

**IN THE MATTER OF THE ARBITRATION ACT 1996**

**AND IN THE MATTER OF AN ARBITRATION**

**PURSUANT TO THE**

**ACCESS DISPUTE RESOLUTION RULES**

**B E T W E E N:**

**THAMESLINK RAIL LTD**

**Claimant**

**v**

**NETWORK RAIL INFRASTRUCTURE LTD**

**Respondent**

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**INTERIM AWARD**

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**INDEX**

THE PARTIES .....	2
THE CONTRACT .....	2
ARBITRATION PROCEDURE .....	9
THE ACCESS DISPUTE RESOLUTION RULES (ADRR) .....	11
PLEADINGS AND INTERCHANGES BETWEEN PARTIES .....	15
THE HEARING .....	20
THE ISSUES .....	22
THE CTRL CONSTRUCTION WORKS .....	26
THE RAIN.....	32
THE CAUSE OF THE TUNNEL FLOODING? .....	38
CONCLUSIONS .....	41
DECISIONS .....	42

## **THE PARTIES**

1. The Claimant herein is variously referred to as “the Claimant”, or “Thameslink”. It is a train operating company which operates the Thameslink rail franchise pursuant to a Franchise Agreement dated 10<sup>th</sup> February 1997, which was extended on 13<sup>th</sup> February 2004. It is represented herein by Dickinson Dees (attention: Paul Stewart, reference GLH/PS2), St Ann’s Wharf, 112 Quayside, Newcastle-upon-Tyne, NE99 1SB.
  
2. The Respondent was formerly known as “Railtrack Plc”, and is variously referred to herein as “the Respondent” or “Network Rail”. It is the operator of the United Kingdom’s rail infrastructure. It is represented herein by Andrew Gilbert, Kennedys, 14-20 Chiswell Street, London EC1Y 4TW.

## **THE CONTRACT**

3. By a contract in writing dated 12<sup>th</sup> November 1995 the Claimant and the Respondent (under its former name of Railtrack Plc) entered into a Track Access Agreement (“TAA”). The TAA was subsequently varied by eighteen Supplemental Agreements by the time of 1<sup>st</sup> April 2004, the first of which was made on 6<sup>th</sup> December 1995 and the most recent on 13<sup>th</sup> June 2000. Accordingly, all references herein to the TAA are to that Agreement as amended as at April 2004.
  
4. By the said Agreement the Respondent granted permission to the Claimant to use certain track, and the Parties agreed various arrangements relating thereto.
  
5. Clause 8 of the TAA dealt with “Indemnities And Liability For Performance”. This dealt with, amongst other things, the liability of the Parties to make payments from

one to the other in various specified circumstances. In particular, by Clause 8.2 the Respondent agreed to indemnify the Claimant in certain specific situations. Further, by Clause 8.3 it was provided that the Parties' sole entitlement as between themselves for compensation arising from cancellations, interruptions or delays to trains should be as set out in Schedules 4 and 8.

6. Clause 11 dealt with "Disputes and Claims". Clause 11.1 therein provided that any dispute or claim arising under, amongst other things, Clause 8, should be resolved by mediation followed, if necessary, by arbitration pursuant in each case to the Access Dispute Resolution Rules. Clause 11.3 provided that any dispute or claim arising out of or in connection with the Agreement should be resolved by the Industry Committee followed, if either party shall be dissatisfied with the decision of the Industry Committee or the ruling of the Chairman thereof (as the case may be), by a referral to such other body (other than a mediator) as the Industry Committee may specify, pursuant in each case to the Access Dispute Resolution Rules ("ADRR").
7. Clause 16 dealt with "Governing Law and Jurisdiction" and provided that the TAA shall be governed by and construed in accordance with the laws of England and, subject to Clause 11, the Parties irrevocably agreed that the Courts of England are to have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Agreement.
8. Schedule 4 to the TAA dealt with the "Possessions Regime" and set out the applicable rules of the route, applicable rules of the plan, compensation for possessions and protected journey times.

9. Schedule 4 Part 3 dealt with “Compensation for Restrictions of Use and Protected Journey Times”. In Clause 2.1 thereof, dealing with Defined Terms, the term “Network Rail Restriction of Use” was defined as:

*“means any Restriction of Use other than an Operator Restriction of Use, a Competent Authority Restriction of Use, a CTRL Possession or, if applicable, a Thameslink possession”*

10. Schedule 4 Part 4 deals with “CTRL Possessions”.

10.1 Schedule 4 Part 4, Part 1, Clause 1.1 therein deals with Definitions and includes a definition of “CTRL” by reference to proposed rail link works known as the Channel Tunnel Rail Link authorised by the CTRL Act 1996. The Definitions also included:

- (i) *“ ‘CTRL Possession’ means any restriction of use of all or any part of the Routes as a result of the construction of the CTRL Project including, but without limitation, each of the following types of restriction:-*
  - (a) *blockage,*
  - (b) *temporary speed restriction,*
  - (c) *single line working,*
  - (d) *interruption to power supplies,*
  - (e) *diversion,*
  - (f) *weave;”*
- (ii) *“ ‘CTRL Project’ means CTRL together with the Thameslink Works (excluding the Thameslink Completion Works), the Thameslink Enabling Works and all other works authorised by Schedule 2 of, or pursuant to paragraph 1 of Schedule 8 of, the CTRL Act in relation thereto”.*
- (iii) *“ ‘Part IV CTRL Possession’ means any CTRL Possession which results or would result in the Train Operator being unable to operate or Bid to operate*

*services in either or both directions on the Routes or those parts of the Routes during the time in which CTRL Possession takes effect”.*

- (iv) “ *‘Thameslink Completion Works’ means those works, including (a) the fitting out of the Thameslink Box, station stairwell, underpass and concourse, (b) the installation of new signalling and electrification for the Midland Road station and (c) railway works associated with the cross-site links to the Great Northern Line ---*”.
- (v) “ *‘Thameslink Works’ means the Thameslink Advance Works and the Thameslink Completion Works.*”
- (vi) “ *‘Nominated Undertaker’ means any person or persons who is/are not owned or controlled by HM Government, who enter(s) into a development agreement with HM Government for the construction of CTRL and who is notified, in writing, by Network Rail to the Train Operator as “Nominated Undertaker” for the purposes of this Part 4.*”

(Underlining added)

10.2 Schedule 4 Part 4, Clause 1.3 provides (amongst other things) as follows:

*“1.3 For the purposes of this Part 4:-*

- (a) Any Possession notified and/or taken in connection with the construction of the CTRL Project shall be a CTRL Possession subject to the provisions of this Part 4;*
- (b) references to the ‘construction’ of the CTRL Project shall be deemed to include the design, construction and/or commissioning of the CTRL Project; ---”*

(Comment: It was suggested by the Respondent, at the hearing (see paragraph 30 below), that the phrase, used in Clauses 1.1 and 1.3(b), set out immediately above, “*construction --- of the CTRL Project*” did not include the maintenance and monitoring of pumps used for the CTRL temporary works, although it was accepted that the construction of temporary diversions of the sewers was included. At the hearing I indicated that my view at that time was that the maintenance and monitoring of pumps used for the purposes of the temporary works, including the sewer

diversions, would simply be part and parcel of those temporary works, and that no legitimate distinction could be drawn for present purposes between the temporary sewer diversion works and the pumps (including their maintenance and monitoring) which enabled such diversion works to take place. For the avoidance of doubt, this remains my view and I so hold for the purposes of this Interim Award.)

10.3 Schedule 4, Part 4, Part IV, deals with Compensation Terms in respect of CTRL Possessions.

(i) Clause 4.1, thereof states amongst other things;

*“4.1 Notwithstanding the provisions of Part G of the Access Conditions, the right of the Train Operator to receive payment under this Part IV shall, except as otherwise provided in this Part 4, constitute the sole right of the Train Operator to receive compensation in respect of:-*

*(i) Part IV CTRL Possessions ---”*

(ii) *“4.2(a) Subject to paragraph 4.2(b), payments to the Train Operator arising in connection with the taking --- of any Part IV CTRL Possession during any Calculation Period in which such Part IV CTRL Possession takes effect --- shall be calculated in accordance with the provisions of this Part 4 to the exclusion of the application of --- Part 3 --- of this Schedule 4, and Schedule 8 of the Agreement.”*

(Comment: The Respondent refers to (amongst other things) the above provision in making the point that Schedule 4 Part 3 and Part 4 provide for mutually exclusive compensation mechanisms. The Respondent relies upon

this to contend that any Tribunal should strain against finding that there are two co-equal concurrent causes of a track interruption where one (e.g. a flash flood) would give rise to compensation under Schedule 4 Part 3, while the other (e.g. CTRL Project construction) would give rise to compensation under Schedule 4, Part 4. However, my view is that if the factual analysis results in a finding that there are two co-equal concurrent causes of an event then the mere fact that the different causes are each associated with different compensation mechanisms is no reason to avoid recognising what the factual analysis has established. It is often the case in construction disputes that concurrent causes are found where one carries compensation for the contractor while the other carries no compensation at all. This is not a good reason for avoiding recognising the outcome of a proper factual analysis of causation.)

(iii) Clause 4.6 of Schedule 4 Part 4, Part IV, provides as follows:

*“4.6 If the Train Operator gives notice --- and Network Rail’s Representative and the Train Operator’s Representative fail to resolve any such dispute within 28 days of the date of the relevant notice, then either party may require that the matter be resolved by the Access Dispute Resolution Committee and if either party is dissatisfied with the decision of that Committee or the ruling of the Chairman thereof (as the case may be) such party shall be entitled to refer the matter for arbitration pursuant in each case to Part C of the Access Dispute Resolution Rules. Neither Network Rail nor the Train Operator shall object to the Nominated Undertaker being present, and giving evidence, in relation to any such resolution or arbitration.”*

(Comment: The Revised Statement of Claim (“RSC”), at paragraph 1A.1, states that the referral of the present dispute to the Access Disputes Resolution Committee (“the ADRC”) was made pursuant to the above Clause, and the Respondent subsequently referred the dispute to arbitration pursuant to the

same provisions and to paragraph 1.3 of Part C of the ADR Rules (see paragraph 17.2 below). Further, at the hearing (see paragraph 30 below) the Respondent indicated that in view of the final sentence of Clause 4.6 as quoted above, it did not consider that the Nominated Undertaker should be precluded from being made aware of the outcome of the present arbitration. (This is not a matter with which I am concerned.) The term “*Nominated Undertaker*” is defined in Clause 1.1 of Schedule 4 Part 4, as quoted in paragraph 10.1(iv) above.)

10.4 Schedule 4 Part 4, Part VII, deals with “*Payment Terms*”, and Clause 7.2 thereof provides, amongst other things, as follows:

*“7.2 Where any compensation which is the subject of this Part 4 is in dispute:-*

- (a) The undisputed amount shall be paid in accordance with paragraph 7.1;*
- (b) The disputed balance (“disputed balance”) shall be paid within 28 days after the dispute is resolved or determined in accordance with the provisions of paragraph 4.6 of this Part 4; and*
- (c) The disputed balance shall carry interest (accruing daily and compounded monthly) at the Default Interest Rate from the date on which the disputed balance would but for such dispute have been due to be paid until the date of payment.”*

(Comment: In view of the possible financial outcome of the present Interim Award (see below) the Parties specifically requested that the present Interim Award should be confined strictly to dealing with which of the payment mechanisms (Schedule 4 Part 3 or Part 4) applied, and should not deal with matters of quantum, interest, costs or other matters, all of which are specifically reserved to a subsequent Final Award.)



11. Schedule 8 to the TAA dealt with the “*Performance Regime*”. Clause 1 therein dealt with Interpretation and 1.1 dealt with Definitions, including the term “*Possession*” which means, amongst other things:

“ ‘*Possession*’ means: ---

- (b) *in relation to any day on or after the Summer Change Date 2002, a Network Rail Possession or a Competent Authority Possession each as defined in Part 3 of Schedule 4, or, if applicable a CTRL Possession or Thameslink Possession, as defined in Part 4 of Schedule 4;”*

### **ARBITRATION PROCEDURE**

12. The Access Disputes Panel (“ADP”) sent to the Parties on 9<sup>th</sup> June 2005 a Determination (reference: ADP3) relating to a dispute between the Parties herein. The Determination was signed by Sir Anthony Holland, Chairman, and the Panel included a representative of Network Rail. The Determination stated that Thameslink had sought a Determination in respect of possessions resulting from flooding of King’s Cross Tunnels in April 2004 and, in particular, compensation under Schedule 4 Part 4 (“CTRL Possessions”) of the TAA. It stated that the Parties were seeking to establish an issue of principle in relation to the specific circumstances and were not seeking any determination of quantification of amounts that may be payable.
13. The said Determination of the ADP of the Access Disputes Committee, made following a hearing on 1<sup>st</sup> June 2005, stated at paragraph 24:

*“The Panel therefore finds for Thameslink that, on the balance of probabilities,*

- 24.1 The flooding of Thameslink tunnel on the evening of 27<sup>th</sup> April 2004, and the consequent need for the line to be closed to Thameslink trains until the morning 29<sup>th</sup> April was a “restriction of use of all or any part of the routes as a result of the construction of the CTRL Project”; as such*

24.2 *The period of closure fulfils the terms of the definitions of both a CTRL possession, and a Part IV CTRL possession, and therefore*

24.3 *Thameslink is entitled to compensation in respect of this blockage in line with the provisions of Part IV of Part 4 of Schedule 4 of its Track Access Agreement.*

(Underlining and emboldened type as in original.)

14. By letter dated 24<sup>th</sup> June 2005 Kennedys, on behalf of Network Rail, wrote to Mr. C. Blackman, the Disputes Secretary of the ADR Committee, and stated, amongst other things, that pursuant to paragraph 4.6 Part IV of Schedule 4 of the TAA between the Parties herein, and paragraph 1.3 of Part C of the ADR Rules, it gave notice of arbitration of the dispute which it summarised as:

*“Thameslink Rail claimed, and the ADP determined, that in respect of flooding of King’s Cross Tunnels in April 2004 Network Rail should compensate Thameslink under Schedule 4 Part 4 of the TAA. Network Rail considers the Determination to be wrong.”*

(Comment: Given the terminology of the Notice of Arbitration referred to immediately above, the Parties expressly asked, at the hearing of 14<sup>th</sup> December 2005, that the present Interim Award should be confined to the issue of which payment mechanism (Schedule 4 Part 3 or Part 4) applies in the circumstances, and should not deal with other matters such as quantification, etc. Also see paragraph 10.4 above as regards matters of interest and costs being entirely reserved to a future Final Award.)

15. By letter dated 21<sup>st</sup> July 2005, Mr. Chris Blackman, the Secretary to the Access Dispute Committee, informed me, Robert Gaitskell Q.C., that on behalf of the Parties he confirmed my appointment as Arbitrator in the matter of a dispute between the Parties herein, pursuant to paragraph 4.6 of Part IV of Schedule 4 of the TAA and

paragraph 1.3 of Part C of the ADR Rules. He went on to state that the arbitration should proceed in accordance with Section C on page R21 of the ADR Rules.

### **THE ACCESS DISPUTE RESOLUTION RULES (ADRR)**

16. The Access Dispute Resolution Rules deal in Part A with the function and operation of Panels. Rule 1.1 in Part A states that the purpose of a Panel is to determine disputes referred to it by industry parties and which arise out of or in connection with, amongst other things, an Access Agreement. In particular, Rule 1.71 within Part A refers to Determinations, and states:

*“1.71 Subject to any other provision of the Access Conditions and Access Agreement in the determination of a dispute, the Panel --- may make any of the following orders that:*

- (a) one dispute party shall pay an amount of money (including damages) to another dispute party, whether that amount is specified in the determination or calculated in accordance with such procedure as the Panel shall specify;*
- (b) one dispute party shall take or not take specified action;*
- (c) the meaning of an agreement or a dispute party's obligations under that agreement are as stated in the determination; or*
- (d) any principal sum the Panel may order one party to pay to another shall carry interest at such rate and over such period as it shall determine.”*

17. Part C of the ADRR dealt with Arbitration and included the following Rules.

17.1 Rule C1.1 deals with disputes to be decided by arbitration, and states, amongst other things:

*“1.1 Any dispute arising between industry parties --- --- which the parties to the dispute have agreed should be referred in part or in whole to arbitration under these rules shall be arbitrated in accordance with the provisions of this Part C. In each of the following cases the*

*arbitration may only proceed if a notice of arbitration is served on the Secretary by the party wishing to begin the arbitration:*

---  
(b) *in the case of a dispute referred --- to the Access Disputes Panel pursuant to rule A1.29, within fourteen working days of the written determination of the Panel; ---”*

17.2 Rule C1.3 dealt with the Notice of arbitration, and stated:

*“1.3 A person wishing to refer a dispute to arbitration shall serve a written notice of arbitration on the Secretary and shall serve a copy of the notice of arbitration on every other party to the dispute. The notice shall summarise the basis of the claim and list the other parties concerned. It may suggest one or more appropriate arbitrators, whether from the register or otherwise.*

17.3 Procedure so far as “General” matters are concerned is dealt with in Rules 1.8 – 1.11, and states, amongst other things,:

*“1.8 The arbitrator shall act fairly and impartially as between the parties giving each a reasonable opportunity of putting his case and dealing with facts of his opponent.*

*1.9 The arbitrator shall adopt procedures suitable to the circumstance of the case, avoiding unnecessary delay or expense to provide a fair means for the resolution of the matters falling to be determined.*

*1.10 --- The arbitrator shall have the power at any time to make or amend the procedure to be followed by the parties in the arbitration.*

*1.11 Unless the arbitrator rules otherwise, the following timetable and procedure shall apply:*

*(a) within 14 working days of the notice of appointment of the arbitrator, the claimant shall serve upon the arbitrator and the other party a written statement of its claim. The statement of claim shall specify all relevant facts and matters and contentions of law (if any, and naming the principal authorities) on which the claimant relies (or admits or denies) and the relief and remedies sought;*

*(b) within 14 working days of service by the claimant of the statement of its claim, the other party shall serve upon the arbitrator and the claimant a written statement of its defence. The statement of defence shall specify the defence and all relevant facts and matters and contentions of law --- on which*

*the respondent relies ---. The statement of defence may set out any counterclaim which the respondent wishes to make.*

- (c) the statements served pursuant to sub-paragraphs (a) and (b) above shall be accompanied by copies of any documents referred to in them or upon which the party serving the statement wishes to rely. ---*
- (d) after service by the respondent of its statement of defence --- the arbitrator may allow the parties a period (the "adjustment period") within which to adjust the written pleadings so that each material averment of the parties shall be answered (whether by admission, denial, explanation or otherwise);*
- (e) ---*
- (f) within 14 working days after the pleadings have been so finalised each party shall serve upon the arbitrator and the other party signed statements of any factual witnesses upon whose evidence it wishes to rely, together with any copies of documents referred to in them not already in the possession of the other party. ---*
- (g) ---*
- (h) within 7 working days after the pleadings have been finalised, the Secretary shall agree with the arbitrator and the parties a hearing date and the estimated length of the hearing. Unless the parties agree otherwise, the hearing date shall be no later than 28 working days after the finalisation of the pleading;*
- (i) ---*
- (j) at least 5 working days before the hearing each party shall serve on the other and on the arbitrator its written submission;*
- (k) ---*
- (l) the arbitrator shall deliver to the parties a reasoned award within fourteen working days of the end of the hearing."*

17.4 "Awards" are dealt with in Rules 1.17 – 1.20, and include the following:

*"1.17 Without prejudice to the provisions of the Arbitration Act 1996 --- and any other relevant law and the provisions of any agreement between the parties to the dispute and the relevant Access Conditions, awards shall be final and binding on the parties.*

1.18 *Subject to any other provision of the Access Condition and the Access Agreement, the arbitrator may make such orders in his award as he considers necessary to resolve the dispute, including any of the orders provided for in Rule A1.71. Any references to 'the Panel' shall, for the purposes of this Rule C 1.18, be replaced by 'the arbitrator'.*

1.19 *The arbitrator shall send a copy of his award to the parties, the Disputes Chairman and the Secretary."*

17.5 Costs are dealt with in Rules 1.21 – 1.23 and include the following:

*"Discretion to order payment of costs.*

1.22 *Whether or not the arbitration reaches the stage of a final award, the arbitrator may order any party to pay some or a specified proportion of any party's costs incurred in the arbitration, the arbitrator's fees, any costs of his appointment and any fee paid to the Secretary pursuant to Rule C1.21, assessed in such manner as the arbitrator shall determine.*

*Joint and several liability of parties to arbitrators for fees and expenses.*

1.23 *The dispute parties are jointly and severally liable to pay the arbitrator's reasonable fees and expenses.*

17.6 Confidentiality is dealt with in paragraphs 1.24 – 1.30 and states as regards the confidentiality of arbitration awards;

*"1.26 Copies to Industry Parties and Strategic Rail Authority*

*Subject to Rule C1.27 to C1.30, a copy of every award of an arbitrator pursuant to this Part C shall be sent by the Secretary to each industry party. No such copy shall be sent until the expiry of 21 days after the receipt by the Secretary of the copy of the award in question unless the Disputes Chairman shall order otherwise.*

1.27 *Discretion to order confidentiality.*

*The Disputes Chairman shall be entitled to direct that an award or any part of it shall be kept confidential, to the extent stated and subject to such conditions (if any) as shall be specified in the direction, on the grounds that;*

(a) *publication would or might seriously and prejudicially affect the interests of any of the parties to the dispute or any other person; and*

(b) *such prejudice outweighs or is likely to outweigh the interests of the industry in the publication of the award.*

*Any such direction shall be in writing and shall be given to the parties to the dispute and the Secretary.*

1.28 *Exceptions to confidentiality directions.*

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1.29 *Representations of parties as to confidentiality.*

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1.30 *Hearing on confidentiality representations.*

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(Comment: See paragraph 10.3 above. In view of the Respondent's desire to show the present Interim Award to the party responsible for the CTRL Works, the Respondent will undoubtedly take account of, amongst other things, the above rules as regards confidentiality of arbitration awards.)

### **PLEADINGS AND INTERCHANGES BETWEEN PARTIES**

18. By letter dated 25<sup>th</sup> July 2005 the Arbitrator wrote to the Parties, with a copy to the Secretary of the Access Dispute Committee, and, amongst other things, noted that by Rule C1.12 the Parties should inform him of any amendments to the procedure or the time limits set out in Rule C1.11 they considered appropriate. His terms were also enclosed.

19. Thereafter, the Parties exchanged correspondence, amongst other documents. Kennedys' letter of 12<sup>th</sup> August 2005, to Dickinson Dees, stated that it considered a hearing would be required. Dickinson Dees' of 2<sup>nd</sup> September 2005 made proposals as regards the timetable for pleadings and the hearing, stating that in accordance with

Rule C1.11(h) any hearing should take place no later than 14<sup>th</sup> December 2005. Dickinson Dees' letter of 1<sup>st</sup> September 2005 asked the Arbitrator for confirmation that he would allow an adjustment period as provided for in Rule C1.11(d) of Part C of the Rules for the amendment of written pleadings to take account of the opponent's arguments. Kennedys' letter of 6<sup>th</sup> September 2005 made the point that the arbitration is not an appeal from the earlier Determination.

20. By letter dated 7<sup>th</sup> September 2005 the Arbitrator stated that he would expect adjustment of the pleadings to take place as suggested by Dickinson Dees. He also set out his understanding of the timetable agreed by the Parties. He provisionally booked Wednesday 14<sup>th</sup> December 2005 for a one day hearing.

21. By letter dated 16<sup>th</sup> September 2005 Dickinson Dees confirmed their acceptance of the Arbitrator's terms.

22. The Claimant's Statement of Claim with supporting documents was served under cover of a letter dated 19<sup>th</sup> September 2005. The accompanying documents were as follows:

Tab 1: Extracts from TAA.

Tab 2: Minutes of meetings, correspondence between Parties.

Tab 3: WS Atkins' Report.

Tab 4: RLE/CORBER Report.

Tab 5: WS Atkins' Additional Report.

Tab 6: Joint Submission to the Panel (without Appendices).



Tab 7: Decision of the Panel.

Tab 8: Notice of arbitration.

23. Kennedys served the Defence with supporting documents under cover of a letter dated 10<sup>th</sup> October 2005. The accompanying documents were as follows:

Tab 1: TAA.

Tab 2: Thameslink Rail Control Office Logs: Extracts for 27-29 April 2004.

Tab 3: Network Rail Control Office Logs: Extracts for 27-29 April 2004.

Tab 4: Press cuttings.

Tab 5: Weather data from PA Weather (Part of the Press Association Group).

Tab 6: Network Rail National Control Centre Logs: Extracts for 27-29 April 2004.

Tab 7: Two photographs taken by Network Rail in May 2004, and annotated Atkins' plan showing direction in which photographs taken.

Tab 8: Letter from Cunningham Lindsey of 18.4.05.

Tab 9: Channel Tunnel Rail Link Act 1996: Extracts.

24. Under cover of letter dated 9<sup>th</sup> November 2005, Dickinson Dees served the Claimant's Revised Statement of Claim which responded to the Defence. It was accompanied by:

Exhibit 1: Kennedys' letter of 24.6.05 to Secretary of the ADR Committee.

Exhibit 2: The PA Weather Centre letter of 9.11.05, accompanied by various schedules of rainfall statistics.

25. By letter dated 14<sup>th</sup> November 2005, Kennedys confirmed that the Claimant wished to have a hearing, and proposed a date for exchange of witness statements. Kennedys' letter of 28<sup>th</sup> November 2005 enclosed a bundle of witness statements and summaries.
26. By letter dated 28<sup>th</sup> November 2005 Kennedys wrote to the Arbitrator applying, pursuant to Section 43 of the Arbitration Act 1996, for permission to apply to Court for a witness summons to secure the attendance of Isobel Coman, whose witness summary was included in the witness statements bundle already served by Kennedys. They also requested permission to secure the attendance of the two train drivers in respect of whom witness summaries had been served, in the event that statements from these drivers were not forthcoming from Thameslink.
27. By letter dated 5<sup>th</sup> December 2005 the Arbitrator referred to the above application, and referred to Dickinson Dees' letter of 2<sup>nd</sup> December 2005 which objected to the same, and the Arbitrator asked Kennedys for their response. Thereafter, in a subsequent letter on 5<sup>th</sup> December 2005, the Arbitrator referred to a letter received from Kennedys that day and he formally gave the necessary permission envisaged by Section 43 of the 1966 Act. Similarly, as regards the two train drivers who witnessed the flooding of the tunnel, he noted that Dickinson Dees had not served statements on their behalf, nor provided facilities to Kennedys to interview them, as Kennedys had requested. Comments are attributed to those drivers in the Atkins Report. Accordingly, the Arbitrator formally gave permission as required by Section 43 of the

1996 Act. He went on to state that since Kennedys envisaged a one day hearing, while Dickinson Dees envisaged a half-day hearing, he would order a one day hearing for Wednesday, 14<sup>th</sup> December 2005, commencing 10:30am and ending no later than 4:30pm. He suggested the Parties consider having a transcript.

28. Kennedys' letter of 7<sup>th</sup> December 2005 informed Dickinson Dees that the latter's witnesses would not be cross-examined. Kennedys' letter of 12<sup>th</sup> December 2005 stated that it did not propose to call either of the Thameslink drivers to give oral evidence at the hearing. Dickinson Dees' letter of 13<sup>th</sup> December 2005 informed Kennedys that it did not require Ms. Coman to attend the arbitration hearing to be cross-examined, although it contended aspects of her evidence were inadmissible, such as her opinion as regards the cause of the high water levels in the Midland Road sewer.
29. In preparation for the hearing, the Claimant's Pre-hearing Submissions ("Skeleton Argument") were served on 9<sup>th</sup> December 2005, as were the Respondent's Submissions. In addition, a bundle of witness statements, witness summaries and a copy of the Access Dispute Resolution Rules was served. This bundle contained the following items:

- Tab 1: Statement of John Hayman Beer with exhibits.
- Tab 2: Statement of Stephen Parker.
- Tab 3: Statement of Andrew MacGregor with exhibits.
- Tab 4: Statement of Steve Scott with exhibits.
- Tab 5: Statement of Frank Berridge.

- Tab 6: Statement of Julian Harms.
- Tab 7: Statement of Isobel Coman with exhibits.
- Tab 8: Summary of driver of Thameslink vehicle 2V92.
- Tab 9: Statement of driver of Thameslink vehicle 2T61.
- Tab 10: ADR Rules.

Thus, there were three bundles available for the hearing:

- Bundle 1: Revised Statement of Claim and accompanying documents.
- Bundle 2: Defence and accompanying documents.
- Bundle 3: Statements, summaries and ADRR.

### **THE HEARING**

30. A one day hearing took place on Wednesday, 14<sup>th</sup> December 2005, at Keating Chambers, between 10:30am and 4:40pm. Besides the Arbitrator (accompanied by Ms. Sarah Whitley, a Keating Chambers' Mini-Pupil, as an observer) the attendees from the Parties were:

- (i) Claimants
  - (a) Mr. Alexander Hickey – Counsel.
  - (b) Mr. Paul Stewart – Dickinson Dees.
  - (c) Mr. Mark Causebrook – Managing Director, Thameslink.

(d) Ms. Wilma Allan – Finance and Commercial Director, Thameslink.

(e) Ms. Ann Ferguson – Dickinson Dees.

(ii) Respondent

(a) Mr. Anthony Speaight, Q.C. – Counsel for Network Rail.

(b) Ms. Clare Hitchcock, Partner, Kennedys.

(c) Mr. Andy MacGregor, Programme Manager, Network Rail.

(d) Ms. Alison Clarke, Route Commercial Manager, Network Rail.

(e) Mr. Michael Conn – Business Manager, Thameslink (on behalf of Network Rail).

31. As indicated in paragraphs 10.4 and 14 above, the Parties agreed that for the purposes of the present Interim Award the Arbitrator would confine his decision to whether or not Schedule 4 Part 3 or Part 4 applied, and would not deal with quantum or ancillary matters such as interest, costs, etc. After the Interim Award has been produced the Claimant will consider whether or not it wishes to issue a further Arbitration Notice so that quantum issues could be dealt with, if this became necessary in the light of the decision in the Interim Award.

32. Since none of the witnesses who had produced statements/summaries was to be cross-examined, the hearing consisted of oral submissions, with the Parties adopting the conventional procedure of the Claimant setting out its case, with the Respondent responding, and the Claimant replying.
33. At the conclusion of the hearing the Parties agreed that if the decision was that Schedule 4 Part 4 was the applicable compensation mechanism, then the extra amount payable by the Respondent to the Claimant would be the sum of £564,643.58, as set out in the email sent to Thameslink on 19<sup>th</sup> October 2005. Nevertheless, the Interim Award itself should be confined to the issue aforesaid as to which compensation mechanism applied, with all matters of quantum, interest, costs, etc. being reserved to a Final Award.

### **THE ISSUES**

34. The Claimant's case, as pleaded in the Revised Statement of Claim and orally elaborated at the hearing, is conveniently summarised in the Skeleton Argument of 9<sup>th</sup> December 2005.
35. There is little factual dispute that on the night of 27<sup>th</sup> and 28<sup>th</sup> April 2004 the King's Cross Tunnel was flooded with diluted sewage and detritus from the Channel Tunnel Rail Link ("CTRL") site. This sewage and detritus had entered the tunnel through a large hole in the crown of the tunnel. The tunnel became impassable to rail traffic because the water quickly covered the rails. Thameslink was obliged to suspend rail services in both directions. In the terminology of the TAA, a "Possession" had

occurred, and this entitled Thameslink to compensation for that interference with its usage of the line.

36. The principal issue for this Interim Award is precisely which compensation mechanism should apply in all the circumstances. There are two competing mechanisms:

- (i) Schedule 4 Part 3 (the general provision for compensation to be paid by Network Rail to Thameslink in respect of restrictions of use), coupled with Schedule 8 (the general provisions for compensation in respect of late running). (See Respondent's Submissions, paragraph 11.) Network Rail has already paid the sum calculated in accordance with this first possible mechanism. See Claimant's Bundle, Tab 6, paragraph 4.5, on page 137: Network Rail has paid Thameslink in excess of £400,000 for the incident, in accordance with Schedule 4 Part 3 and Schedule 8 of the TAA. Network Rail contends that it has paid all that is necessary, and this first possible mechanism is the appropriate one to be applied in all the circumstances. MacGregor paragraph 10 says £409,913.06 has been paid.
- (ii) The second possible mechanism for compensation is to be found in Schedule 4 Part 4, and if that is the correct mechanism to be applied, then the further sum of £564,643.58 is to be paid by the Respondent to the Claimant (see the Parties' agreement upon this figure at the hearing, as recorded in paragraph 33 above).

37. Determining which of the two identified compensation mechanisms is applicable depends upon whether Thameslink can show that, in all the circumstances, on the balance of probabilities, there was a “CTRL Possession” as defined in the TAA, Schedule 4, Part 4, Part 1, Clause 1.1, as quoted above in paragraph 10.1(i). In essence, therefore, the Claimant must show that the restriction of use suffered by Thameslink (about which there is no doubt) was “as a result of the construction of the CTRL Project”. (Underlining added).
38. At the hearing Mr. Hickey for the Claimant said that of the various types of restriction set out in the Definition of “CTRL Possession” (see paragraph 10.1(i) above), he relied particularly upon “(a) blockage”. Mr. Speaight for the Respondent did not challenge such reliance. Accordingly, I proceed on the basis that there is no dispute between the Parties that there was indeed a “restriction of use of all or any part of the Routes” as required by the definition of “CTRL Possession”.
39. At the hearing there was some discussion (see paragraph 10.2 above) as to whether or not the term “*the construction of the CTRL Project*”, within the definition (see immediately above) was satisfied. I have dealt in paragraph 10.2 above with Mr. Speaight’s suggestion that the maintenance and monitoring of pumps forming part of the CTRL temporary sewer diversion works was not part of ‘the construction of the CTRL Project’. I there concluded that such a distinction could not be sustained, since pumps forming part of the temporary works, and whose proper functioning made those temporary works viable, were an inherent part of such works, and their proper maintenance and monitoring was part and parcel of the same. Further upon this point, the definition of “CTRL Project” is set out in Clause 1.1 (see paragraph



10.1 above), as are the other relevant terms contained within its definition, such as “CTRL” and “CTRL Act”. Further, I note from the Respondent’s Submissions of 9<sup>th</sup> December 2005, paragraphs 22 and following, that there is apparently no dispute that the sewer diversion works and the breaking open of the crown of the tunnel were elements of the “*construction of the CTRL Project*” for the purposes of the definition of “CTRL Possession” now being discussed. In any event, if and insofar as there is any issue as to this matter, in the light of the material put before me, I have no doubt that the sewer diversion works (including the CTRL pumps already referred to) and the hole made in the top of the tunnel as part of those works, are plainly part of “*the construction of the CTRL Project*”, and I here so hold.

40. This leaves the fundamental issue between the Parties: was the tunnel flooding, which constituted the restriction of use, “*as a result of*” the CTRL works referred to (particularly the sewer diversion works and the hole in the tunnel top) or was it “*as a result of*” flash flooding from freak weather conditions?
41. As the Respondent states in paragraph 83 of its Submissions, the question for this Interim Award is: What caused the flooding of the Tunnel? The two possibilities are:
- (i) The rain (contended for by the Respondent), in which case the general compensation provisions apply (Schedule 4 Part 3, and Schedule 8); or
  - (ii) The CTRL Project construction works, particularly the sewer diversion and the Tunnel hole (as the Claimant contends), in which case the compensation mechanism is found in Schedule 4 Part 4.

We now consider each of these two possibilities, starting with the CTRL Project construction works.

### **THE CTRL CONSTRUCTION WORKS**

42. The factual background to the Tunnel flooding is important because it throws light on the question of how and why sewage entered the Tunnel in the first place. (Claimant's Skeleton, paragraph 17.)
  
43. A convenient summary of the position is set out in the Statement of Defence at paragraphs 26 and following. There were a number of existing sewers in the vicinity of the northern end of the Tunnel, including the Fleet Sewer, the Fleet Relief Sewer and the Midland Road Sewer. These sewers were owned by Thames Water, which was the sewerage undertaker. The layout of the sewers is shown on plans in the report of W. S. Atkins (see Tab 3 in Claimant's bundle). The said sewers carry both sewage and rain water, and can quickly change from being almost empty to full if there occurs sudden very heavy rainfall.
  
44. In about late 2003 (Defence paragraph 27) the Nominated Undertaker (a defined term for the purposes of Schedule 4 Part 4 – see paragraph 10.3 above) altered the position of a sewer by constructing a new or temporary sewer, in the vicinity of the junction of Brill Place and Midland Road. This operation was carried out pursuant to the Channel Tunnel Rail Link Act, Schedule 1 or Schedule 2. (See the definition of "CTRL Project", which refers to the CTRL Act, all in Schedule 4 Part 4, as referred to in paragraph 10 above.)

45. The new sewer arrangements included (see Defence paragraph 28) a temporary coffer dam made of sandbags on part of the Midland Road Sewer, and a pump or pumps to move water into a shaft connecting to the Fleet Relief Sewer (as described in the RLE report at Tab 4 in the Claimant's bundle).
46. This arrangement was adequate and functioned well until the exceptional weather on 27<sup>th</sup> April 2004. (Defence paragraph 29).
47. In about late 2003/early 2004 the Nominated Undertaker removed part of the roof of the northern end of the Tunnel in which the Thameslink line runs north from King's Cross Thameslink station. This location was close to the location of the new sewer arrangements. (Defence paragraph 30).
48. No construction work was being undertaken on 27<sup>th</sup>, 28<sup>th</sup> or 29<sup>th</sup> April 2004 in relation to the sewers or to the Tunnel roof. Nor was any other construction work being undertaken on 27<sup>th</sup> – 29<sup>th</sup> April 2004 which caused any restriction of use of the Thameslink railway line. (Defence paragraph 32).
49. There is no dispute that heavy rain fell on the night of the incident in April 2004. The precise nature and qualities of that storm are discussed in detail below. What is not disputed is that as a result of the rain there were surges of water flowing down the sewers. (See paragraphs 43 and following in the Statement of Defence.) These surges apparently overturned the main pump near the dam (Defence paragraph 44.) A convenient plan of the material sewers, dam and pumps may be found at Exhibit

AJDM/1 to the statement of Andrew MacGregor at Tab 3 of the Witness Statements bundle, or in Tab 7 of that bundle, exhibited to the statement of Ms. Coman. This plan was explained by Counsel at the hearing. As there shown, a temporary weir had been constructed from sandbags at a point in the vicinity of the junction of Brill Place Sewer and the Midland Road Sewer, and two submersible pumps were located there, in the pond of water created by the weir. These pumps, as part of the temporary sewer diversion works, discharged water in the direction of Manhole 5, where there was an existing drop shaft manhole to the Fleet Relief Sewer. This plan also shows that on the other side of the temporary sandbag weir (i.e. on the side away from the submersible pumps) there was an outfall blocked with sandbags, adjacent to Culvert A, which was itself adjacent to the orthotropic deck above the Tunnel.

50. It seems that the flow of water “knocked out” the dam (Defence paragraph 45).

51. The RLE Report (SHE Incident Investigation Report) at Tab 4 in the Claimant’s Bundle states (page 113) :

*“At the end of the sewer a sandbag dam was in place to prevent water from flowing into Culvert A. During the exceptionally heavy rainfall on the 27/04/04 the dam was breached and the sewer flooded the excavation over the Thameslink Tunnel. Sewage flowed into the Thameslink Tunnel between the existing Tunnel and the temporary crash deck”.*

52. The RLE Report at page 3 of 7 describes events as follows:

*“It appeared that the flow within the Midland Sewer had been great enough to knock out the temporary dam in Culvert A. This meant the water which normally backs up in Manhole 5, and is pumped directly into the Fleet Relief, was flowing so quickly past the pumps that they were not removing any of the water. The water was then flowing out into Culvert A through the damaged dam and into the excavation of the Thameslink tunnel at the Fleet crossing location. The water was then flowing into the tunnel through the joint between the crash deck and the tunnel”.*

53. MacGregor, in his statement at Tab 3 in the Witness Statement Bundle, page 17, paragraph 6, refers to the aforesaid plan and states:

*“This plan shows where the diverted Midland Road Sewer was being overpumped at its northern end via pipes leading from two pumps installed in a concrete shaft (marked on the plan with a reference to a temporary weir) into Manhole 5, in turn leading to the much deeper Fleet Relief sewer. It shows where a coffer dam, or wall of sandbags, was built at the site of Culvert A.”*

54. The statement by Isabel Coman is at Tab 7 in the Witness Statement Bundle. She is the Senior Engineer of the Contractor, CORBER and is the Section Manager, Infrastructure. CORBER is a consortium comprising CostainLaing, O’Rourke Civil Engineering, Bachy Soletanche and Emcor Rail, which at the material time was carrying out civil engineering and construction works for the Channel Tunnel High Speed Rail Link project. In paragraph 5 of her statement she refers to the aforesaid plan. She gives her description in, amongst other places, paragraphs 5 and 6, and states:

*“5. The overpumping was done via pipes leading from two 6-inch submersible pumps on float switches which were installed in a concrete shaft (marked on this plan with a reference to temporary weir) into Manhole 5, which in turn leads to the much deeper Fleet Relief sewer. The thick black line on this plan showing the diverted Fleet sewer under construction denotes the part that was not constructed by 27<sup>th</sup> April 2004; the section that had been constructed was not operational. The water from the Fleet Sewer ran through the original pipework indicated by a dashed line on the drawing and referenced as “live Fleet sewer”.*

*6. --- The diverted Midland Road sewer was constructed up to the edge of Culvert A. The section of the Midland Road sewer between the concrete shaft containing the pumps and Culvert A was not intended to be used until the Fleet sewer diversion was complete, and the connection made between the Midland Road and the Fleet sewer at Culvert A. Culvert A is in effect a concrete box built to connect one section of the diverted Fleet sewer into Manhole 3. As at 27 April 2004, it was partially covered but it was open at its eastern end. The plan also shows where a dam, or wall of sandbags was built at the end of the Midland Road sewer abutting Culvert A. (The label on the plan at page 9 ‘outfall blocked with sandbags’). Whilst the pumps were*

*installed to pump the flow from the Midland Road sewer into the Fleet Relief sewer, as an additional measure, a dam was built to prevent any water that was not overpumped into the Fleet Relief sewer from flowing into Culvert A."*

55. At Tabs 8 and 9 in the Witness Statement Bundle are summaries from the drivers of two Thameslink trains. Each states that at the time of flooding water was coming through the Tunnel roof. The driver of Thameslink vehicle 2V92, at page 64 in Tab 8, is summarised as saying that: "*A deluge of water was coming through the roof near to the CTRL site*".

56. Once the Tunnel was flooded and rail traffic interrupted, the action taken is conveniently recorded in the RLE Report in Tab 4 in the Claimant's Bundle. The immediate action taken is recorded at page 115.

*"The existing pumps were uprighted and a further four inch pump was placed into Culvert A to prevent any further water flowing into the excavation over the tunnel. This appeared to work initially but subsequent to another very heavy deluge of rain at about 2.30 more sewage flowed into the Thameslink Box excavation. At this point we repaired the dam with sandbags and stopped the flow into Culvert A. A further pump was sourced and placed into the TLB excavation and the water pumped out. At 5.00 confident the dam was repaired and the pumps in place."*

At page 116 the follow-on works are described:

*"In the morning CORBER instructed Barhales to construct a temporary flume between the Midland Sewer and the Fleet Sewer to deal with any future surcharge in the flow in Midland Sewer. This was completed prior to the end of the day."*

Coman, at Tab 7 of Witness Statement Bundle, paragraph 11, states:

*"After the flooding, a flume (a pipe) was installed at the north end of the Midland Road sewer as an additional precaution to deal with any further surcharge in the flow of that sewer and additional pumps and a sandbag wall were set up in Culvert A."*

A photograph of the flume pipe is at page 177 in Tab 7 in the Respondent's Bundle.

The photograph at page 176 shows the deck over the Tunnel.

57. The Atkins' Report, Final Issue, of 29<sup>th</sup> November 2004, is at Tab 3 in the Claimant's Bundle. At page 77 of the Bundle (page 26 of the Report), in paragraph 6.1, Atkins set out their conclusions and state, amongst other things:

*"Atkins was appointed by Birse Rail to investigate the incident of flooding in the King's Cross Tunnel which occurred from 27<sup>th</sup> to 29<sup>th</sup> April 2004. --- On 27<sup>th</sup> April 2004, severe weather hit Central London. Rainfall was heavy and prolonged, the month of April being a rainfall event of between one in two and one in five year return period. In the course of the storm, water flooded the Cross City Line, overwhelming the pumps which serve the King's Cross Tunnel. All Thameslink services were suspended.*

*Works underway on the CTRL Project had breached the Tunnel north of King's Cross Station, and the project was managing a diversion of the Midland Road sewer which has the potential to carry an unsurcharged flow of 2m<sup>3</sup>/s.*

*Floodwaters were observed by train drivers just before 7pm on 27<sup>th</sup> April entering the King's Cross Tunnel from above at the CTRL site. Floodwaters rose rapidly and the Tunnel was closed to traffic at 19:05. At 19:36 high water alarms triggered within the pumping station wet well and by 20:03 the pump tripped out indicating that floodwater had risen to engulf the control cabinet. A rapid flooding event had filled the lower section of the King's Cross Tunnel with approximately 1600m<sup>3</sup> of water. The water was observed to be diluted foul sewage."*

58. The Aktins' Report at page 77 continues by considering where the source of the water could be:

*"Such a rapid inundation of the Tunnel with dilute foul sewage appears to be only possible through two routes:*

- *Inflow from CTRL site where Midland Road sewer diversion overflowed and poured into King's Cross Tunnel from above via the common excavation prepared for the Fleet sewer diversion over the tunnel.*
- *Surcharge of the Caledonian Road Relief sewer ---.*

*Evidence of the flooding from the CTRL site includes:*

- *Drivers witness the inflow at the start of the flooding event;*
- *Conversations recorded on the Operations and Fault Control logs indicate that CTRL were aware that their temporary sewer pump had stopped working and that flooding was occurring;*
- *Debris from the CTRL site had to be cleared from the tunnel roof prior to reopening for traffic;*
- *Calculation of flow rates from the Midland Road sewer indicate that the volume of water which flooded the tunnel could have been delivered by the unsurcharged sewer in just 13 minutes of full bore flow.*

*Surcharging of the Caledonian Road Relief Sewer can be discounted as being a contributory factor to the source of the floodwater ---."*

59. Above we have considered the part played by the CTRL construction works at the time of the incident. We now turn to the rain.

### **THE RAIN**

60. Network Rail's contentions as regards the nature, extent and quality of the rain on the 27<sup>th</sup>/28<sup>th</sup> April 2004 are conveniently summarised in its "Submissions of Respondent" served on 9<sup>th</sup> December 2005. At paragraph 35 the Respondent relies upon the RLE Report (quoted above) to the effect that the sewer diversion works were "*adequate and functioned well during normal weather conditions but was insufficient for the extremely heavy rains that occurred on 27<sup>th</sup>/04/04*".

The Respondent goes on to state that in the six months between the carrying out of temporary works and 27<sup>th</sup> April 2004, there was no occasion on which there is any record of flooding from a CTRL diverted sewer.



61. At paragraphs 37 onwards in the Submissions, the Respondent deals with the weather on 27<sup>th</sup> April 2004, and quotes from Press Reports at the time. These speak of, for example: *“freak thunderstorms swamp south-east”* and *“heavy rain causes flash floods”*. The Press Association’s Weather Centre reported that parts of London were under 5ft of flood water, and that railway stations and stretches of track had to be closed. The Evening Standard reported that *“half the average monthly rainfall fell in two hours”*.

62. The Respondent contends (paragraph 46):

*“Thameslink minimised the severity of the weather by reason of the number of other occasions on which an equivalent volume of rain has fallen over a 24 hour period. However, in this case it is not just the volume of rain which was significant. It is the speed at which it fell. It is the fact that during a very short period there was such torrential rain as to cause greater surges through sewers”*.

63. The Respondent refers to Thameslink’s Revised Statement of Claim, paragraph 4.1D:

*“---the combination of the volume of the rain and the speed at which it fell gave rise to flash floods generally and gave rise to large surges of water to flow down the sewers”*.

64. At paragraph 47 onwards the Respondent relies upon data from the Hampstead area which shows the rain falling in 15 minute periods. This shows, for example, between 18:30 – 18:45 BST a fall of 2.8mm; between 18:45 – 19:00 BST, a further fall of 4.6mm; and between 19:00 – 19:15 BST, an additional 7mm. The Submissions state in paragraph 48 that:

*“In the 45 minutes between 17:30 and 18:15 GMT the rainfall was 14.4mm. --  
----*

49. *One can put that in context by comparison with a chart which Thameslink exhibit as Schedule C to the RSC. This shows that over an*

*8 year period there were only 26 occasions when there was rainfall in excess of 14mm over the much longer period of 6 hours – that is on average 3 times a year. To have such a volume of rain in the much shorter period of 45 minutes is, therefore, a truly striking event”.*

65. The Submissions go on to refer to radar rainfall images from the Environment Agency showing heavy rain moving across London from east to west on 27<sup>th</sup> April 2004. At King’s Cross at 17:45 the rain appears to be about 32mm per hour.
66. At paragraphs 53 onwards the Respondent describes the impact of the weather on the rail system, and notes a variety of disruptions on other points on the rail system that evening.
67. At paragraphs 55 onwards the Respondent deals with the flooding of the Thameslink Tunnel. It refers to the train drivers stating that the water came through the roof of the tunnel, and that the tunnel was closed to rail traffic at about 19:05 because of the dangerous level it had reached. At paragraph 58 it states that it is common ground that the source of this deluge of water into the Tunnel was a diverted sewer within the CTRL site.
68. At paragraph 60 the Respondent refers to Network Rail’s Operations Log which records that the main pump for the Fleet Sewer was on its side and not working but which, once raised to its correct position, immediately started pumping. At paragraph 66 it refers to Mr. Harms of Network Rail who speaks of gaps around the orthotropic deck (a large metal trough constructed over the Thameslink line). The Respondent states:

*“Such gaps would have provided a route by which water flowing out of culvert A could have reached the Tunnel”.*

69. At paragraphs 83 and following the Respondent says that as regards the crucial issue of “*what caused the flood?*”, with Thameslink contending for the construction of the CTRL while Network Rail contends for the weather, “*in a sense both sides are right*”.

The Respondent continues:

“83. *Certainly if one applies a ‘but for’ test both matters are causative. ‘But for’ the temporary sewer works, there would probably have been no escape of water on 27<sup>th</sup> April and ‘but for’ the remarkable weather that day, there would have been no escape of water on 27<sup>th</sup> April. ----*

86. *Thameslink present their case on the basis of a ‘but for’ test: see RSC paragraph 7.1.2: ‘--- that restriction would not have occurred had it not been for ---’. Similarly, a ‘but for’ test was applied by the Access Disputes Resolution Committee’s Panel (RSC paragraph 6.2) and Thameslink say that the Panel’s approach was correct (RSC paragraph 7.1). ----*

87. *However, we submit that a true interpretation (of) the words ‘as a result of the construction of the CTRL Project ----’ (emphasis supplied) do not call for application of a ‘but for’ test. There may be a whole series of factors ‘but for’ which a possession occurs. For instance if the rails in the Tunnel had been at a higher level relative to the floor of the Tunnel, or if there had been direct open drains running through the Tunnel, the deluge of water into the Tunnel might not have caused it to have to be closed. So one might say that ‘but for’ those things there would have been no possession. But it would be unreal to suggest that the existence of such a catalogue of ‘but for’ factors must detract from attribution of the causation of the possession to its principal or dominant cause. ----*

88. *We submit that as a matter of law the correct test is the ‘proximate cause’ test. ----”*

The Submissions at paragraph 89 and following go on to consider the English law as to causation.

70. The Claimant's Revised Statement of Claim deals with whether or not the weather was the causative factor: see paragraph 4.1 D and following. It states, amongst other things:

*“--- The Claimant accepts that there was a heavy rainstorm and the combination of the volume of the rain and the speed at which it fell gave rise to flash floods generally and gave rise to large surges of water to flow down the sewers.*

*4.1E Notwithstanding, the heavy rainfall between 27<sup>th</sup> and 28<sup>th</sup> April 2004 was not exceptional or particularly unusual”.*

The pleading goes on to refer to the Press Association Weather Centre figures recording rainfall every six hours, on a rolling basis, giving the rainfall for the previous 24 hours. The Claimant states at 4.1F that there have been frequent instances where the rainfall within a 24-hour period has equalled or exceeded 20mm (which is the amount of rainfall measured on 27<sup>th</sup> April 2004). It states that in some cases rainfall has significantly exceeded 20mm, with numerous instances of rainfall in the low to mid-30mms range, and in one case as much as 45mm. Reference is made to Schedule A of Exhibit 2 to the pleading, which records 48 occasions occurring on separate calendar days. At paragraph 4.1G it states that there have been frequent instances when the rainfall within a six hour period has equalled or exceeded 13mm (which is the amount of rainfall measured between 18:00 hours and midnight on 27<sup>th</sup> April 2004). In two cases more than 20mm of rain fell in six hours, and in one case as much as 30mm of rain fell in six hours. Schedule C records 32 occasions occurring on separate calendar days. The Claimant states that there are no recorded incidents of those rainstorms causing floods in the Tunnel, so that rainfall and flash-flooding conditions were not themselves responsible for causing the Tunnel to flood on this occasion. It states that the fact that rail traffic was affected at other points on the

system that night could well be the result of particular factual circumstances applying at those points.

71. At paragraph 4.1J the Claimant states, amongst other things:

*“4.1J --- previous heavy downfalls of rain had not caused the Tunnel to flood, albeit that flooding had been caused to other parts of the train network. It was only because CTRL contractors as part of the CTRL works had put in place temporary arrangements for the nearby sewers, which arrangements failed, and because CTRL contractors had opened a hole in the Tunnel on the CTRL site, that the Tunnel became flooded.*  
-----

*4.1K -----the temporary arrangements which the CTRL contractors put in place as part of the CTRL works failed to cope with the flows of sewage, and resulted in the flooding of the Tunnel. Absent the CTRL works, that is to say if the ordinary sewerage layout had been retained and the crown of the Tunnel had not been opened up, the Tunnel would not have become flooded and the sewers would have coped with the surges of rainwater which would have been carried away from the Tunnel. ----*

*4.1L Accordingly it was the CTRL works that was the effective or dominant or proximate cause of the flooding because without it the flooding of the Tunnel would not have taken place. ----”*

72. At the hearing, the Claimant referred to the radar diagrams (see Witness Statement Bundle, Tab 3, pages 24 and following) and emphasised that this data showed rainfall at King’s Cross at a level significantly below the highest (Cambridge Blue/White) level. Although the Respondent’s case was that the storm was moving east to west and that it should be inferred that the highest levels of rainfall passed directly above King’s Cross, no particular radar diagram actually showed this.

73. Comment:

73.1 In my view it is clear that there was very heavy rainfall on the night in question in the London area, and that the King’s Cross area was not spared. I note that it is the

Respondent's case that it is the speed/intensity of the rain which is crucial, and that in a short period of two hours a considerable amount of rain fell in the area of the Tunnel. I accept this.

73.2 However, this still leaves the issue of what caused the tunnel flooding.

### **THE CAUSE OF THE TUNNEL FLOODING?**

74. The Claimant considered the legal authorities on the issue of causation during the course of its oral submissions at the hearing. For example, the Claimant referred to the "Miss Jay Jay" (1987) 1 Lloyds' LR, Vol 1, 32 at 33 (in Tab 14 of the Authority's Bundle) where the Court of Appeal held that there was more than one cause. The Claimant contended that, for the purposes of the phrase "*as a result of*" (see paragraph 10.1(i) above) it was sufficient for its purposes that "*the construction of the CTRL Project*" is found to be one of the relevant causes of the "*restriction of use*". As the Claimant's Skeleton Argument states in paragraphs 3-5:

- "3. *The Arbitrator needs to be satisfied that contractual requirements are made out, namely that the restriction was:*
  - (1) *a result (the word result in this context could mean no more than a "consequence", or it could connote a "cause" – Thameslink's case can be made good whichever interpretation is put on it;*
  - (2) *of CTRL works.*
4. *The Arbitrator should be careful not to fall into the trap of applying a different and the wrong test of "caused by". That is not what the contract requires. The Arbitrator does not have to engage in a philosophical/jurisprudential struggle of trying to decide on the basis of a legal fiction that there was a single cause in law. However, Thameslink's case could as well be made out on the question of dominant or proximate cause.*

5. *If the answer is that the restriction or interference was a result of the construction of the CTRL Project it is common ground that Thameslink is entitled to be compensated under Schedule 4, Part 4. ---"*
75. On this particular point the Claimant also relied upon (Tab 6) Leyland Shipping v Norwich Union (1980) AC 350; (11) Wayne Tank and Pump v Employers Liability Assurance (1974) 1QB 57; and (16) Midland Mainline v Eagle Star Insurance (2004) 2 Lloyd's Rep 604.
76. In the Wayne Tank (supra) case the holding recorded at page 57H states among other things: "*one of the two effective causes and if selection were necessary the dominant cause, of the damage was the dangerously defective nature of the installation ---*". Further, at page 58A: "*Where there are two causes of the damage, one within the general words of the policy and one within an exception to it, the insurers can rely upon the exception --.*"
77. In Midland Mainline (supra) the holding of the Court of Appeal as recorded on page 604 includes the following: "*It was well established that there could be more than one proximate cause of loss. In the present case, there were two causes of each loss --.*" (The support for this proposition is listed as Wayne Tank (supra); Leyland Shipping (supra) and the Miss Jay Jay (supra). The Judgment of Sir Martin Nourse on the point is set out at 606.
78. The Respondent's contention as regards the above was that a tribunal should be slow to find two proximate causes where one (rain) was associated with the Schedule 4 Part 3 compensation mechanism, which was mutually exclusive from the compensation mechanism (Schedule 4 Part 4) associated the other possible cause (CTRL works). I

have referred to this contention and dealt with it in paragraph 10.3(iii) above. In my view there is no reason why the mere fact that the two possible causes have mutually exclusive compensation mechanisms should discourage a Tribunal from finding (if that be the case) that there are two proximate causes. For the reasons set out herein my primary finding is that this was the case in the present dispute. However, (using the phraseology of Wayne Tank (supra), quoted in paragraph 76 above), if selection is necessary then, in my view, the dominant cause is the construction of the CTRL Project, in particular the sewer diversion works which proved inadequate when exposed to the surge of water, and the hole in the crown of the Tunnel which allowed that water to go directly into the Tunnel and disrupt rail traffic. We know from the speed at which the flume pipe was installed after the event that adequate arrangements could have been put in place relatively simply at the outset of the diversion works. However, they were not. This meant that when the intense rain did fall it overwhelmed the sewer diversion works and made its way through the hole in the top of the Tunnel into the Tunnel and disrupted rail traffic. The fact that the water flooding into the Tunnel came from the failed sewer diversion works is clear from the Atkins' Report and is not disputed (see above).

79. Thus, even assuming that the Respondent is correct in contending that the phrase "*as a result of*" effectively means "*caused by*", it is my view that the "*possession*" on the night in question was "*as a result of*", or "*caused by*", two concurrent proximate causes, the CTRL works and the heavy rain, but that if it is necessary to select one dominant cause, then in my view that dominant cause is the CTRL works.



## CONCLUSIONS

80. In its Submissions the Respondent asks for a declaratory award (paragraph 18). It makes the point that the present Arbitration is not an appeal against the ADR Committee's decision (paragraph 19). It states that the sole issue in this Interim Award is whether there was a "*CTRL Possession*" (see paragraph 22 of Submissions and paragraph 10.1(i) above). The Respondent's Submissions discuss the CTRL works, particularly the sewer diversions (paragraphs 25 and following, as referred to above), and the weather (paragraphs 37 and following in the Submissions, as summarised above). At paragraph 83 it states that the question in the present Arbitration is: what caused the flood? At paragraph 85 it states that "*in a sense both sides are right*" in their different contentions. (I agree with that view.) In paragraph 87 and 88 it contends that as a matter of law the correct test is the "*proximate cause*" test, and in paragraphs 89 and following it explains why it contends the cases on causation support this assertion. At paragraph 109 it contends that the proximate, effective and dominant cause of the flood was the exceptional weather conditions on 27<sup>th</sup> April and the flash flooding to which those conditions gave rise. Therefore, it contends, the proximate cause of the closure of the tunnel was not the construction of the CTRL Project, so the restriction of use does not fall within the definition of a "*CTRL Possession*" and, hence, the compensation mechanism is Schedule 4 Part 3 (and Schedule 8) and is not Schedule 4 Part 4.
81. However, in my view, applying a common sense approach, there were two proximate causes of the water flooding through the roof of the Tunnel, into the Tunnel, and disrupting rail traffic there. Those two causes were, firstly, the CTRL project works,

particularly the sewer diversion arrangement and the hole made through the Tunnel roof; and, secondly the flash flooding from the heavy rainfall at that time.

82. The reason I consider both the above were proximate causes is because they acted together at the material time to cause the flood of water into the tunnel that resulted in the restriction of use. However, if it is necessary to select one dominant cause, then in my view that dominant cause is the CTRL works referred to. It was precisely because the sewer diversion works were inadequate in coping with the heavy rainfall and the resulting surge of water that water was able to pour through the hole in the roof (part of the CTRL works) and flood the Tunnel.

83. As explained above, I do not consider there is any material reason why a finding should not be made that there are two proximate causes. See above. However, if one must be selected as the dominant cause, then in my view it is the CTRL works.

### **DECISIONS**

84. Now, I, Dr. Robert Gaitskell, Q.C., CEng, FIEE, FIMechE, FCIArb, the Arbitrator appointed herein, having considered the material documents, including all the written submissions and supporting material produced on behalf of the Parties, and the oral submissions made at the hearing, with regard to this Arbitration and the particular issue identified above, do hereby make and publish this Interim Award, pursuant to the procedure set out in the Access Dispute Resolution Rules and in accordance with the wishes of the Parties as expressed at the hearing, and subject to the Arbitration Act 1996.

85. For the reasons set out above, and particularly as summarised in paragraphs 74-83, I hereby formally find and/or hold that there were two proximate causes of the restriction of use which occurred on or about 27<sup>th</sup> – 29<sup>th</sup> April 2004, these being, firstly, the construction of the CTRL Project and, secondly, the heavy rain and associated flash flooding at that time. Accordingly, since at least one of the causes of the restriction of use was the construction of the CTRL Project, I declare that there was a “CTRL Possession” at the material time and that, therefore, the compensation mechanism in Schedule 4, Part 4 applies.

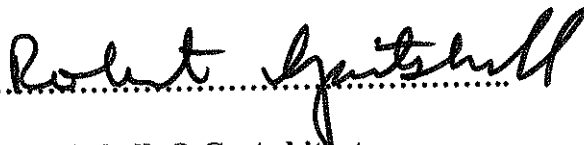
For the avoidance of doubt, if (contrary to the above) it is necessary to select a dominant cause from the two proximate causes identified immediate above, then it is my view, and I so find and/or hold, that the dominant cause was the construction of the CTRL Project, for the reasons already given, so that, again, there was a “CTRL Possession”, and the compensation mechanism in Schedule 4, Part 4 applies (and I so declare).

86. As referred to above, this Interim Award is restricted to the above issue as regards which compensation mechanism applies, and all other matters such as quantum, interest and costs are hereby formally reserved to the Final Award. Accordingly, for the avoidance of doubt, save for those matters expressly decided in this Interim Award, all other matters are fully reserved. (See paragraphs 10.4, 14, 31 and 33 above.)

87. If and insofar as there are any slips or minor errors or omissions in this document please would the parties notify me immediately upon receipt so that these may be corrected.

88. My fees for dealing with this Arbitral Dispute, including holding the hearing and providing this Interim Award, are to be paid in equal shares (50%-50%) by the parties. The ultimate outcome as regards fee payment is one of the matters reserved. The relevant fee notes are being supplied with this Interim Award.

Given under my hand this 20<sup>th</sup> day of December 2005 in London.

Signed: ..... 

**Dr. Robert Gaitskell, Q.C., Arbitrator**

Keating Chambers  
15 Essex Street  
London  
WC2R 3AA

**IN THE MATTER OF THE ARBITRATION  
ACT 1996 AND IN THE MATTER OF  
AN ARBITRATION PURSUANT TO THE  
ACCESS DISPUTE RESOLUTION RULES**

**BETWEEN:**

**THAMESLINK RAIL LTD**

**Claimant**

**- v -**

**NETWORK RAIL**

**INFRASTRUCTURE LTD**

**Respondent**

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**INTERIM AWARD**

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