow passenger trains to pass. However, by late March 2014, it had become clear that the freight operating companies were not prepared to accept this alternative.

24.5. Meanwhile, NR continued to work towards the implementation of the reinstatement works with the engagement of a contractor (Carillon) to survey for and design the Loop in April 2014, formal instruction to commence work in June 2014, and parallel ongoing work on the PRS (including with regard to Existing Site Information, Feasibility Study Requirements, Particular Requirements and Design and Implementation Costs).

24.6. By September 2014, NR reported to the affected train companies that the design contract and contractor contract had been awarded, the approval in principle for the permanent way (or "Pway") was to be submitted later that month, the signalling design was under way, the point work had been ordered (with a manufacturing slot having been booked), and engineering possessions were in the process of being sought with haulage capacity then to be ordered, and likely installation being estimated to be in the early summer of 2015. During its subsequent communications with the freight operating companies in October 2014, NR acknowledged the delay in implementing the ADA 17 Determination and "*explained that unfortunately due to sourcing difficulties the Loop would not be reinstated for the December 2014 timetable and it appeared there would be a delay until summer 2015*".

24.7. In early November 2014, NR sought to formalise the position by issuing a formal notice of Short Term Network Change to defer the reinstatement of the Loop until summer 2015, but the freight operating companies rejected the notice in early December 2014.

24.8. Meanwhile, the necessary design work continued, including with respect to the signalling aspects. By May 2015, NR submitted the signalling design (together with related scheme plan, design log, signal overrun risk assessment, braking calculations, sighting forms and other related documents) to the Minor Scheme Review Panel ("MSRP"), being the panel responsible for reviewing every signalling plan to ensure that it meets all the required safety and design standards. Unfortunately, the MRSP rejected NR's signalling proposals for the reinstatement of the Loop and determined that further design and risk assessments were required.

24.9. The need for these additional design and risk assessments meant that works that had originally been estimated to cost about £2 million or at most £4-5 million were now likely to cost up to £10 million. NR did not have such funds available to it during the then current financial period and therefore "*a decision was taken at [a Monthly Business Review meeting on 2 September 2015] that work on reinstating the Loop should not continue and efforts should be taken to obtain industry agreement about that*". This decision was taken in the light of the fact that "*NR was going to have to spend much greater sums of what was public (tax payer) money on reinstating a Loop than had ever been anticipated when ADA 17 had been decided*" and this "*did not seem to be the best solution for the rail industry when there were so many other calls on funding for the Network*".

24.10. For their part, however, the freight operating companies remained unsympathetic towards the problems encountered by NR and insisted on compliance with the ADA 17 determination whatever the cost and proceeded with the reference that became ADA 30.

25. It is unfortunate that this detailed evidence was not available to the Hearing Chair. However, in light of the facts as summarised above, it seems to me that the very highest that matters could be put against NR in relation to the implementation of the ADA 17 Determination is that NR was guilty of very serious delay and wrongly sought to rely on funding problems to justify its delay. However, it seems to me quite impossible to conclude that NR's conduct is to be characterised as "oppressive, arbitrary or

unconstitutional" or "calculated [by NR] to make a profit for [itself] which exceeds the damages payable to [GBRF and DBC]".

26. For all these reasons, it is my conclusion that the Exemplary Damages Decision was wrong in law and must be set aside.

27. In reaching this conclusion, I have borne well in mind the broad argument advanced by the Respondents that the absence of any power to award exemplary damages constitutes a lacuna and is, to say the least, unsatisfactory. In response, it was submitted on behalf of NR that there is, in truth, no relevant lacuna because a disgruntled party may, in an appropriate case, apply to the Court for interim relief as contemplated by F36 of the ADRR and the Court will have appropriate robust powers to deal with any continuing breach of contract. Be this as it may, I do not consider that the existence of the lacuna suggested by the Respondents justifies any conclusion different to the one stated above having proper regard to the terms of the ADRR, the TAAs and existing case-law. Of course, those concerned in the industry may wish to consider an amendment to the TAAs or the ADRR to address any perceived lacuna. But that is for others to consider and falls outside the scope of this arbitration.

(G) COSTS

28. It was common ground that I have a discretion with regard to an award of costs. However, the position is not entirely straightforward. Given that NR launched and then abandoned its appeal in respect of the Regulatory Milestone decision, it would seem plain that NR should pay the Respondents' costs in relation thereto and I did not understand NR to suggest otherwise. As to the appeal in respect of the Exemplary Damages Decision, it seems to me that the initial costs incurred by NR in launching such appeal and serving its Statement of Claim should be borne by NR itself. Thereafter, there is, in my view, a very strong argument that the Respondents should bear the costs of such appeal – if only because they could, if they so wished, have agreed that the Exemplary Damages Decision should be set aside and the appeal allowed to that extent. However, it was NR who insisted on an oral hearing. This was strongly opposed by the Respondents. In such circumstances, it seems to me that there is a strong argument that the additional costs incurred as a result of the oral hearing

should be borne by NR. Bearing all these points in mind and in the exercise of my discretion, it is my conclusion that the appropriate order is that each party should bear their own costs ie there be no order as to costs. So far as my own fees are concerned, it was agreed that these should be split as ordered below.

AWARD

For all these reasons, I, the undersigned Sir Henry Bernard Eder, having taken upon myself the burden of this arbitration and having considered carefully the evidence submitted and the parties' submissions, do hereby DECLARE AND ORDER as follows:

1. **By consent, the appeal by NR in respect of the Regulatory Milestone Decision is hereby dismissed.**
2. **The appeal by NR in respect of the Exemplary Damages Decision is hereby allowed and, to that extent, the decision of the Hearing Chair as set out in paragraph 7.4 of the Determination is hereby set aside.**
3. **To the extent that the Respondents have paid any sum awarded to them pursuant to paragraph 7.4 of the Determination, such sum shall (if not already repaid) be repaid forthwith.**
4. **There be no order as to costs as between the parties themselves save that my own fees shall be borne in the following shares viz (i) NR:50%; (ii) GBRF:25%; and (iii) DBC:25%.**

The seat of this arbitration is London, England.

The Hon Sir Bernard Eder

~~DATED THIS 20th DAY OF JULY 2017~~

DATED THIS 26th DAY OF JULY 2017