

**ACCESS DISPUTES PANEL REFERENCE**

**ADP48**

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**AND**

**FIRST RAIL HOLDINGS LIMITED**

**RE: INTERPRETATION OF MAINTENANCE AND REPAIR OF RETAIL TELECOMMS AND  
CCTV AND OTHER RETAIL TELECOMMUNICATIONS EQUIPMENT AT FRANCHISED  
STATIONS**

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**LEGAL OPINION (2)**

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- 1 On 5 March 2010, I was appointed pursuant to the provisions of A1.53 of the Access Disputes Resolution Rules as Legal Assessor to the Access Disputes Panel ("the Panel") to assist in the determination of this dispute.

**Proceedings to Date**

- 2 Prior to the hearing fixed for 17 March 2010, I was provided with submissions by the Parties dated 3 March 2010 with appendices 1 - 10 as there listed and including at, respectively, appendices 8 & 9, National Station Access Conditions 1996 (England and Wales) and National Station Access Conditions 1996 (Scotland) (together "NSAC"):
- 2.1 At the direction of the Panel Chairman and to assist the Panel at that hearing, I provided a Legal Opinion ("First Opinion") dated 9 March 2010.
- 2.2 At that hearing, and following a meeting between the legal representatives of the Parties and the Assessor, chaired by the Panel Chairman, the legal representatives were directed to produce joint submissions on the dispute as referred to below.
- 2.3 For the sake of completeness, I should note that the Parties did, at the hearing on 17 March, produce short written submissions in response to my First Opinion and

also written opening statements, but since those documents were not formally tabled, I do not refer to them here.

- 2.4 In addition to the submissions dated 3 March 2010 referred to at paragraph 2 above, I have now been provided, as directed, with the “Joint reference from the Parties in respect of legal issues of interpretation” dated 16 April 2010 (“Joint Submissions”).
- 2.5 For ease of reference, I attach to this Opinion at Appendix 1 copies of my First Opinion and of the Joint Submissions.
- 2.6 All the Definitions referred to in this Opinion are the Definitions as set out in NSAC. All the conditions here referred to are the NSAC Conditions.

### 3 The Dispute

- 3.1 As set out in the earlier documents which I have listed, the dispute between the Parties is essentially which of Network Rail (“NR”) and First Rail Holdings (“FRH”) should pay for certain categories of work at the relevant stations. In essence, NR is obliged to pay for Repair to the Equipment and FRH for Maintenance, all as defined. The issue between them concerns the interpretation and application of the Definitions of Maintenance and of Repair as set out in NSAC.

### 4 NSAC Definitions

- 4.1 For ease of reference, it may be helpful if I set out in the body of this Opinion the Definitions of, respectively, Maintenance and Repair, as they appear at Part A of NSAC:

*“Maintenance means the carrying out of the following in each case in accordance with the specifications (if any) set out in Annex 12 [Repair and Maintenance Specification] or determined pursuant to Annex 11 [Production of Specifications]:*

*(a) in relation to every part of the Station:*

- (i) any treatment, operation or work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required (whether by any current statutory or other code of practice or otherwise) from time to time to facilitate the efficient and safe operation and/or use in compliance with the requirements of any Statute of the relevant part for any purpose permitted by the Relevant Agreement;*

- (ii) *the replacement of such parts of the Station as require, or are designed for, regular replacement; and*
- (iii) *any inspection or certification required by a Statute or for the purpose of any treatment, operation or works described in this paragraph (a); and*
- (b) *in relation to the Equipment, all treatment, operations and works which are recommended in a current manufacturer's operating or maintenance manual (as updated from time to time) at the intervals and in the manner so recommended;"*

*"Repair means in relation to every part of the Station the carrying out, in accordance with the specifications (if any) set out in Annex 12 or determined pursuant to Annex 11, of:*

- (a) *any work required to keep the Station in no worse a state than evidenced by the Statement of Condition; and*
- (b) *any work required so that the Station is safe for operation and/or use in compliance with the requirements of any Statute for any purpose permitted by the Relevant Agreement;*

*but does not include the carrying out of:*

- (c) *any Maintenance;*
- (d) *any work to the Station which is the responsibility of any third party now or in the future entitled to occupy any part of the Station under any of the Existing Agreements; or*
- (e) *renewal of any item for so long as repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level;"*

4.2 It may be helpful at this point to add the Definition of Equipment which is referred to in each of the Definitions of Maintenance and Repair:

*"Equipment means the items of Equipment, plant, machinery and apparatus at the Station owned by Railtrack (whether or not listed in the Equipment Inventory) from time to time"*

## 5 Interpreting the NSAC

5.1 As I endeavoured to highlight in my First Opinion, the issue here is a short, albeit not straightforward issue of construction. We need to look at the words used in the Definitions of Maintenance and Repair, understand what they mean and then apply that understanding to the individual situations cited by the Parties.

5.2 In that connection, the Parties have helpfully referred to the decision of the Regulator in [2003] (RR1) *Network Rail Infrastructure Limited v Great North Eastern Railway Limited* paragraph 84 in which he set out his view on the correct approach to the interpretation of the Network Code in which he agreed with his assessor's conclusion that:

*“(a) In construing the [Network Code], the fact that the Parties did not negotiate those conditions and that they were established administratively in 1994 and extensively modified by the Regulator in 1995 forms part of the factual matrix against against which the track access contract and the [Network Code] fall to be construed; and*

*(b) “In construing the track access contract and the [Network Code], the proper approach is to seek to identify the meaning of the words used, objectively assessed, rather than to seek to identify the intentions of any particular party or parties”.*

5.3 In that case, the Regulator went on to say (at paragraph 104):

*“.....the words of a contract should be construed in their natural, ordinary and grammatical sense, except to the extent that some modification might be required to avoid absurdity, inconsistency or repugnancy, or unless it is apparent that particular terms bear or were intended to bear a special or technical meaning...The second factor relates to the factual matrix in which the contract was made and in which it falls to be construed: “the Court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the ‘genesis’ and objectively the ‘aim’ of the transaction (Lewison paragraph 2 - 10)”.*

*“Accordingly the commercial purpose intended to be served by a contract may illuminate the meaning of particular terms where on a reading of the language alone there might be doubt. Similarly, in the context of a contract such as a track access contract, the regulatory objectives pursued by the Regulator in adopting*

*the modifying Network Code, and in agreeing (or not) to the inclusion of particular terms when this approval is sought, form a significant part of the factual matrix of the contract, which matrix may play a decisive role in resolving disputes as to the correct construction of the contract where the words alone are insufficiently clear"*

5.4 The reference to Lewison is to the well respected work entitled *The Interpretation of Contracts*, the author of which is Mr Justice Lewison one of Her Majesty's Justices of the High Court.

5.5 As the Parties highlight in their footnote 2, the relevant paragraph in the current edition of Lewison is 3.14 which states:

*"In construing any written agreement the Court is entitled to look at evidence of the objective factual background known to the Parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction. However, this does not entitle the Court to look at evidence of the Parties' subjective intentions; nor to ascribe to the words of the contract meaning they cannot legitimately bear."*

That statement summarises the current approach of the Courts to the interpretation of contracts.

5.6 The Parties have helpfully set out their agreement (2.4 of the Joint Submissions) that when interpreting the NSAC:

*"(a) The proper approach is to seek to identify the meaning of the words used, objectively assess rather than to seek to identify the intentions of any particular party or Parties;*

*(b) The words of a contract should be construed in their ordinary, natural and grammatical sense, except to the extent that some modification might be required to avoid absurdity, inconsistency or repugnancy, or unless it is apparent the particular terms bear or are intended to bear a special or technical meaning;*

*(c) Where the words of a contract are clear, the Court must give effect to them even if they have no discernable commercial purpose and*

*(d) The Parties are entitled to look at evidence of the objective factual background known to the Parties at or before the date of the contract,*

*including evidence of the 'genesis' and objectively the 'aim' of the transaction. This ordinarily includes consideration of the commercial purpose intended to be served by a contract but in the context of a contract such as a Track Access Agreement also includes regulatory objectives pursued by the Regulator in adopting the modifying [sic] the NSACs"*

- 5.7 In their Joint Submissions, the Parties go on to say (paragraph 2.5 of the Joint Submissions):

*"In relation to the 'genesis' of the Definitions referred to in point 2.4(d) above, the Parties agree that the interaction between the Definitions of Repair and Maintenance has given rise to disagreements and doubt throughout the period in which the NSACs have been enforced (since 1996). This in turn resulted in proposals from the Regulator to revise the responsibility for Repair and Maintenance at stations as part of the drafting of "Stations Code" (which has recently been finally abandoned). The Parties consequently agree that little assistance can be gained from a consideration of the Regulator's regulatory objectives in originally adopting these Definitions. The Parties consider that this does not prevent consideration of the commercial purpose to be served by the contract and the objective 'aim' of the Definitions".*

I concur with the view expressed in that final sentence and I return below to a consideration of the "objective 'aim' of the Definitions".

- 5.8 In relation to the Definitions themselves, the Parties have, at paragraph 3.2 of the Joint Submissions, set out that they agree that:

- "(a) The definition of Station includes Equipment and the definition of Equipment includes all aspects of the items in dispute in these proceedings (including their software). Consequently the references to Station can be considered for the purposes of this reference to be reference to the relevant equipment;*
- (b) Within the definition of Maintenance, each of the activities listed as (a)(i), (a)(ii), (a)(iii) and (b) can individually or together constitute Maintenance (i.e. Maintenance does not require all such activities to be taking place concurrently);*

- (c) *The definition of Repair (in sections (a)5 and (b)6 of that definition) is sufficiently wide to encompass most of the interventions listed in Part 1 and 2 of Appendix 1 with the exception of inspection under Maintenance definition (a)(iii) which are the subject of this reference. Consequently, where an activity subject to this reference does not fall within parts (c) - (e) of that definition, it will usually be 'Repair';*
- (d) *Where an activity falls within the definition of 'Maintenance' it is, by virtue of part (c) of the definition of Repair, not Repair;*
- (e) *Part (d) of the definition of Repair and Part (a)(iii) of the definition of Maintenance have no practical implications for this reference 7 although can be taken into account in considering the correct interpretation of the words and phrases used elsewhere in the Definitions; and*
- (f) *The boundary between works which are 'Repair' and those which are 'Maintenance' largely depends upon the scope of the definition of Maintenance. If work set out in Appendix 1 Fault Types 1 and 2 of the Joint References which are the subject of this reference do not fall within that definition then they will likely be 'Repair'.*

In passing I should note that the Parties' agreement as set out above is subject to the points at footnotes 5, 6 and 7 of the Joint Submissions. Their agreement on these points does narrow the extent of the dispute before the Panel.

- 5.9 Pausing there, those are, in summary, the principles of construction to be applied to the present dispute. Put shortly, where the words are clear, effect must be given to those words. Where the words are not clear, the Parties are entitled to look at, objectively, the 'aim' of the transaction, the commercial purpose intended to be served.

## 6 Commentary

- 6.1 The Parties have set out their respective interpretations at paragraph 4 of the Joint Submissions: those of FRH are to be found at paragraphs 4.1 to 4.18 and those of NR at paragraphs 4.19 to 4.36.
- 6.2 Before I review the submissions of the two Parties and provide my analysis, it may be of assistance if I refer briefly to the issue referred to at paragraph 5.6 above and alluded to by the Parties at paragraph 2.4 (b) of their Joint Submissions,

namely the “ ‘genesis’ and objectively the ‘aim’ of the transaction.” In that connection, the Parties both acknowledge that consideration may be given to “*the commercial purpose to be served by the contract and the objective ‘aim’ of the Definitions*”.

That is a helpful indication by the Parties but, interestingly, and as far as I can see, neither party has made any submissions as to the aim of the Definitions and indeed NR highlight that point at paragraph 4.27 (lines 10 and 11) of the Joint Submissions.

Since both Parties acknowledge that it is appropriate to look objectively at the aim of the Definitions, but neither has thought it appropriate to do so, I consider it right to make my own observations on it. It is of course acknowledged that neither NR nor FRH was party to the transaction at the time the NSAC were drafted. That said, it must, at the very least, be acknowledged that, looked at objectively, when drafting the Definitions the draftsman intended a distinction between what was Repair and what was Maintenance. Accordingly, when applying the usual principles of construction, effect must be given to that aim such as to find, as the Parties helpfully put it at paragraph 6.1 of the Joint Submissions, the “boundary” between Repair and Maintenance.

- 6.3 We then need to ask the question whether there are any indications in the words used in the Definitions which help us in ascertaining what that distinction is, namely what was the commercial purpose and the objective ‘aim’ of separating out those two Definitions.
- 6.4 It seems to me that there are a number of such indications, the most helpful of which is contained at (e) of the Definition of Repair which is defined not to include “*renewal of any item*” “*for so long as repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level*”.

Those words clearly indicate, in my judgment, a distinction is to be drawn between the two activities of Maintenance on the one hand and Repair on the other.

Taking a simply layman’s example to illustrate the point, renewal would be the fitting of a new window frame, Repair would be cutting out a section of rotting wood and splicing in new wood so that Maintenance i.e. painting of the window frame could be undertaken.



In my view, it also seems clear from part (e) of the Definition of Repair that cost is a consideration: a factor to be taken into account when deciding where the “boundary” lies.

- 6.5 Pausing there, it is perhaps worthy of note that, in their very understandable desire to discern the meaning of the Definition of Maintenance, the Parties have perhaps not derived as much assistance as it seems to me may be derived from the definition of Repair. So, for example, whilst the Definitions of Maintenance and of Repair both include the introductory words “*in relation to every part of the Station*” it is, in my view, significant that the definition of Maintenance goes on to refer at paragraph (a)(i) “*to facilitate the efficient and safe operation and/or use....of the relevant part*” and at paragraph (a)(ii) “*the replacement of such parts of the Station...*” In contrast, paragraph (a) of the definition of Repair refers to “*any work required to keep the Station in no worse a state than evidenced by the Statement of Condition*” and paragraph (b) refers to “*any work required so that the Station is safe for operation and/or use...*”.
- 6.6 I take the view that the distinction is clear: the definition of Repair envisages the whole operation as opposed to the relevant parts. Particularly bearing in mind the reference to the Statement of Condition, those latter paragraphs a) and b) provisions are, in my view, consistent with the notion of Repair and indicate a clear distinction between Repair of the whole and Maintenance of the parts.
- 6.7 In my judgment, the effect of that distinction is to bring the factor of degree of intervention into play.
- 6.8 It is that distinction, that aim, which needs to be borne in mind when applying the Definition of Maintenance to the various tasks listed in Appendix 1 of the Parties’ 3 March 2010 Submissions.

## **7 The Parties’ Interpretations of the Definitions**

- 7.1 I now turn to the interpretations of the Definitions as put forward by each of the Parties. In passing, I should note that, as I understand the position, the Parties have confined the areas of dispute to the Definitions at (a)(i) and (a)(ii) of the Definition of Maintenance and essentially agree on the construction of (a)(iii) and (b) - see paragraphs 4.14 and 4.15 of FRH’s submissions and paragraph 4.36 of NR’s submissions. I do not therefore comment on parts (a)(iii) and (b) of that Definition.
- 7.2 The Parties deal first of all with paragraph (a)(i) of the definition of Maintenance:

*“(a)(i) any treatment, operation or work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required (whether by any current statutory or other code of practice or otherwise) from time to time to facilitate the efficient and safe operation and/or use in compliance with the requirements of any Statute of the relevant part for any purpose permitted by the Relevant Agreement;”*

#### **FRH’s Interpretation**

- 7.3 FRH contend that to fall within the Definition work must be (a) routine and foreseeable and (b) required to facilitate the efficient and safe operation etc of the [equipment]. They say that the words *“routine and foreseeable”* should be read together. That is clearly correct.
- 7.4 They go on to refer to the Oxford English Dictionary (“OED”) definitions of, respectively, the words “foresee”, “routine” and “maintenance”.
- 7.5 In their analysis, FRH rely, in particular, on that part of the OED definition of “routine” which refers to *“unvarying”* as opposed to those other parts of that definition which include *“performance as part of a routine”* or *“customary, standard, usual”*.
- 7.6 FRH also rely on part (e) of the Definition of Repair to which I have referred at paragraph 6 above. That part excludes the obligation to renew (as part of the obligation to Repair) in circumstances where *“repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level”*. Relying on that provision, FRH contend that it is appropriate to consider the degree and costs of intervention as one aspect of whether work is Maintenance.
- 7.7 FRH go on to deal with the requirement that to fall within the definition of Maintenance work must be *“required to facilitate the efficient and safe operation (etc) of the [equipment]”*.
- 7.8 They submit that those words differ from those within the definition of Repair in that they are required for *“facilitation”* of operations. They contend that usage supports the view that *“Maintenance work of this sort is to preserve or assist the functioning of the equipment rather than to procure or provide it when it fails”*.

- 7.9 FRH summarise their submission in respect of definition (a)(i) of Maintenance by submitting that for works to fall within that part of the definition *"they must have the character of expected, unvarying actions conducted to keep the equipment in the state in which it was provided and which would be anticipated in advance. This will in turn depend upon the degree of intervention and the cost of that intervention"*.
- 7.10 FRH further submit that the reference in this part of the Definition to work required *"whether necessary at regular or irregular intervals"* relates to *"when the work is actually required (i.e. at any time) rather than whether the nature of the work has the character of expected, unvarying actions. This is the difference between "regular" and "routine"."*

#### NR's interpretation

- 7.11 NR accept that to be Maintenance, work must be routine and foreseeable. They do however take issue with FRH's reliance on that part of the definition of "routine" in the OED which refers to *"a regular course of procedure; an unvarying performance of certain acts; regular or unvarying procedure or performance"*.
- 7.12 NR contend that *"this definition equates regularity with unvarying performance, and that is of course different from the explicit wording of the definition of Maintenance which specifically provides for irregularity of performance. In Network Rail's submission such a wide interpretation would be mistaken"*
- 7.13 NR also take issue with FRH's assertion that such work, in reliance on the OED definition of "foreseen", is work which *"must be provided for in advance"*.
- 7.14 NR contend, on the clear wording of the OED definition of "maintenance" that there is no reason to imply any need for work of Maintenance to be *"provided for in advance"*.
- 7.15 In relation to part (e) of the definition of Repair, NR contend that the deduction that where the cost of an intervention is high, work will not be of a routine nature and consequently the work will not be Maintenance, cannot be made.
- 7.16 NR make the further point that Equipment can fail foreseeably on a regular or irregular basis and require Maintenance as defined.
- 7.17 NR also contest FRH's interpretation of the word "facilitate" and say that whilst FRH suggest that facilitation is to preserve or assist the functioning of the

equipment rather than to procure or provide it when it fails, facilitation may include as Maintenance the procuring and provision of items of Equipment when covered by the wording of the NSAC Definitions *“as the same could be an ‘operation’ under (a)(i) (and equally a ‘replacement’ under (a)(ii) or an ‘operation’ under (b)”*.

7.18 NR also take issue with FRH's reliance on the word “unvarying”. NR submit *“‘unvarying’ could mean that the work had to be carried out in exactly the same way as it was required on separate occasions over time. Plainly that would not be considered to be a normal and everyday interpretation of the words “routine and foreseeable nature”*.

7.19 Those are the submissions of the Parties in relation to part (a)(i) of the Definition of Maintenance.

#### 7.20 Analysis

I have considered carefully the respective submissions of the Parties on this part of the definition. The position as I see it is this.

7.21 To fall within this part of the Definition any treatment, operation or work must be:

- (a) Routine and foreseeable
- (b) Whether necessary at regular or irregular intervals
- (c) Required from time to time to facilitate the efficient and safe operation and/or use of the [Equipment]
- (d) In compliance with the requirements of any Statute.
- (e) For any purpose permitted by the Relevant Agreement.

Taking each of those elements in turn:

#### (a) Routine and foreseeable

The OED definitions are helpful but are not a straitjacket. Just as the words of the NSAC Definition should be construed in their natural ordinary and grammatical sense so must the dictionary definitions themselves. It is not helpful to extract a particular part of the OED definition to the exclusion of others. So, in relation to the definition of the word “foresee” it is

appropriate to bear in mind that the definition includes all of the following - *“be aware of beforehand, predict, prepare, provide for or against in advance, exercise foresight, make provision”*.

The NSAC Definition has to be read in the round and in context. Thus, it may be that an event is predictable but may not necessarily be provided for in advance. For example a motorist knows that his wiper blade needs replacing from time to time but he may not necessarily have provided for that event in advance by having the relevant spare part to hand. The replacement would still in my judgment, be Maintenance.

Reference has also been made to the dictionary definition of “routine”. The word “routine” is used in this part of the NSAC Definition as an adjective. The OED definition includes *“performance as part of a routine; unvarying, mechanical; customary, standard, usual”*.

Again, it is not helpful to take one element of the definition, namely the word “unvarying” and apply that element alone.

On balance, I prefer NR’s submissions on this element of the Definition. It seems to me that the words “routine” and “foreseeable” import the notion of performance as part of a routine, work which is foreseeable or predictable but for which provision may not necessarily have been made in advance.

I return below to the issue of cost.

**(b) Whether necessary at regular or irregular intervals**

It seems to me the words here are clear. Taking again the example of the motorist, replacement of a wiper blade is routine and foreseeable and may be carried out at regular intervals when the car goes in for its regular service, or at irregular intervals if the motorist finds that the blade is squeaking and decides to replace it.

Reading, respectively, paragraph 4.11 of FRH’s submissions and paragraphs 4.21 and 4.22 of NR’s submissions, it may appear they are at odds as to the meaning of the words “regular or irregular intervals”. However, analysing those submissions in detail, it does not seem to me they are at odds. They in fact agree that the words relate to when the work is carried out i.e. from

time to time. The area of disagreement is in relation to whether work which is foreseeable must be unvarying and provided for in advance as FRH submit, or routine as required from time to time and not necessarily provided for in advance as NR submit.

I do not think that the notion of unvarying can be imported here and on balance I prefer the submissions of NR on this element.

**(c) Required from time to time to facilitate the efficient and safe operation and/or use of the [Equipment]**

In this instance, the Parties have not had recourse to the OED definition of “to facilitate”. Although it probably does not take the point much further, for the sake of completeness, I set out the OED definition below:

*Facilitate vt to make (an action, process etc) easy or easier; to promote, help forward; to assist in bringing about (a particular end or result).*

So, in lay terms, to fall within this part of the definition of Maintenance, the treatment, operation or work must be needed to help forward the efficient and safe operation of the [Equipment] and/or its use. Those words, as it seems to me are to be read in contrast with the words at part (a) of the definition of Repair namely, “*any work required to keep the Station in no worse a state than evidenced by the Statement of Condition*” and of course read in conjunction with the other words of part (a)(i) namely that the work must be routine and foreseeable whether necessary at regular or irregular intervals from time to time.

**(d)&(e)** The Parties have not thought it necessary to make submissions on (d) *in compliance with the requirements of any Statute* or (e) *for any purpose permitted by the relevant Agreement*. Accordingly, I make no observations on those elements.

7.22 The Parties have also made submissions on the provisions of part (e) of the Definition of Repair namely that as part of the obligation to Repair, the obligation to renew is excluded in circumstances where “*repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level*”.

In my view, and as I indicated in my First Opinion, those words are helpful to the issue of construction. On the basis that we are to look objectively at the aim of the transaction and accordingly at the fact that the draftsman sought to make a distinction between Repair and Maintenance, those words must be given meaning and it seems to me clear that cost is intended to be a factor to be taken into account when deciding whether or not an intervention constitutes Maintenance. Pursuing the motorist theme, replacing the wiper blades and oiling the wiper arms where they fit on to the splines is Maintenance but if one of the splines shears or the wiper motor fails that, as it seems to me, is Repair.

- 7.23 In summary, a treatment, operation or work falling within the Definition at part (a)(i) is work which follows a regular course of procedure, is performed as part of a routine, is predictable, is carried out where necessary from time to time and helps to keep going safely and efficiently the operation of the Equipment. The cost of the work will be a factor to be taken into account when deciding whether what is needed is Repair or Maintenance, as will the degree of intervention.

- 8 The Parties have also made submissions in relation to part (a)(ii) of the Definition of Maintenance. That definition provides as follows:

*"(a)(ii) The replacement of such parts of the Station as require, or are designed for, regular replacement;..."*

#### 8.1 FRH's interpretation

FRH submit that the natural meaning of these words is tolerably clear. They go on to say: *"they relate to parts of the Equipment which are expected or designed to wear out. FRH has previously used the undefined word "consumable" in this respect and continues to believe that this is the best characterisation of such parts"*.

#### 8.2 NR's interpretation

NR contend that *"whilst parts of the Station requiring or designed for regular replacement might include what are commonly referred to as "consumables" there is no reason to restrict the wording of the definition to them. Had the draftsmen wished to refer to consumables he would have used that word. He did not."*

### 8.3 Analysis

In relation to FRH's submission, I do not think it helpful to read for the words "*designed for regular replacement*" the words "*expected or designed to wear out*". I do not think that the words "expected to" add anything to the words used. Turning again to the motorist example, a wiper blade requires regular replacement: that work will be carried out on a regular service basis, whether in fact the blade has worn out or not.

Although the Parties have not made detailed submissions on this aspect, there are in fact two elements here:

Replacement of such parts...as require...regular replacement;

Replacement of such parts...as...are designed for regular replacement.

Those two elements do not connote precisely the same course of action. It is possible that parts require regular replacement without necessarily having been specifically so designed. Taking a layman's example, radiator valves require regular replacement albeit it is not clear they are actively so designed. Design connotes a more active approach to the creation of the object in question. That, as it seems to me, is a question of fact in each case and it may be that, for example, the regular replacement of laptop cables is actively so designed. Accordingly, work may be needed to an item which requires replacement as a matter of fact, as opposed to on an item which is designed for regular replacement.

The reality is that whilst I agree with NR that the reading of the Definition should not be restricted to what are commonly referred to as "consumables", the words have to be read in context as part of the overall Definitions of, respectively Maintenance and Repair. That being so, reference can again properly be made to the cost factor as referred to at part (e) of the definition of Repair and to the separation out of Repair and Maintenance as distinct activities. It is perfectly correct that (a)(ii) contains its own specific direction to the Parties but the Definition of Maintenance has to be read even so as a whole such that each element is understood as part of the whole.

It follows that considerations of cost, the requirement of or design for regular replacement and the degree of intervention are all relevant. Taking an extreme example, it might be argued that the Station lifts require regular replacement, albeit perhaps only every 20 years: whilst clearly such regular replacement does not



fall within FRH's use of the undefined word "consumable", it clearly does not fall within the requirement of the words of (a)(ii) either. The example is to make the point: in fact, as I understand the Station - Equipment Inventory (Appendix 4 to Annex 1 of item 28) NR would both maintain and repair in that situation.

## 9 Summary and Conclusion

9.1 The Parties have helpfully sought to summarise their key areas of disagreement. I deal with each of those issues in turn and which are as follows:

Issue (a)

*The scope of the application of part (a)(i) of the definition of Maintenance, in particular whether this:*

*(i) can (as FRH suggests) be considered to suggest work of the character of expected, unvarying actions conducted to keep the equipment in the state in which it was provided and which would be anticipated in advance or*

*(ii) (as NR suggest) cannot be extended to such a specific interpretation*

As I make clear at paragraph 7.21 above, I do not consider the reliance which FRH apparently seek to place on the use of the word "unvarying" in the OED definition of "routine" to be either helpful or to take matters much further. I do not think the words used connote that degree of restriction: work which is routine may vary as required from time to time.

That said, I take the view that the work envisaged by the use of the words "work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required... from time to time to facilitate the efficient and safe operation..." of the equipment envisages routine Maintenance of the equipment in the state in which it is provided and is work which is characterised as predictable or foreseeable.

Issue (b)

*The interpretation of part (a)(ii) of the definition of Maintenance and in particular the degree to which the items referred to in that part have the*

*character of 'consumable' parts. FRH suggests that the items referred to in that part have the nature of consumable parts, NR rejects this description.*

Strictly speaking, NR does not in my view so much reject the description as reject the limitation sought to be imposed. In other words, the test is one of degree. Clearly, a light bulb falls within the definition and a station lift does not: it is, in reality, a question of fact whether a part requires or is designed for regular replacement and the Parties must taken into account the other factors, mainly those of cost and degree when applying these provisions. They must, as I have indicated throughout, look at the objective purpose of the provision of separate Maintenance and Repair Definitions.

#### Issue (c)

*The degree to which the costs of the intervention are relevant to establishing whether it is Repair or Maintenance. FRH suggests that high cost interventions are likely to be Repair, NR accept that many Repairs will relate to the more expensive interventions however not all high cost interventions will be Repair.*

Under this heading, I underline again the need to read the Definitions of Maintenance and Repair as a whole and to look objectively at the 'aim' of the transaction. The draftsman put the requirements of, respectively, Repair and Maintenance under separate heads, thereby making a distinction as to what was required under each head. It follows that we can find a distinction between the type of work required in each case.

*In the case of Maintenance, we are looking at "...work of a routine and foreseeable nature....the replacement of...parts...as required, or are designed for, regular replacement and....works which are recommended in a current manufacturer's operating or Maintenance manual...."*

*In contra-distinction, works of Repair are works "required to keep the Station in no worse a state than evidenced by the Statement of Condition and...required so that the Station is safe for operation and/or use..."*

Taking those provisions together, it is clear that cost is a relevant factor in establishing whether the work is Repair or Maintenance. It will be a question of fact and degree which side of the "boundary" an individual item of work falls.

Issue (d)

*The degree to which it is helpful to assist the understanding of the difference between Repair and Maintenance by considering Maintenance as generally having the character of “upkeep” while Repair might have the character of “mending”.*

*FRH argues that this distinction is helpful, NR that it is not correct or helpful.*

In circumstances in which parts of the Definitions are not clear, it is perfectly legitimate to look, as an aid to construction, at the way in which the Courts have from time to time sought to distinguish between maintenance and repair. That is what I sought to do at paragraphs 3.3 and 3.4 of my First Opinion. Those authorities are not determinative. They are however of assistance when looking objectively at what the words of the Definitions mean. Accordingly, to suggest that Maintenance generally has the character of “upkeep” whilst Repair might have the character of “mending” is not complete: it is simply an attempt to underline the distinction within the two Definitions. That said, following the hearing on 17 March, having now had the Joint Submissions from the Parties, it is probably not necessary to adhere to the notions of “upkeep” versus “mending” since, analysing the words used, their meaning can be discerned without further characterisation.

The approach to the issue of construction: the guidance the parties seek, is therefore:

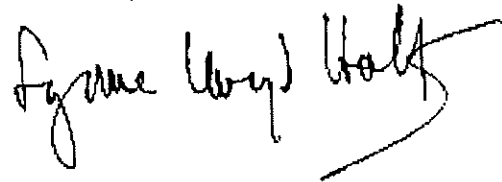
- (a) to analyse the individual elements of the Definitions as set out in paragraph 7 above, finding thereby the factors to be taken into account
- (b) to read then the Definitions as a whole to take account of the commercial purpose which in my judgment was to make a distinction between the Definitions of, respectively, Repair and Maintenance.
- (c) Keeping the commercial purpose in mind, apply the words used and the principles identified to the individual item of work in question.

In summary

My views on the substantive issues are as set out in paragraphs 6,7, 8 and 9 of this Opinion. I am happy to deal with any additional points which Panel members may wish to raise.

Suzanne Lloyd Holt  
Solicitor  
Wragge & Co LLP  
55 Colmore Row  
Birmingham  
B3 2AS

Dated: 7 May 2010

A handwritten signature in black ink, appearing to read 'Suzanne Lloyd Holt', with a long horizontal flourish extending to the right.

**ACCESS DISPUTES PANEL REFERENCE**

**ADP48**

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**AND**

**FIRST RAIL HOLDINGS LIMITED**

**INTERPRETATION OF MAINTENANCE AND REPAIR OF RETAIL  
TELECOMMS AND CCTV AND OTHER RETAIL  
TELECOMMUNICATIONS EQUIPMENT AT FRANCHISED STATIONS**

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**LEGAL OPINION 2**

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**APPENDIX 1**

**Access Dispute Resolution Rules**

**Reference to ADP in respect of the  
interpretation of Maintenance and Repair  
of CCTV and other Retail  
Telecommunications Equipment at  
Franchised Stations-  
ADP 48**

**Joint reference from the Parties in respect  
of legal issues of interpretation**

*16 April 2010*

## 1 JOINT REFERENCE

- 1.1 This document is prepared jointly by the parties in accordance of the order of the Chairman dated 17 March 2010 for consideration by the Assessor appointed by the Panel in this matter (Suzanne Lloyd Holt).
- 1.2 The Chairman has asked the parties jointly to respond to the Assessor's first Legal Opinion (dated 10 March 2010 – the "Assessor's Report"), with their legal analysis of the correct interpretation of the meanings of the terms Repair and Maintenance as defined in the NSACs and the boundary between these terms:
  - (a) identifying the issues of legal interpretation of these definitions on which the parties are agreed;
  - (b) where the parties disagree about the correct legal interpretation, recording each party's analysis; and
  - (c) providing any further comments on the analysis in the Assessor's Report with which the parties (or any party) specifically agree or disagree,

in the light of their joint discussion with the Assessor on 17 March.

## 2 INTERPRETING THE NSACS

- 2.1 The relevant definitions are included within the NSACs which are terms, approved by ORR and incorporated into the relevant station contracts. Neither party to the station contract negotiated or drafted the NSACs and consequently their contents should not be construed against either party as the draftsman.
- 2.2 In the appeal of NV33<sup>1</sup> the Regulator considered a similar issue in connection with the interpretation of the Network Code (terms which are incorporated into track agreements and approved by the ORR) in which he agreed with his assessor's conclusion that:

- "(a) in construing the [network code], the fact that the parties did not negotiate those conditions and that they were established administratively in 1994 and extensively modified by the Regulator in 1995 forms part of the factual matrix against which the track access contract and the [network code] fall to be construed; and*
- (b) in construing the track access contract and the [network code], the proper approach is to seek to identify the meaning of the words used, objectively assessed, rather than to seek to identify the intentions of any particular party or parties."*

- 2.3 He further explained his view on the correct approach to interpreting such regulated contracts at paragraph 104:

*"How then is an objective and reasonable interpretation arrived at? In my judgment, there are two factors of overarching weight or importance. The starting point is the language used set in the context of the contract read as a whole. In that regard, the words of a contract should be construed in their natural, ordinary and grammatical sense, except to the extent that some modification might be required to avoid absurdity, inconsistency or repugnancy, or unless it is apparent that particular terms bear or were*

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<sup>1</sup> [2003] (RR 1) Network Rail Infrastructure Limited v Great North Eastern Railway Limited paragraph 84 – this is binding upon the Panel as a result of ADRR A1.17(b)

*intended to bear a special or technical meaning...The second factor relates to the factual matrix in which the contract was made and in which it falls to be construed: "the court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction" (Lewison, paragraph 2-10)<sup>2</sup>. Accordingly the commercial purpose intended to be served by a contract may illuminate the meaning of particular terms where on a reading of the language alone there might be doubt. Similarly, in the context of a contract such as a track access contract, the regulatory objectives pursued by the Regulator in adopting the modifying the network code, and in agreeing (or not) to the inclusion of particular terms when this approval is sought, form a significant part of the factual matrix of the contract, which matrix may play a decisive role in resolving disputes as to the correct construction of the contract where the words alone are insufficiently clear."*

- 2.4 The parties agree that the principles addressed by the Regulator concerning the Network Code are applicable to consideration of the NSACs in this matter, along with any other relevant ordinary and accepted principles of interpretation, and consequently, the parties agree that when interpreting the NSACs:
- (a) the proper approach is to seek to identify the meaning of the words used, objectively assessed, rather than to seek to identify the intentions of any particular party or parties;
  - (b) the words of a contract should be construed in their natural, ordinary and grammatical sense, except to the extent that some modification might be required to avoid absurdity, inconsistency or repugnancy, or unless it is apparent that particular terms bear or were intended to bear a special or technical meaning;
  - (c) where the words of a contract are clear, the court must give effect to them even if they have no discernable commercial purpose and
  - (d) the parties are entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction. This ordinarily includes consideration of the commercial purpose intended to be served by a contract but in the context of a contract such as a track access agreement also includes the regulatory objectives pursued by the Regulator in adopting the modifying the NSACs.
- 2.5 In relation to the 'genesis' of the definitions referred to in point 2.4(d) above, the parties agree that the interaction between the definitions of Repair and Maintenance has given rise to disagreements and doubt throughout the period in which the NSACs have been in force (since 1996). This in turn resulted in proposals from the Regulator to revise the responsibility for repair and maintenance at stations as part of the drafting of a "Stations Code" (which has recently been finally abandoned). The Parties consequently agree that little assistance can be gained from a consideration of the Regulator's regulatory

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<sup>2</sup> The relevant paragraph in the current edition of Lewison is 3.14, which states,

"In construing any written agreement the court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the 'aim' of the transaction. However, this does not entitle the court to look at evidence of the parties' subjective intentions; nor to ascribe to the words of the contract a meaning they cannot legitimately bear."

Paragraph 8 states,

"Where the words of a contract are clear, the court must give effect to them even if they have no discernable commercial purpose."



objectives in originally adopting these definitions.<sup>3</sup> The Parties consider that this does not prevent consideration of the commercial purpose to be served by the contract and the objective 'aim' of the definitions.

### 3 THE DEFINITIONS

#### 3.1 The relevant definitions are as follows<sup>4</sup>:

*"Maintenance means the carrying out of the following in each case in accordance with the specifications (if any) set out in Annex 12 [Repair and Maintenance Specification] or determined pursuant to Annex 11 [Production of Specifications]:*

(a) *in relation to every part of the Station:*

(i) *any treatment, operation or work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required (whether by any current statutory or other code of practice or otherwise) from time to time to facilitate the efficient and safe operation and/or use in compliance with the requirements of any Statute of the relevant part for any purpose permitted by the Relevant Agreement;*

(ii) *the replacement of such parts of the Station as require, or are designed for, regular replacement; and*

(iii) *any inspection or certification required by a Statute or for the purpose of any treatment, operation or works described in this paragraph (a); and*

(b) *in relation to the Equipment, all treatment, operations and works which are recommended in a current manufacturer's operating or maintenance manual (as updated from time to time) at the intervals and in the manner so recommended;"*

*"Repair means in relation to every part of the Station the carrying out, in accordance with the specifications (if any) set out in Annex 12 or determined pursuant to Annex 11, of:*

(a) *any work required to keep the Station in no worse a state than evidenced by the Statement of Condition; and*

(b) *any work required so that the Station is safe for operation and/or use in compliance with the requirements of any Statute for any purpose permitted by the Relevant Agreement;*

*but does not include the carrying out of:*

(c) *any Maintenance;*

(d) *any work to the Station which is the responsibility of any third party now or in the future entitled to occupy any part of the Station under any of the Existing Agreements; or*

<sup>3</sup> The general duties of the ORR are set out in section 4 of the Railways Act 1993.

<sup>4</sup> copied from the Assessor's Report

- (e) *renewal of any item for so long as repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level;*"

3.2 In respect of these definitions the Parties agree that:

- (a) The definition of Station includes Equipment and the definition of Equipment includes all aspects of the items in dispute in these proceedings (including their software). Consequently the references to Station can be considered for the purposes of this reference to be references to the relevant equipment;
- (b) Within the definition of Maintenance, each of the activities listed as (a)(i), (a)(ii), (a)(iii) and (b) can individually or together constitute Maintenance (i.e. Maintenance does not require all such activities to be taking place concurrently);
- (c) The definition of Repair (in sections (a)<sup>5</sup> and (b)<sup>6</sup> of that definition) is sufficiently wide to encompass most of the interventions listed in Part 1 and 2 of Appendix 1 with the exception of inspection under Maintenance definition (a)(iii) which are the subject of this reference. Consequently, where an activity subject to this reference does not fall within parts (c)-(e) of that definition, it will usually be 'Repair';
- (d) Where an activity falls within the definition of 'Maintenance' it is, by virtue of part (c) of the definition of Repair, not Repair;
- (e) Part (d) of the definition of Repair and Part (a)(iii) of the definition of Maintenance have no practical implications for this reference<sup>7</sup> although can be taken into account in considering the correct interpretation of the words and phrases used elsewhere in the definitions; and,
- (f) The boundary between works which are 'Repair' and those which are 'Maintenance' largely depends upon the scope of the definition of Maintenance. If works set out in Appendix 1 Fault Types 1 and 2 of the Joint Reference which are the subject of this reference do not fall within that definition then they will likely be 'Repair'.<sup>8</sup>

4 **'THE PARTIES' INTERPRETATIONS OF THE DEFINITIONS**

- 4.1 FRH's interpretation of the interaction between the definitions is set out in the following paragraph. Network Rail's interpretation follows from paragraph 4.19.

**FRH' interpretation**

- 4.2 FRH's interpretation of each part of the definition of Maintenance is as follows:

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<sup>5</sup> While there are Statements of Condition for the Stations none mention the SISS Equipment.

<sup>6</sup> While the opposite might well be arguable Network Rail accepts for the purpose of this dispute alone that the retail telecommunications and CCTV equipment with which we are concerned is required for the safe operation of the Station in the widest sense of that phrase.

<sup>7</sup> This is on the basis that Network Rail accepts that it is responsible for funding repair and renewal within the definitions but equally that the party maintaining is obliged to inspect under (a)(iii).

<sup>8</sup> Part (e) of the definition of Repair excludes renewal from the definition of Repair "so long as repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level". This exclusion is in accordance with other clauses of NSAC where Repair is not construed as requiring renewal where repair remains practicable and will not increase maintenance costs unduly. See for example D4.1.2 and D4.1.3; and D5.1.4.

- (a) (i) any treatment, operation or work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required (whether by any current statutory or other code of practice or otherwise) from time to time to facilitate the efficient and safe operation and/or use in compliance with the requirements of any Statute of the relevant part for any purpose permitted by the Relevant Agreement;

4.3 To fall within this definition work must be:

- (a) Routine and foreseeable; and  
(b) Required to facilitate the efficient and safe operation (etc.) of the [equipment].

#### Routine and Foreseeable

4.4 The interpretation of the phrase 'routine and foreseeable' must be determined in accordance with its objective natural meaning in the context of the definitions as a whole and the aim of the clause (see NV33 quotations above at paragraph 2.2 and 2.3). To fall within the definition, work must be both routine and foreseeable. 'Routine' and 'foreseeable' are words which are generally understood to involve advance awareness and unvarying regularity. OED definitions include:

*"foresee<sup>9</sup>*

*1 verb trans. Be aware of beforehand; predict*

*2 verb trans. Prepare; provide for or against in advance*

*3. verb intrans. Exercise foresight; make provision"*

*"routine*

*A noun 1. a regular course of procedure; an unvarying performance of certain acts; regular or unvarying procedure or performance*

*B adjective 1. performance as part of a routine; unvarying, mechanical*

*2. Customary, standard, usual."*

4.5 On this basis, FRH's view is that, according to the natural meaning of the words routine and foreseeable, Maintenance within definition (a)(i) should consequently have the character of unvarying, expected work which is provided for in advance.

4.6 In addition, it is appropriate to consider the words in context of the definition of Maintenance. The natural meaning of maintenance also involves concepts of expected work provided for in advance. OED definitions include:

*"4. The action of upholding or preserving a cause, state of affairs etc*

*5. The action of keeping something in working order, in repair etc."*

4.7 The interpretation of Maintenance can also be seen by comparison to its use in part (e) of the definition of Repair. This clause (although not directly relevant otherwise) excludes the obligation to renew (as part of the obligation to repair) in circumstances

<sup>9</sup> "Foreseeable" is defined by the OED as "able to be foreseen".

where *repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level*. The implication of this phrase is that one aspect of Maintenance is the degree of costs associated with it. Where the cost of an intervention is high, work will not be of a routine nature and consequently the work will not be Maintenance. Consequently, it is appropriate to consider the degree and cost of intervention as one aspect of whether work is Maintenance.

- 4.8 In the context of maintenance (as opposed to repair) within standard terms for a lease it is appropriate also to bear in mind the types of work which are routine for a lessee of a station to conduct on the property of the landlord (and which are also foreseeable). In FRH's submission, again it is normal to expect that the lessee will conduct routine (i.e. unvarying, expected) work on the property to keep it in the state in which it was provided. By contrast the landlord will take steps which involve correcting failures when his property fails.

Required to facilitate the efficient and safe operation

- 4.9 In addition to being routine and foreseeable the works must be required to facilitate operation. These words differ from those within the definition of Repair in that they are required for 'facilitation' of operation. This again supports the view that maintenance work of this sort is to preserve or assist the functioning of the equipment rather than to procure or provide it when it fails.
- 4.10 Overall, therefore, FRH's submission is that for works to fall within definition (a)(i) of Maintenance they must have the character of expected, unvarying actions conducted to keep the equipment in the state in which it was provided and which would be anticipated in advance. This will in turn depend upon the degree of intervention and the cost of that intervention. In this respect FRH continues to agree with the Assessor's view that a distinction in this respect can be drawn between actions which are "regular maintenance" (i.e. 'upkeep') and those which are "mending." (paragraph 3.8) and that the definition of Maintenance involves consideration of the degree of intervention and its cost (paragraph 4.2.3).
- 4.11 The reference to "*regular or irregular intervals*" does not undermine this understanding. This relates to when the work is actually required (i.e. at any time) rather than whether the nature of the work has the character of expected, unvarying actions. This is the difference between "regular" and "routine."

(a) (ii) *the replacement of such parts of the Station as require, or are designed for, regular replacement; and*

- 4.12 In FRH's submission the natural meaning of these words is tolerably clear. They relate to parts of the Equipment which are expected or designed to wear out. FRH has previously used the undefined word 'consumable' in this respect and continues to believe that this is the best characterisation of such parts.
- 4.13 This interpretation again accords with the obligation on a lessee being to maintain the property in working order by expected, unvarying work predicted in advance. Consumables by their nature, are expected to be substituted as part of normal operation of Equipment.

- (a) (iii) *any inspection or certification required by a Statute or for the purpose of any treatment, operation or works described in this paragraph (a); and*

4.14 This definition does not have any significant bearing on the issues in dispute. Where work falls within the definition, that work is Maintenance.

- (b) *in relation to the Equipment, all treatment, operations and works which are recommended in a current manufacturer's operating or maintenance manual (as updated from time to time) at the intervals and in the manner so recommended;*

4.15 In FRH's submission, this is a statement of fact. Either the work is provided for in an appropriate manual or it is not. Where it is provided for then the work is Maintenance. If not then it will be Repair unless it falls within one of the above definitions.

#### Conclusion of FRH's Interpretation

4.16 Effect must be given to the wording of the definitions of Maintenance and Repair. In doing so it is legitimate to consider the natural English meanings of the words used in those definitions.

- (a) In respect of part (a)(i) of the definition of Maintenance it is necessary to consider the meaning of work which is "*routine and foreseeable*" and which is "*required*" to "*facilitate efficient and safe operation.*" Consideration of the meaning of these words gives an understanding that it relates to expected, unvarying actions conducted to keep the equipment in the state in which it was provided and which would be anticipated in advance;
- (b) In respect of part (a)(ii) the meaning is tolerably clear and relates to items which will be used up by normal operation of the Equipment. Such items may be considered to have the character of consumable parts.

4.17 Parts (a)(i) and (a)(ii) of the definition of Maintenance require interpretation because they are not on their face sufficiently clear to understand where the dividing line between them falls in respect of all the types of intervention in the Joint Reference Appendices. It is therefore legitimate to consider wider issues such as the aim of the definitions and NSACs and what is generally understood to be the repair and maintenance obligations in a commercial lease arrangement of this type.

4.18 In doing so it is reasonable to consider the ordinary meanings of repair and maintenance and the landlord's obligations to correct faulty equipment as opposed to the tenant's obligation to keep equipment in the state it was provided. This supports the conclusion that Maintenance has the character of 'upkeep' as opposed to repair which has the character of 'mending.'

#### **Network Rail's Interpretation**

4.19 The definition of Maintenance is as follows:

- "(a) (i) *any treatment, operation or work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required (whether by any current statutory or other code of practice or otherwise) from time to time to facilitate*

*the efficient and safe operation and/or use in compliance with the requirements of any Statute of the relevant part for any purpose permitted by the Relevant Agreement;”*

- 4.20 To fall within this definition any treatment, operation or work must be:
- (a) routine and foreseeable;
  - (b) whether necessary at regular or irregular intervals from time to time
  - (c) required to facilitate the efficient and safe operation of the [Equipment].and/or its use
  - (d) in compliance with the requirements of any Statute of the relevant [Equipment]
  - (e) for any purpose permitted by the Relevant Agreements

- 4.21 In paragraphs 4.4 and 4.5 above FRH 4. rely on (a) and (c) above to the exclusion of the other parts of the definition. They then suggest that in relation to those parts the definitions of the OED should be adopted. They state accordingly that maintenance work must be routine and foreseeable and have the character of unvarying, expected work which is provided for in advance.

- 4.22 Network Rail accepts that to be Maintenance work must be routine and foreseeable. However, the words as to irregularity must be given meaning and cannot simply be ignored. The definition of routine in the OED upon which FRH relies includes,

““a regular course of procedure; an unvarying performance of certain acts; regular or unvarying procedure or performance.”

This definition equates regularity with unvarying performance, and that is of course different from the explicit wording of the definition of Maintenance which specifically provides for irregularity of performance. In Network Rail’s submission such a wide interpretation would be mistaken.

- 4.23 Further at paragraph 4.5 FRH assert that not only must Maintenance be unvarying and expected, but in reliance on the OED definition “must be provided for in advance”. While a requirement that work should be foreseeable might cause it to be provided for in advance, it does not follow that something which is foreseeable is not foreseeable unless it is provided for in advance. There is no hint in the NSAC definition of such a requirement, and there is in Network Rail’s submission no logical requirement in the language of the NSAC definition for the word “foreseeable” to be interpreted in this way. Further there is no absurdity or unacceptable consequence which requires to be cured by interpreting “foreseeable” as imposing such an additional requirement.

- 4.24 At paragraph 4.6 above FRH seeks to make the same point by reference to two of the parts of the OED definition of maintenance namely,

*"4. The action of upholding or preserving a cause, state of affairs etc*

*5. The action of keeping something in working order, in repair etc."*

Again in Network Rail’s submission there is no reason whatsoever to imply from these OED definitions any need for the work of Maintenance to be “provided for in advance” on their own wording or in the NSAC definition of Maintenance.

- 4.25 At paragraph 4.7 above FRH seeks to infer from part (e) of the definition of Repair that because it excludes,

*“renewal of any item for so long as repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level;”*

then where the cost of an intervention is high, work will not be of a routine nature and consequently the work will not be maintenance.

- 4.26 Notwithstanding that Network Rail does not accept that such a deduction can be made from the definition of Repair it does accept that in some circumstance a badge of work not being foreseen might well as a matter of practicality be that the work is expensive. However, in certain circumstance the contrary might well be the case, and the expensive replacement of some part of a system be foreseeable on a regular or irregular basis and therefore be within the NSAC definition of Maintenance notwithstanding its expense.

- 4.27 At paragraph 4.8 FRH asserts that a landlord is obliged to take steps which involve correcting failures “when his property fails”. FRH thereby appears to assert that work carried out because Equipment fails to function is Repair rather than Maintenance. Network Rail submits that there is nothing in the NSAC definitions of Maintenance and Repair to suggest the same. Plainly Equipment can fail foreseeably on a regular or irregular basis and require Maintenance as defined. Further failure of equipment to operate may not require either Maintenance or Repair – it may be as a result of operator error. It would be illogical to infer that rectification of such failures are Repair just because a specialist contractor is asked to rectify the failure. Further if this is an attempt to rely on the commercial purpose to be to be served by the contract, it is mistaken as no evidence as to the commercial purpose of this lease and these conditions is put forward by FRH. It does not avail FRH to refer to what might be the usual intention in other leases placing different obligations on their parties.

- 4.28 The same point is made at paragraph 4.9 above in connection with the phrase,

*“required (whether by any current statutory or other code of practice or otherwise) from time to time to facilitate the efficient and safe operation and/or use.”*

relying on the word “facilitate” in contrast to procuring and providing equipment when it fails.

- 4.29 The definition is as to the facilitation of efficient and safe operation and there is no logical reason why that facilitation should not include as Maintenance the procuring and provision of items of Equipment when covered by the wording of the NSAC definition as the same could be an “operation” under (a)(i), (and equally a “replacement” under (a)(ii) or an “operation” under (b)).<sup>10</sup>
- 4.30 In relation to paragraph 4.10, above Network Rail submits that to summarise the distinction between Maintenance and Repair by reference to regular “upkeep” as against “mending” is plainly unhelpful as not reflecting the detailed requirements of the definitions. It cannot be suggested that an Expert, faced with particular works should decide whether they are Maintenance or Repair on the basis of such a gloss on the words of the definition. While consideration of whether work is Maintenance might

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<sup>10</sup> In practice the required spares list is agreed with the train operator and Network Rail purchase them at the beginning. If a spare cannot be repaired and is beyond economical repair, NR would replace it. The train operator keeps the existing Network Rail owned spares stock in working and serviceable condition. Any other item procured would be pursuant to the train operator’s maintenance obligations.

involve consideration of its “expense”, and indeed the “degree of intervention” those are only considerations as to whether work is covered by the wording of the definition and cannot be adopted as substitutes for the same.

- 4.31 At paragraph 4.11 FRH state that reference to “regular or irregular intervals” in the definition of Maintenance does not undermine their contention that the nature of the work has the character of expected unvarying actions because it relates to when the work is actually required. They further state that this is the difference between “regular” and “routine”.
- 4.32 This would seem effectively to mean that they do not seek to rely on the complete wording of the definition of routine in the OED as might be supposed from paragraphs 4.4 and 4.5.
- 4.33 If it is the nature of the work which must be unvarying and not its timings which may be irregular then Network Rail agrees with FRH to the extent that the work is “routine and foreseeable”. However, while such work might be characterised as “unvarying” it is in Network Rail’s submission inappropriate to place such a gloss on the words. Unvarying could mean that the work had to be carried out in exactly the same way as it was required on separate occasions over time. Plainly that would not be considered to be a normal and every day interpretation of the words “routine and foreseeable nature”. Had the draftsman wished the work to be “unvarying” he would have used that word. He did not.
- 4.34 In relation to paragraphs 4.12 and 4.13 above essentially the same point can be made as in paragraph 4.30 above. Whilst parts of the Station requiring or designed for regular replacement might include what are commonly referred to as “consumables” there is no reason to restrict the wording of the definition to them. Had the draftsman wished to refer to consumables he would have used that word. He did not.
- 4.35 In Network Rail’s submission it is unhelpful to attempt to elucidate the meaning of the NSAC definitions of Maintenance and Repair by reference to reported cases dealing with the use of these words in other circumstances, or indeed to try to gloss the definitions in an understandable but ultimately misguided attempt to simplify them.
- 4.36 As to paragraph 4.14 and 4.15 above Network Rail agrees with FRH.

## **5 KEY ISSUES OF DISAGREEMENT BETWEEN THE PARTIES**

- 5.1 For the reasons given above, the parties are not agreed on the following key issues:
- (a) The scope of the application of part (a)(i) of the definition of Maintenance; in particular whether this
    - (i) can (as FRH suggests) be considered to suggest work of the character of expected, unvarying actions conducted to keep the equipment in the state in which it was provided and which would be anticipated in advance or
    - (ii) (as NR suggests) cannot be extended to such a specific interpretation;
  - (b) The interpretation of part (a)(ii) of the definition of Maintenance and in particular the degree to which the items referred to in that part have the character of ‘consumable’ parts. FRH suggests that the items referred to in that part have the nature of consumable parts, Network Rail rejects this description;



- (c) The degree to which the costs of the intervention are relevant to establishing whether it is Repair or Maintenance. FRH suggests that high cost interventions are likely to be Repair, Network Rail accept that many Repairs will relate to the more expensive interventions however not all high cost interventions will be Repair.
- (d) The degree to which it is helpful to assist the understanding of the difference between Repair and Maintenance by considering Maintenance as generally having the character of "upkeep" while Repair might have the character of "mending." FRH argues that this distinction is helpful, Network Rail that it is not correct or helpful.

## **6 CONCLUSION AND REQUEST FOR DETERMINATION**

- 6.1 In light of the above analysis the parties believe that there is significant common ground between them, however in order to interpret the 'boundary' between Repair and Maintenance works some key issues remain outstanding. They therefore request guidance from the Assessor in respect of the correct interpretation of the definitions of Maintenance and Repair and the scope of each.

ACCESS DISPUTES PANEL REFERENCE

ADP48

NETWORK RAIL INFRASTRUCTURE LIMITED  
AND  
FIRST RAIL HOLDINGS LIMITED

RE: INTERPRETATION OF MAINTENANCE AND REPAIR OF RETAIL TELECOMMS AND  
CCTV AND OTHER RETAIL TELECOMMUNICATIONS EQUIPMENT AT FRANCHISED  
STATIONS

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LEGAL OPINION

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- 1 On 5 March 2010, I was appointed pursuant to the provisions of paragraph 1.53(b) of Part A of the Access Disputes Resolution Rules as Legal Assessor to the Access Disputes Panel ("the Panel") to assist in the determination of this dispute.

**Documents and Definitions**

- 2 I have been provided with copies of the following documents:
- 2.1 Submissions dated 3 March 2010 with appendices 1 to 10 as there listed and including at, respectively, appendices 8 and 9, National Station Access Conditions 1996 (England and Wales) and National Station Access Conditions 1996 (Scotland) (together "NSAC").
- 2.2 All the definitions referred to in this Legal Opinion are the Definitions as set out in NSAC. All the conditions here referred to are the NSAC Conditions.
- 2.3 The dispute between the parties is helpfully set out at paragraphs 4.2 and 4.3 of the Submissions:

*"4.2 The dispute between the parties concerns the interpretation and application of the Maintenance and Repair obligations for Retail Telecommunications Equipment and CCTV on the stations including software support. Retail Telecomms and CCTV Systems include some of the most important customer facing assets, such as information screens and public announcing that are used to communicate train running information and safety and security advice."*

4.3 *This dispute concerns which of Network Rail or the relevant First SFO should pay for certain categories of work done by contractors on this Equipment depends upon whether the work is Repair or Maintenance as defined under the NSAC or neither. The parties are bringing this reference to seek a decision from the ADP on which tasks (from a list of examples) fall into which definition"*

2.4 The background narrative provided by the parties within paragraph 4 of the Submissions has been helpful to me as I am sure it will also be to Panel members. The Witness Statement of Amanda Freeman of Network Rail (undated) at Appendix 3 is also of considerable assistance to us in understanding some of the technical considerations in issue.

I should mention one point here. It is not clear from the Submissions whether Ms Freeman's Witness Statement is an agreed statement of facts. I have therefore treated it as helpful background and not as part of Network Rail's submissions.

2.5 At Appendix 1 to the Submissions, the parties have helpfully identified four main types of faults ("the Fault Types"), to the details of which I refer at paragraph 4 below.

The following issue arises for determination by the Panel:

Paragraph 8.1.1 of the Submissions:

*"Whether in relation to the Fault Types, the remedial actions carried out are Maintenance or Repair as defined by the NSAC Definitions".*

## 2.7 NSAC Definitions

2.7.1 For ease of reference, it may be helpful if I set out in the body of this Opinion the Definitions of, respectively, Maintenance and Repair as they appear at Part A of NSAC.

*"Maintenance means the carrying out of the following in each case in accordance with the specifications (if any) set out in Annex 12 [Repair and Maintenance Specification] or determined pursuant to Annex 11 [Production of Specifications]:*

*(a) in relation to every part of the Station:*

*(i) any treatment, operation or work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required*

*(whether by any current statutory or other code of practice or otherwise) from time to time to facilitate the efficient and safe operation and/or use in compliance with the requirements of any Statute of the relevant part for any purpose permitted by the Relevant Agreement;*

- (ii) the replacement of such parts of the Station as require, or are designed for, regular replacement; and*
- (iii) any inspection or certification required by a Statute or for the purpose of any treatment, operation or works described in this paragraph (a); and*
- (b) in relation to the Equipment, all treatment, operations and works which are recommended in a current manufacturer's operating or maintenance manual (as updated from time to time) at the intervals and in the manner so recommended;"*

*"Repair means in relation to every part of the Station the carrying out, in accordance with the specifications (if any) set out in Annex 12 or determined pursuant to Annex 11, of:*

- (a) any work required to keep the Station in no worse a state than evidenced by the Statement of Condition; and*
- (b) any work required so that the Station is safe for operation and/or use in compliance with the requirements of any Statute for any purpose permitted by the Relevant Agreement;*

*but does not include the carrying out of:*

- (c) any Maintenance;*
- (d) any work to the Station which is the responsibility of any third party now or in the future entitled to occupy any part of the Station under any of the Existing Agreements; or*
- (e) renewal of any item for so long as repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level;"*

2.7.2 It may also be helpful at this point to add the Definition of Equipment which is referred to in each of the Definitions of Maintenance and Repair:

*"Equipment means the items of Equipment, plant, machinery and apparatus at the Station owned by Railtrack (whether or not listed in the Equipment Inventory) from time to time"*

### 3 Commentary

3.1 The parties have provided very detailed Submissions and have also provided very full examples and analysis of the four agreed Fault Types which they have identified. That said, it seems to me that what is at issue here is a short, albeit not straightforward issue of construction. We need to look at the words used in the Definitions of Maintenance and Repair, understand what they mean and then apply that understanding to the individual situations.

3.2 The Definitions are not happily drafted and, therefore, not easy to construe. That said, NSAC constitutes a commercial agreement between the parties and the normal principles of interpretation apply. The modern approach to the interpretation of contracts is set out in the leading case of *Investors Compensation Scheme Limited -v- West Bromwich Building Society* [1998] 1WLR896 in which the Court said:

*"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..."*

*The meaning which a document (or any other utterance) has conveyed 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 "rule" that words must be given their "ordinary and natural meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents."*

The guidance in *Investors Compensation Scheme Limited* is often referred to as the "purposive approach". That approach is essentially, as the Court said in another leading case - *Mannai Investments Co -v- Eagle Star Life* [1997] AC749:

*"[T]he enquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind."*

- 3.3 As I say, we need to look at the words used, but to assist us further in understanding them, it may be helpful to look at the way in which the Courts have from time to time sought to distinguish between maintenance and repair. Probably one of the most helpful authorities on the concept of maintenance is *ATP Construction Limited -v- Customs and Excise Commissionaires* [1981] 1WLR49 in which the Court said of the expression "maintenance" that:

*"[W]ithout entering into the realms of definition, maintenance generally involves the following characteristics: firstly, an element of repetition, because the object is to keep the building in the condition in which it started; secondly, that the work is generally speaking foreseeable..; thirdly, again generally speaking, that the work is of a minor character and habitual, although naturally there are exceptions as in the case of roof works; fourthly, that generally speaking in maintenance one does not add something substantial which is new; and lastly, that you do not in ordinary maintenance make a substantial improvement to that which you maintain".*

- 3.4 Probably the most helpful case in the understanding of the concept of repair is the leading case of *Quick -v- Taff-Ely Borough Council* [1986] QB809 in which the Court said:

*"[T]he landlord need not do anything until there exists a condition which calls for repair. As a matter of the ordinary usage of English that which requires repair is in a condition worse than it was at some earlier time...."*

The Court went on to say:

*"...a state of disrepair, in my judgement, connotes a deterioration from some previous physical condition."*

Both the authorities referred to are decisions of the Court of Appeal.

- 3.5 Reading the Definitions in NSAC of, respectively, Maintenance and Repair, both construing the words used and bearing in mind the helpful guidelines laid down by the Courts, it seems to me that we can find a distinction between the type of work required in each case. In the case of Maintenance, we are looking at *"....work of a routine and foreseeable nature...the replacement of....parts...as required, or are*

*designed for, regular replacement and...works which are recommended in a current manufacturer's operating or maintenance manual..."*

In contra distinction, works of Repair are works *"required to keep the Station in no worse a state than evidenced by the Statement of Condition and...required so that the Station is safe for operation and/or use..."*

- 3.6 It is arguable that the words which most crucially make that distinction are those contained in the Definition of Repair which provide that Repair *"does not include the carrying out of...renewal of any item for so long as repair may still reasonably be undertaken and the costs of Maintenance are not in consequence increased above a reasonable level"*

I think the point can be illustrated by reference to a simple example. Appendix 4 to Annex A to the NASC is the Station Equipment Inventory which provides for the Allocation of Responsibility. Headings include Responsibility for Maintenance and Responsibility for Repair. Taking, as my laymen's example, central heating systems, radiators need to be bled regularly and valves changed at regular intervals. That, as it seems to me, is clearly Maintenance. But if a radiator has rusted and failed and needs either welding or replacement that, as it seems to me, would clearly be within the Definition of Repair since, to do otherwise would render *"the costs of maintenance...increased above a reasonable level"* and/or Maintenance would be impossible.

- 3.7 As I indicate in paragraph 3.2 above, I think it has to be acknowledged that the Definitions are not always happily drafted but, construing the words used in the Definitions and doing the best I can, it seems to me that the distinction is very much one of degree and of process.

- 3.8 In passing, I note that the concept of "renewal" is referred to at Conditions D4 [Railtrack's Obligations] and D5 [the Station Facility Owner's Obligations]. I cannot see that "renewal" is defined but conditions D4.1.3 and D5.1.4 both provide, in essence, that *"renewal shall be undertaken ... where it is reasonably necessary and the most economic method of repair"*.

That requirement, as it seems to me, aids construction and underlines the distinction sought to be set out in the Definitions as between what might be colloquially described as "regular maintenance" on the one hand and "mending" on the other.

## 4 Analysis

4.1 I now turn to the four Fault Types which the parties have helpfully identified and to the parties' Submissions in relation to those Fault Types. The Fault Types identified are as follows:

- Fault Type 1: Investigate and rectify a fault without using a spare;
- Fault Type 2: Investigate and rectify a fault with a spare;
- Fault Type 3: No fault and system works to specification, but TOC requests better product (hardware or software) to improve service (and upgrade or enhancement of kit) prior to a whole system renewal;
- Fault Type 4: Third party issue [e.g. electricity company, building contractor].

I deal with each of those Fault Types in turn:

### 4.2 Fault Type 1: Investigate and rectify a fault without using a spare

4.2.1 Network Rail submit that all Fault Type 1 items are Maintenance because, in summary, they fall squarely within the words of that Definition.

4.2.2 First submit that many of the Type 1 Faults are Maintenance but some are not as they are not of a routine nature, alternatively not foreseeable, alternatively "the item needs an intervention in order to make it operate again".

4.2.3 On balance, I prefer the submission of First. I say that because, as I have analysed at paragraph 3 above, when construing the Definitions, it is necessary to bear in mind the notion of the degree of intervention inherent in those Definitions. If "*all treatments, operations and works which are recommended in a current manufacturer's operating or maintenance manual (as updated from time to time) at the intervals and in the manner so recommended*" have been carried out, as per sub-paragraph (b) of the Definition of Maintenance, then it seems to me that any other necessary intervention falls outside that Definition and is therefore a Repair.

### 4.3 Fault Type 2: Investigate and rectify a fault with a spare.



4.3.1 Network Rail submit that all Fault Type 2 matters are Maintenance because, again, they fall squarely within the words of the Definition.

4.3.2 First submits, in summary:

- (1) If works are “*required so that the Station is safe for operation and/or use in compliance with the requirements of any Statute for any purpose permitted by the Relevant Agreement*” then those faults are Repair;
- (2) Some parts are not designed for regular replacement and so do not fall within the Definition of Maintenance;
- (3) That there is a distinction between a consumable and a non-consumable spare, use of the latter being, in their view, a Repair.

4.3.3 As it seems to me, the answer lies in the degree of intervention envisaged by the words used. Looking again at the words at paragraph (a)(i) of the Definition of Maintenance: “*any ... work of a routine and foreseeable nature whether necessary at regular or irregular intervals which is required ... from time to time to facilitate the efficient and safe operation ... of the relevant part [of the Station] ...*”, it seems to me that, just as an example, where the digital clock is blank, the installation of a new cable naturally falls within work which is foreseeable and is therefore Maintenance.

4.3.4 I return below to Appendix 1 which the parties have prepared jointly and which gives a number of detailed examples of each Fault Type.

4.4 **Fault Type 3: No fault and system works to specification, but TOC requests better product (hardware or software) to improve service (and upgrade or enhancement of kit) prior to a whole system renewal.**

4.4.1 Network Rail submits that Type 3 Faults are all enhancements to which First has no contractual entitlement and can be introduced and charged for by the parties by agreement between them.

4.4.2 First submits that enhancement does not fall within the Definition of Maintenance but there could be instances where the work is being requested for “compliance with the requirements of any Statute” and so may fall under the Definition at (b) of Repair.

4.4.3 I cannot see there is any fundamental disagreement between the parties in relation to Type 3 Faults. That said, and as First submit, responsibility for the charge may depend on the reason for the enhancement requested. So that, for example, where there has been a *“signalling change at Station X from Platform X for services that go forward to Town Y which needs to be added to the CIS system so trains from Platform X are tracked correctly”*, to the extent (and this will be a matter of fact on which we currently have no information) that change was necessitated by signalling works carried out by Network Rail that, as it seems to me, does fall within the Definition of Repair. In any event, and as the parties are aware, Condition P4 of the NSAC makes it very clear that any costs *“should be attributed as between them on a fair and equitable basis”*.

**4.5 Fault Type 4: Third party issue [e.g. electricity company, building contractor].**

4.5.1 Network Rail submits that *“the party for whom the contractor is working should bear the cost of this Fault Type as that party has a contractual right to recover the same from the contractor and therefore the easiest means of recovery and that the same should not be treated as either Maintenance or Repair”*.

4.5.2 First submits that *“[it] is the ultimate party that requested or has caused the work who should bear the cost. The SFO will seek for the work to be done so that customer service is not adversely impacted. However, there is a difference between who enforces against the third party and who takes the risk of the failure to recover compensation. Where a third party causes damage which needs to be corrected then that is Repair...the costs of that repair may be recovered from the third party and Network Rail and SFO are both obliged to take whatever action is necessary to make such recovery, however failing recovery then the loss lies with the party responsible for Repair.”*

4.5.3 In my view, where First assert *“where a third party causes damage which needs to be corrected then that is Repair”*, their analysis is incorrect. The simple position in law is that where a contractor causes damage to the employer's land or goods and equipment then, prima facie, there is a breach of contract on the part of the contractor (assuming the damage has not been caused by the employer's failure to provide adequate instructions and/or information) and the claim lies in damages, the measure of damage being, in an appropriate case, the cost of putting right the damage or diminution in value. I cannot see any basis on which damage caused by a contractor would fall under the Definition of either Repair or Maintenance. The claim is simply for damages for breach of contract and/or negligence.

4.5.4 That said, the parties need to draw a distinction between, on the one hand, the claim which the employer may have against the contractor and, on the other, what work the contractor was employed to do when the damage was caused. I am not convinced that the parties, in their analysis, have made that distinction so that, for example where we are told *"microphone not working in new control unit"* and *"installed three months ago still under warranty"*, as between employer and contractor, clearly the claim lies against the contractor, but between the parties, the primary responsibility will turn on the way on which those works are properly categorised i.e. Maintenance, Repair or enhancement.

4.5.5 Subject to that clarification, it does not seem to me that the parties are in fundamental disagreement.

## 5 Additional Points

5.1 Having considered the parties' submissions in relation to the four Fault Types identified, I now refer to the additional points identified in the Submissions .

5.2 As appears from paragraph 4.19 of the Submissions , an issue arises in relation to the use of the word Systems as, for example, in the Definition *"Passenger Information Systems"*, the parties acknowledging, as I understand it, that technology has moved on since privatisation in the mid 1990's. At paragraph 4.19 the parties submit:

*"Network Rail considers that NSAC does not recognise the existence of software nor the requirement for its maintenance and repair although it does refer to 'Systems'.*

*First considers that the reference to "Systems" includes software. The parties cannot agree whether work on software which is required to operate the Retail Telecommunications Equipment and CCTV is a Maintenance or Repair activity or some other operating cost not falling within the Definitions".*

5.2.1 There are two points here. First, as to whether NSAC recognise the existence of software and the requirement for its maintenance and repair, particularly having regard to the need to assess objectively the commercial purpose of the contract as in the case of *British Gas Corp -v- Universities Superannuation Scheme* referred to at paragraph 3.2 above, it seems to me that the words of the Definitions of Maintenance and Repair are sufficiently wide to encompass evolving computer technology and therefore do include software.

5.2.2 Second, whether work on software constitutes Maintenance or Repair or some other operating cost not falling within the Definitions depends in my view, as set out in paragraph 3 above, on the degree of the intervention.

5.3 At paragraphs 4.17. 4.18 and 5.3.2, the parties raise an issue in relation to the allocation of responsibility for the cost of spares which are kept by the third party contractor. As I read the Submissions, the parties have raised that issue but have not provided detailed submissions on it. Doing the best I can, it seems to me that the answer is again, one of degree so that if, for example, the third party contractor in dealing with a blank customer information computer screen, replaces a cable from his stock that, in my view would be a cost allocated to Maintenance whereas if he replaced the relevant PC, that should be allocated to Repair.

## 6 Determination

6.1 At Appendix 1 to their Submissions the parties, in addition to identifying four Fault Types, have set out what is effectively a Scott Schedule of defects in which, in relation to each item identified, they have set out their own views and sought the view of the Panel.

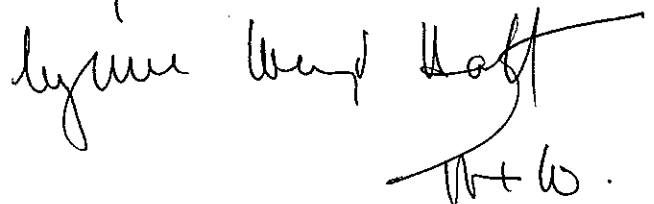
6.2 In my view, the role of the Panel is to determine the construction of the relevant Definitions, in this case those of Maintenance and Repair, and to give general guidance on the principles to be derived from that construction. It is then for the parties to apply those principles to the individual items in dispute, on the basis that if the parties fail to reach agreement, any technical issues outstanding may be referred to Expert Determination under Part D of the Access Dispute Resolution Rules. That said and subject of course to the decision of the Chairman under Rule 1.4, the Panel may elect, in its discretion, to deal with the Appendix 1 Scott Schedule in detail.

## Summary

My views on the substantive issues are set out at paragraphs 3, 4 and 5 of this Opinion. I am happy to deal with any additional points with the Panel members may wish to raise.

Suzanne Lloyd Holt  
Solicitor  
Wragge & Co LLP  
55 Colmore Row  
Birmingham  
B3 2AS

Dated: 9 March 2010

A handwritten signature in black ink, appearing to read 'Suzanne Lloyd Holt', followed by a large, stylized flourish or initial 'H'.