

ACCESS DISPUTES COMMITTEE

ACCESS DISPUTE RESOLUTION RULES

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NETWORK RAIL INFRASTRUCTURE LIMITED

Claimant

-and-

(1) LONDON EASTERN RAILWAY LIMITED

(2) XC TRAINS LIMITED

(3) FIRST CAPITAL CONNECT LIMITED

(4) EAST MIDLANDS TRAINS LIMITED

(5) DB SCHENKER RAIL (UK) LIMITED

Respondents

AWARD ON PRELIMINARY ISSUES

Introduction

- 1 This is an award as to preliminary issues made in an arbitration between Network Rail Infrastructure Limited ("NR") as Claimant and (1) London Eastern Railway Limited trading as National Express East Anglia ("LER") (2) XC Trains Limited ("XC") (3) First Capital Connect Limited ("FCC") (4) East Midlands Trains Limited and (5) DB Schenker Rail (UK) Limited as Respondents. This arbitration, which relates to Cambridge Railway Station, was commenced by a letter which gave notice of arbitration dated 21 January 2009 from Simmons & Simmons, the solicitors acting for NR to the Disputes Secretary of the Access Disputes Committee .

The Claimant

- 2 NR is the successor to Railtrack for all purposes related to the Conditions.

The Respondents

- 3 LER is the Station Facilities Owner ("SFO") of Cambridge Railway Station. XC, FCC and the Fourth and Fifth Respondents are the Relevant Operators/Users, as defined below. The Fourth and Fifth Respondents have settled their differences with NR

concerning this matter. FCC did not serve a statement of case or otherwise participate in the process leading up to and including the hearing of the preliminary issues referred to below.

My appointment

- 4 On 23 February 2009 I, the undersigned, **Roger David Cohen** of Adelaide House, London Bridge, London EC4R 9HA, was duly appointed arbitrator of the dispute referred to in the notice of arbitration. By a letter of that date to the parties, the Committee Secretary stated that I had been appointed as arbitrator in the matter of the dispute between NR and the Respondents pursuant to Condition H5.4 of the National Station Access Condition 1996 (England and Wales) ("the Conditions"). (A reference in this award to a Condition is to be understood accordingly.)

Seat of the arbitration

- 5 The seat of this arbitration is London, England.

Cambridge Railway Station

- 6 This arbitration concerns a station change proposal by NR to make changes to Cambridge Railway Station ("the Proposal").

Lease Document

- 7 On 30 November 2004 NR granted to LER a lease of 63 stations by means of a Lease Document of that date. One of those stations was Cambridge. In the Lease Document LER was defined as the SFO. The Lease Document was made subject to the Conditions.
- 8 Clause 5 of the Lease Document provides that any reference to "RaiTrack", the "Franchising Director" or the "Regulator" in any document incorporated in this Lease (which would include the Conditions) shall be read and construed as references to NR, The Strategic Rail Authority and the Office of Rail Regulation respectively.

Access Dispute Resolution Rules (the ADRR)

- 9 This arbitration is being conducted under the ADRR. Part C, ADRR deals with disputes to be decided by arbitration. Pursuant to Part C paragraph 1.12, I required each party to inform me of any amendments which it considered appropriate to the procedure or the time limits set out in Rule C1.11. I received representations from NR, LER, XC and FCC which I took into account before issuing directions.
- 10 On 5 May 2009 I directed the hearing of the following issues as preliminary issues namely whether the Proposal for Change (being the Proposal referred to below) is:
- (i) deemed to have been accepted within the meaning of Condition C4.1; and/or
 - (ii) is barred from rejection for a failure to commence proceedings within the time limits specified in Condition C4.4.1(b).

Further Directions

- 11 Those directions provided also for:

- (i) the service of statements of claim, defence and reply;
- (ii) the service of signed witness statements of factual witnesses together with copies of documents referred to in those statements;
- (iii) the production of specific identified documents; and
- (iv) the exchange of written submissions

before the hearing.

The preliminary hearing was arranged to take place, by agreement of all parties who wished to appear, on 4 August 2009 and the directions were varied to accommodate a hearing on that date.

The Hearing

- 12 The hearing of the preliminary issues took place as directed at the offices of Simmons & Simmons. NR were represented by Mr Jonathan Seitler QC, LER were represented by their manager Mr John Sarson and XC were represented by Mr Andrew Porter. During the hearing I heard submissions from Mr Seitler QC and Mr Sarson. NR had served a witness statement made by Mr T Barnard of Simmons & Simmons on its behalf. Mr Barnard was cross-examined by Mr Sarson on that witness statement. Mr Porter chose neither to make submissions nor to cross-examine Mr Barnard.
- 13 At the conclusion of the hearing it was agreed that my award on the preliminary issues should be interim, being final, save as to costs.
- 14 Mr Seitler, QC submitted that my function is to decide the matters in dispute between the parties concerning the preliminary issues being the issues identified in the statements of case and written submissions. My duty is to give each party a reasonable opportunity of putting its case and dealing with that of his opponent.
- 15 This dispute is concerned with a Railtrack Change Proposal ("RCP"), for works having a material impact. An RCP is, in terms of the Conditions, a Unanimous Proposal.
- 16 It is common ground that under Condition C4, NR wish to achieve the acceptance of its Proposal. Acceptance can be deemed or actual. There has been no actual acceptance by LER, XC or FCC.
- 17 The question is whether the Proposal has achieved an irrevocable, deemed acceptance.

Statement of the Claimant's Claim

- 18 The central proposition in the statement of NR's claim was that the Respondents are now time barred from rejecting the Proposal, no notice of an intention to commence proceedings having been served within the relevant contractual time limit which expired on about 24 July 2008 and/or no proceedings having been commenced 30 days thereafter, as required by Condition C4.4.1(a) and (b) respectively.
- 19 The prayer in the statement of NR's claim is for an order in relation to the preliminary issues referred to above in the following terms:

- (i) that the Proposal for Change dated 8 May 2008 was deemed to have been accepted on or about 24 June 2008, pursuant to the operation of Condition C2 of the Conditions and that Condition C1.10 of the Conditions does not operate to prevent the commencement and proceeding with of works falling within the definition of an RCP in relation to the Proposal for Change;
- (ii) that the Proposal for Change dated 8 May 2008 cannot validly have been rejected after about 24 July 2008 by reason of the operation of Condition C4.4.1 of the Conditions and the fact that no proceedings had been commenced by that date.

LER's Statement of Defence

20 In a Statement of Defence submitted by Mr Sarson on behalf of LER dated 22 June 2009, LER set out the points on which it relied in response to NR's claim. Those points were as follows:

- (a) The Proposal was the first proposal for change ever received by LER that was issued by solicitors acting on behalf of NR and sent directly to the Users and Consultees (a term defined in the Conditions which includes all the Respondents). In the experience of LER, this method of issuing a proposal for change had never been used before by the Claimant.
- (b) Had LER not been informed that Simmons & Simmons had issued the Proposal to the other Users and Consultees it would have done so itself and in common with its usual practice would have checked that the Users and Consultees had received the Proposal for Change and whether they wished to make a response.
- (c) NR chose not to check whether all the Users and Consultees wished to make a response. The Fifth Respondent and the Department for Transport were unable to trace receipt of the Proposal.
- (d) LER relied on three letters and two emails which are referred to below.
- (e) It is disputed that the Proposal was deemed to have been accepted on or about 24 June 2008 and/or was incapable of being validly rejected after about 24 July 2008 because:
 - (i) the correspondence demonstrates that NR agreed to let LER and other users consider whether to accept or object to the Proposal until 12 December 2008; and
 - (ii) NR's decision to issue the Proposal in an unusual fashion in LER's experience has had the direct consequence of the Fifth Respondent and the Department for Transport not being in a position to exercise their right to comment on the Proposal for Change even by the revised deadline in December 2008.

Statement of NR's Reply

21 NR's reply to LER's Statement of Defence was in terms that:

- (a) NR had previously served copies of proposals for change on all the relevant parties direct: it wished to ensure that it could speak as to receipt by such parties.
- (b) A recipient cannot be in a worse position for having received a copy of the Proposal. LER was capable of liaising with the other Respondents about the Proposal which all of them had received.
- (c) The copy of the Proposal sent to the Fifth Respondent was not returned undelivered, nor was an Addendum document detailing minor variations to the Proposal.
- (d) Once the timetable under the Conditions was engaged, NR sought to discuss matters with relevant parties on a basis outside the strict confines of that timetable. Nothing was agreed about the suspension of the timetable even if agreement was not reached. Parties often seek to discuss and to negotiate against the background of a pre-determined timetable and indeed to give each other separate time limits in the context of those negotiations, but it will always be, unless expressly specified otherwise, on the basis that the parties can fall back on the pre-determined timetable in the event that those negotiations do not end in agreement.
- (e) NR relies on Condition C4.2.

The Issue for Decision

- 22 The central issue for my determination is whether the Respondents are time barred from rejecting or accepting the Proposal. This turns on whether both (a) and (b) in Condition C4.4.1 are satisfied.

The Conditions

- 23 The Conditions are complex and at the hearing much time was devoted to analysing them.
- 24 Mr Seitler QC told me that statutory regulations provide that leases of railway stations must contain access conditions. However, for present purposes, Mr Seitler submitted and I accept that the Conditions are contractual in nature.
- 25 NR is entitled to make an RCP.
- 26 An RCP is a proposal which, if implemented, would involve the carrying out of works of construction, reconstruction, development, redevelopment or refurbishment of, on or to a Station or any part of it and which:
- (a) would be likely materially to affect:
 - (i) the operation of trains to or from the Station;
 - (ii) the ability of a Relevant Operator's Associates to pass to and from trains operated by or on behalf of that operator which stop at the Station; or
 - (iii) the operation of the Station; or

- (b) would not have a material effect on the condition (or working order), standard or quantum of the Common Station Amenities or Common Station Services at the Station.
- 27 This dispute concerns a proposal which will have a material affect, so (a) applies but (b) does not.
- 28 By Condition C1.3 a Proposal for Change (which can include an RCP) made by NR shall be sent to the SFO, together with sufficient copies of such proposal to enable the SFO to distribute a copy to each person entitled to receive one.
- 29 On its true construction, Condition C4 operates as set out below.
- 30 A Proposal for Change is deemed to have been accepted at the expiry of a Decision Period (see paragraph 43 below) if, in the case of a Unanimous Proposal, the proposal is an RCP likely to have material affect on operations and no Relevant Operator shall have given a Notice of Objection.
- 31 If a Notice of Objection has been given by the expiry of the Decision Period, the Proposal for Change has failed to be accepted pursuant to Condition C4.1. However, Condition C4.2 stipulates that:
- "Notwithstanding the failure of a Proposal for Change to be accepted pursuant to Condition C4.1 and subject to Condition C4.4, it shall be deemed to have been accepted at the expiry of a Decision Period if Railtrack, any Relevant Operator or any number of Relevant Operators shall within the Decision Period individually or collectively provide Financial Undertakings to the remaining Relevant Operators or Railtrack (as appropriate)."*
- It is common ground that these undertakings have been provided.
- 32 Condition C4.2 is subject to Condition C4.4. Under Condition C4.4 a Proposal for Change shall not be accepted if:
- 4.4.1 a Relevant Operator or NR shall have:
- (a) given notice to all other Relevant Operators and NR if the notice is given by a Relevant Operator and all Relevant Operators if the notice is given by NR within 30 days after the end of the Decision Period of its intention to commence final proceedings in accordance with Condition H5; and
- (b) commenced such proceedings not later than 30 days after the giving of such notice.
- 33 The following questions need to be answered on the facts of this matter:
1. when did the Decision Period expire?
 2. did a Relevant Operator give a Notice of Objection by that date?
 3. did NR (being the appropriate option) provide Financial Undertakings?
 4. if so, is the RCP deemed accepted subject to Condition C4.4?

5. in relation to Condition C4.4, can notice of intention to commence proceedings in relation to the Proposal be given by NR (as opposed to a Relevant Operator)?
6. if so, was notice of intention to commence proceedings given within 30 days after the end of the Decision Period?
7. can proceedings be commenced by NR (as opposed to a Relevant Operator) and if so were proceedings commenced not later than 30 days after the giving of notice of intention to commence proceedings?
8. were the proceedings commenced proceedings only to determine whether or not an irrevocable deemed acceptance of the Proposal had occurred or are the proceedings final proceedings in accordance with Condition H5 being proceedings of the kind referred to in Condition C4.4.2?

Extension of Time

34 In argument, I asked Mr Seitler if the time limits in Condition C4 could be extended by agreement. Mr Seitler thought not, noting the absence of any permission or provision allowing for the extension of time. I do not agree. The Conditions are a contractual document. I was not referred to any provision excluding the ability of the parties to agree extensions of time. The parties to the contract are NR, the owners of station facilities and those entitled to station access. All operate within the rail industry. These Conditions are drafted to serve the industry. There is no express fetter on the ability of the parties to agree a variation of the contractual rules by extending time. Moreover, I was not taken to any provision that would preclude the parties from agreeing even informally to vary their contract by extending time. Plainly, on the true construction of the Conditions, the parties to a Proposal for Change can agree to extend time for the steps referred to in Condition C4.

Condition C4.4.1

35 There are two issues. The first is whether a notice of intention to commence proceedings under Condition C4.4.1(a) must be given by a Relevant Operator or whether notice could be given by NR where the Proposal for Change in question is an RCP. Condition C4.2 refers to "the provision of Financial Undertakings to the remaining Relevant Operators or NR (as appropriate)". Thus, in that context, the Conditions acknowledge that in some circumstances the undertakings are to be provided by a Relevant Operator or a number of Relevant Operators and in others by NR.

36 By contrast, Condition C4.4. does not make that distinction. The opening words of Condition C4.4 refer only to a Proposal for Change not to an RCP or to a Proposal for Change made by a Relevant Operator. Nowhere in Condition C4.4.1(a) is a direction given that the notice of intention to commence proceedings is to be given by one party or the other "(as appropriate)".

37 Accordingly, I hold that the notice referred to in Condition C4.4.1(a) which is a notice of intention to commence proceedings can be given either by a Relevant Operator or by NR whether or not the Proposal for Change is an RCP or a proposal made by a Relevant Operator.

38 The second issue under Condition C4.4 is whether proceedings pursuant to Condition C4.4.1(b) must be commenced by a Relevant Operator, rather than by

NR. The same considerations apply as in relation to the notice of intention to commence proceedings.

- 39 In submissions, I suggested to Mr Seitler that if notice of intention to commence proceedings was given by a Relevant Operator, NR might wish to commence final proceedings in accordance with Condition H5 without delay, whereas the Relevant Operator might be content to wait until the 30 day period had almost expired. Mr Seitler submitted that on the true construction of this condition one party must give notice of intention to commence proceedings and then commence proceedings. I do not agree. No good reason has been advanced as to why NR should be constrained to wait and see whether a Relevant Operator commences proceedings following a notice of intention to commence proceedings by any party. Commercially, there is every good reason why NR should have the option itself of commencing the final proceedings under Condition H5, thereby eliminating delay.

Facts

- 40 Taking into account the documents and the evidence, I find the following facts.
- 41 On 8 May 2008 Simmons & Simmons on behalf of NR wrote to LER, XC, FCC and the Fifth Respondent by recorded delivery as follows:

"Cambridge Station - Station Change Proposal made under Part C of the Station Access Conditions

We act on behalf of Network Rail and enclose on their behalf the Station Change Proposal.

We are sending a copy of the Proposal to John Sarson. We have also been instructed by Network Rail to send copies of the Proposal to the Users and other parties mentioned in clause 14 of the Proposal."

The Proposal

- 42 The Proposal stated that:
- "2.1 the Proposal is a Full Proposal to carry out the works described
- 2.4 the Proposal involves the closure and replacement of Station Facilities as defined under the Condition, to a higher standard than existing.
- 2.5 the Proposal relates to a number of separate categories of works:
- the Car/Cycle Park Works
 - the Station Square and Interchange Works
 - the construction of a new operational parking for the benefit for the Station Facility Owner, its retail tenants and NR
 - the demolition of the existing station stall at the relocation of the retail cabins adjoining the south-west wing of the Station
 - the construction of new accommodation for the British Transport Police and Cross Country Trains crew, the provision of temporary accommodation for them and the demolition of the existing accommodation when the new is completed

- the relocation of the existing Hertz accommodation at the Station
- the re-provision of the Bus Turn Round Facility, the Short Stay Parking Area, the Hertz Parking any other facilities which are altered by the Agreement dated 20 December 2004 for the Guided Bus Route, if implemented prior to the Proposals for the Cb figure 1 Master Plan. Schedule 1 of the Proposal noted that the existing car park and the Station Lease in that area will need to be altered to accommodate the new development"

43 The following features of the Proposals are noteworthy. First , in paragraph 3, NR requested that LER and each Consultee provided:

- A preliminary response to this proposal within 28 days of receipt; and
- Any further representations or objections with 45 days of receipt.

By Condition C1.5 LER should, on receipt of the Proposal, have given a reasonable period (not being less than 45 days) for each User to submit a Notice of Objection in relation to the Proposal, this being the Decision Period, subject to any agreed extension.

44 Secondly, paragraph 6.1 of the Proposal stated that in satisfaction of Condition C3.4.1, NR offered an indemnity in favour of each Relevant Operator to pay to it such sums as shall fairly and reasonably compensate that person for any material and adverse effect of a change proposal on its existing and future business made by it. NR offered the indemnity provided that the Proposal is accepted and to the extent that the Proposal is implemented. By paragraph 6.3, NR offered an undertaking in favour of each Relevant Operator to make available alternative accommodation facilities. LER accepted that the indemnities and undertaking in the proposal complied with Condition C3.4 and accordingly, Condition C4.2 applies.

45 Although NR do not rely on the failure of LER to give Notice of Objection, it is relevant to establish the period within which any Notice of Objection must be given.

46 I find that a reasonable period for giving Notice of Objection under Condition C1.5.3 was 45 days, for the following reasons:

1. Condition C1.5.3 refers to a reasonable period being not less than 45 days. Therefore, as a starting point, 45 days can be reasonable.
2. NR requested objections within 45 days of receipt of the Proposal.
3. there was no indication that LER challenged the reasonableness of the request or the selection of this period.
4. LER, FCC and the Fifth Respondent all wrote to NR concerning the Proposal within 45 days of the Proposal.
5. the Notice of Objection has no prescribed form. It can be given by letter and without stating grounds and not, therefore, a labour intensive document to produce.

47 On 28 May 2008 the Fourth Respondent wrote to NR to consent to the Proposal. The Fourth Respondent has played no part in this arbitration. Therefore, there is

nothing in LER's point that the Proposal had not been served on the Fourth Respondent.

- 48 On 4 June 2008 the XC wrote to the solicitors for NR seeking clarification/information on certain points. The letter stated that the Second Respondent was not in a position to agree to the Proposal but it did not wish to hold up any works and could see the benefit of the entire scheme going forward.
- 49 On 4 June 2008 John Sarson of LER Limited wrote to Mr Barnard of Simmons & Simmons acknowledging receipt of his 8 May 2008 letter and stating with regard to paragraph 3.1 of the Proposal that he had that day agreed with Kate Warner of NR to postpone the date by which he would provide a preliminary response. He continued: *"Kate Warner is arranging a meeting with us to discuss the changed proposal. Our preliminary response will be made thereafter."* At the material time Ms Warner was a senior commercial scheme sponsor at NR.
- 50 On 9 June 2008 FCC wrote to NR acknowledging the Proposal and making a number of representations and seeking information.
- 51 On Mr Seidler's primary case, the Decision Period expired on about 22 June 2009, without Notice of Objection having been given.
- 52 On 10 July 2008 FCC wrote to Ms Warner acknowledging her letter dated 2 July 2008 (which I have not seen) agreeing to an extension to the deadline for representation or objections to the above Proposal to 12 July 2008. FCC stated that this letter constituted a formal Notice of Objection in accordance with Part C of the Conditions. On NR's analysis, that Notice of Objection was given after the expiry of the Decision Period.
- 53 On 11 July 2008 Simmons & Simmons wrote to each of the Respondents enclosing on behalf of NR a copy of an Addendum to the Station Change Proposal made on 8 May 2008. The purpose of the Addendum was to advise of proposed variations to the layout of the multi-storey car park and combined cycle storage facility and its capacity. The Addendum also advised of changes to the temporary car parking provision whilst the multi-storey car park was being constructed and variations to the layout of the Station Square. The Addendum was not a Material Variation and, accordingly, its issue did not vary the timetable in relation to the Proposal.
- 54 On 1 October 2008 Ms Warner, met Mr Sarson. At that meeting, Mr Sarson outlined the approach which would lead to LER supporting the Proposal. Mr Sarson tabled financial compensation proposals.
- 55 By an email on 6 October 2008 (which I have not seen but which is referred to in the letter dated 10 November 2008 referred to below) Mr Sarson clarified those proposals.
- 56 On 15 October 2008, the Planning Committee at Cambridge City Council approved the Master Plan for the scheme, subject to agreement of a Section 106 Agreement.
- 57 No details of the negotiations were produced, until a letter 10 November 2008. Ms Warner wrote an 8 page letter to Mr Sarson setting out NR's counter-proposal. From that letter, it emerges that the negotiation was as follows. First, LER wished to surrender the station car park to NR in consideration of a premium payable to LER by NR. NR did not wish to take back the station car park. Secondly, LER sought compensation for the impact on the uses and income within the external station lease area of about £[REDACTED]. This proposal involved lump sum payments from the assumed developer start date of June 2009 to the end of LER's franchise

period in March 2014. This would be an alternative to NR indemnifying LER for losses as and when they occur. NR did not agree to this proposal.

58 This letter makes the following comments about the change proposal process. First, Ms Warner expressed the hope that LER would be able to determine in favour of support for the Proposal on the basis that she had set out. Ms Warner did not suggest that LER had lost the ability to object. Secondly, Ms Warner wrote that:

" You will appreciate that five months have now elapsed since the Station Change Proposal was submitted on May 8th 2008. As requested by NEX (i.e. LER), NR agreed an additional period of time for NEX to respond to NR's Proposal after the Addendum was issued on July 11th 2008. It has been useful to allow time for NEX and NR to think through all the options for the delivery of the new car park.

The effective consequence of this has been to extend the Decision Period for the Proposal.

I would now request that NEX responds within the next 21 days in line with attached letter with its approval or states the formal specific grounds for objection to the Station Change Proposal in order that we may consider how this matter can be taken forward.

We are notifying the other Train Operating Companies similarly.

I look forward to hearing from you, and as indicated if you wish to meet to discuss these issues further in the near future, then both David Tannahill and I would be happy to do so."

59 Mr Seitler submitted that whatever Ms Warner thought, it was too late for the parties to avoid the occurrence of a deemed acceptance of the Proposal given that more than 45 days had elapsed since the date of the Proposal. Once the Decision Period had expired it was too late, submitted Mr Seitler, to extend the Decision Period. This extension could not take place without undoing the deemed acceptance. In reality, NR were negotiating a complete solution to the Railway Operator's consent. The Railway Operator wanted £[REDACTED] NR were negotiating on that figure but away from the four corners of the Conditions. Whilst the deemed acceptance was subject to Condition C4.4 there was no notice of intention to commence proceedings given by LER so far as NR are aware. Accordingly, these discussions did not affect the deemed acceptance on or about 22 June 2008.

60 However, by inference from Mr Sarson's 4 June 2008 letter to Simmons & Simmons I find, on balance, that negotiations commenced before 22 June 2008 and that time for Notice of Objection was extended if not expressly then by implication to facilitate those negotiations.

61 There is a construction which can be placed upon Ms Warner's 10 November 2008 letter alternative to that suggested by Mr Seitler. Ms Warner connects the passage of time since 8 May 2008 with the effective consequence that the Decision Period had been extended. In the context of a letter which neither suggests that LER have lost their rights to object nor that a deemed acceptance has occurred, I find that the Decision Period had been extended either to at least 10 November 2008 or generally. Accordingly, the Decision Period had not at 10 November 2008 expired and was capable of being extended. The letter of 10 November 2008 gave LER a 21 day extension of time for its Notice of Objection.

- 62 On 11 November 2008 Simmons & Simmons wrote in identical terms to LER, XC, FCC and the Fourth and Fifth Respondents. The letter referred to paragraph 3.1 of the Proposal for Change and requested that any Relevant Operator shall accept the Proposal or give a Notice of Objection by no later than the date that is 21 days after the date of this letter, namely Tuesday 2 December 2008.
- 63 It would be surprising if the operation of the Conditions both by NR itself and by its external solicitors were both blighted by error. Accordingly, I hold that the Decision Period being the time limit for the giving of Notice of Objection was by 11 November 2008 extended to Tuesday 2 December 2008.
- 64 On 14 November 2008 XC wrote to Simmons & Simmons stating that it supported the proposal in principle but was not yet in a position to agree it due to ongoing negotiations. Therefore, its letter should serve as its "continuing notice of objection and shall remain so until such time as the proposal is either accepted or rejected".
- 65 On 3 December 2008 Andrew Chivers of National Express exchanged emails with Patrick Hallgate of NR. At 17:52, Mr Chivers stated:
- "When we met with Robin and yourself, we discussed the Cambridge development commercial arrangements.*
- You promised to come back to me with a proposal. The deadline for us to object is 12 December. We have a draft objection letter ready but I would rather come to a sensible commercial arrangement instead.*
- ...look forward to receiving something from you."*
- 66 At 18:02, Mr Hallgate replied:
- "I had further discussions with commercial property concerning the offer and counter-offer yesterday. I will get something in writing to you by Monday [note: 8 December 2008 was a Monday] at the latest, but believe we are a long way apart on our aspirations. Given the sentiments you expressed the other evening, I fear a dispute is inevitable, but as agreed, I will confirm our position."*
- 67 Mr Seidler submitted that when Mr Hallgate recorded his fear that a dispute is inevitable, it was possible that he was referring to one of three disputes being:
1. whether or not deemed acceptance of the Proposal had irrevocably occurred;
 2. whether the RCP should be carried out having regard to Condition C4.4.2; or
 3. a dispute as to the value of the indemnity contained in the Proposal.
- 68 Mr Seidler submitted that the meeting on 1 October 2008 and the NR letter dated 10 November 2008, concerned the value of LER's claim under the indemnity. Mr Seidler noted that under Condition C4.4.2 the burden is on the objector to establish in final proceedings the requisite level of prejudice, which would prevent a Proposal for Change being accepted. Therefore, the objector should be the claimant.
- 69 I construe Mr Hallgate's e-mail as referring to the dispute under Condition C4.4.2 for the following reasons:

1. the 11 November 2008 correspondence from NR's solicitors, was consistent only with the Decision Period not expiring until Tuesday 2 December;
2. in his e-mail, Mr Chivers of LER referred to a meeting, the date of which was not in evidence but may have been the dinner on 19 November 2008, referred to by Mr Hallgate in his 8 December 2008 letter to Mr Chivers;
3. On balance, there were dealings between NR and LER which may explain why Mr Chivers referred to a deadline for objection of 12 December 2008, which was not contradicted by Mr Hallgate in his reply;
4. Mr Hallgate's letter dated 8 December 2008, is consistent only with LER's right to object remaining extant.

70 On Monday 8 December 2008 Mr Hallgate wrote to Mr Chivers stating:

"As discussed at dinner on 19 November, I have spoken further with my Commercial Property colleagues to try and assist in concluding this matter on mutually acceptable terms.

To summarise their position: the first Station Change Application was submitted on 8 May after approximately 2 years of discussion with all key stakeholders to understand the aspirations of station improvements and to understand the key commercial drivers. The Station Change Application was then amended on 11 July after further discussion with the planning authorities regarding the size of the transport interchange. Both these applications were received and acknowledged with NXEA asking for additional time to review the application and to propose some counter-proposals which were then presented on the 1 October. Our response to these counter-proposals then formed the letter of the 10 November, which was discussed with you on the 19 November."

Mr Hallgate then set out various commercial points before concluding:

"We cannot support a business case for any 'premium payouts' as discussed on the 1 October at the meeting between our teams.

"Network Rail is, of course, happy to continue ongoing discussions and your response to our last correspondence would be helpful but we still need to adhere to the timescales laid down in our last correspondence and our right to utilise the disputes procedure."

71 On 10 December 2008 Mr Sarson of the First Respondent wrote to Ms Warner of NR. The letter was headed "Cambridge Station - Station Change Proposal made under Part C of the Station Access Conditions".

"This letter constitutes a Formal Notice of Objection in accordance with part C of the NSACs. LER's detailed objections are set out below. LER notes that First Capital Connect submitted a Formal Notice of Objection dated 10 July 2008. Many of LER's objections are similar to those of First Capital Connect. LER has copied this letter to First Capital Connect and XC Trains."

Mr Sarson then set out 13 topics on which LER wished to be satisfied. I find that this letter constituted a timely Notice of Objection.

72 The next step would be for a Respondent or NR to give notice of intention to commence proceedings.

- 73 On 23 December 2008 NR gave notice to LER and the Relevant Operators that in the absence of agreement to the Proposal it was NR's intention to commence proceedings pursuant to Condition C4.4.1 (a) and Condition H5 of the Conditions. This letter was written less than 30 days after 10 December 2008.
- 74 I hold this to be a valid notice of intention to commence proceedings within Condition C4.4.1(a).
- 75 Early in the oral hearing I distributed copies of a letter, not in the hearing bundle, dated 21 January 2009 from Simmons & Simmons to the Dispute Secretary of the Access Disputes Committee. That letter stated that in accordance with the provisions of Part C of the Conditions a Station Change Proposal ("the Proposal") in respect of Cambridge Station was sent on behalf of NR to LER as Station Facility Owner on 8 May 2008. The proposal was also sent to other Relevant Operators which include XC and FCC. An Addendum to the Proposal was subsequently sent to LER and the other Relevant Operators on 11 July 2008. By letter dated 14 November 2008 XC gave Formal Notice of Objection to the Proposal. By letter dated 17 November 2008 FCC gave Formal Notice of Objection to the Proposal. By letter dated 10 December 2008 LER gave Formal Notice of Objection to the Proposal. By letters dated 23 December 2008 NR gave notice to LER and the Relevant Operators that in the absence of agreement to the Proposal it was NR's intention to commence proceedings pursuant to Condition C4.4.1(a) and Condition H5 of the Conditions. On that basis, Simmons & Simmons were instructed by NR to refer a dispute to arbitration in accordance with Part C of the ADRR. That letter was written within 30 days of 23 December 2008.
- 76 I hold this letter to be a valid commencement of proceedings within Condition C4.4.1(b).
- 77 Condition H5 which relates to the resolution of disputes and claims provides in Condition H5.4 that any dispute or claim arising out of or in connection with Condition C4.4 shall be referred to and resolved by arbitration in accordance with the ADRR.
- 78 There is nothing in the correspondence from Simmons & Simmons which is inconsistent with the proceedings, which they intended to commence on NR's behalf, being final proceedings in accordance with Condition H5.

Summary

In paragraph 33 above I proposed 8 questions to which my answers are as follows:

1. the Decision Period expired no earlier than 12 December 2008;
2. Relevant Operators gave Notices of Objection by that date; being FCC on 10 July 2008, XC on 14 November 2008 and LER on 10 December 2008;
3. NR provided Financial Undertakings;
4. accordingly, the Proposal was deemed accepted, subject to Condition C4.4;
5. in relation to Condition C4.4, notice of intention to commence proceedings could be given by NR;

6. notice of intention to commence proceedings was given by NR within 30 days after the end of the Decision Period, by letter dated 23 December 2008;
7. proceedings can be commenced by NR and were so commenced within 30 days of giving of notice of intention to commence proceedings by letter dated 21 January 2009, giving notice of arbitration;
8. although this was not an issue raised in the statements of case, the proceedings commenced seem to me to be final proceedings in accordance with Condition H5 being proceedings of the kind referred to in Condition C4.4.2.

79 Accordingly, in the absence of there being an accepted RCP, NR shall not commence or proceed with any works falling within the Proposal. The parties will wish to consider what further directions are required for the determination of the substantive final proceedings.

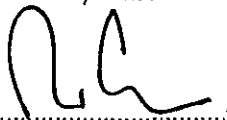
Award

80 I therefore declare, rule and award as follows:

1. Subject to Condition C4.4.1, the Proposal for Change dated 8 May 2008 was deemed to have been accepted on or about 12 December 2008 by which date Notices of Objection had been given but Financial undertakings were provided by NR;
2. Condition C4.4.1 (a) and (b) having been satisfied by NR giving notice of intention to commence proceedings and commencing proceedings, the Proposal is neither barred from rejection nor has it been accepted.

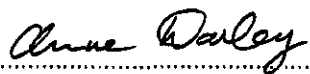
Costs

81 This award is an interim award, being final in relation to the preliminary issues, save as to costs. Any application for costs together with grounds for the application should be made in writing and submitted by email to me and to the parties by 5 pm on Tuesday 1st September 2009. Any response to an application must be submitted by email to me and to the parties by 5 pm on Tuesday 8 September 2009.



Roger David Cohen

Signature witnessed by:



Name: ANNE DARLEY

Address: ADELAIDE HOUSE, LONDON BRIDGE, LONDON. EC4R 9HA

Occupation: LEGAL SECRETARY

Dated this 19th day of August 2009