
ACCESS DISPUTE RESOLUTION COMMITTEE

Determination No. AD19

(Hearing held at Kings Cross on 4th April 2000,
determination delivered on 30th May 2000)

1. The Committee was asked by Connex South Eastern (CSE) to rule that Railtrack had failed properly to carry out the maintenance, for which (under the terms of the Station Access Conditions, Annex 1, Appendix 4) they were responsible, to the underground water pipes on Ramsgate station; and that therefore, Railtrack should compensate CSE for the excessive water bills that had followed as a consequence of leaks in those pipes.
2. The Committee noted that a dispute arising out of the application and interpretation of Condition D4 of the Station Access Conditions was referred to it under the Station Access Condition H5.1; the Committee acknowledged its locus to hear the dispute.
3. CSE's claim centred on the fact that in August 1998 a significant water leak had been identified in underground water pipes, which had been repaired by Railtrack within the stipulated 7 days of reporting. A second leak was reported and repaired in October 1998. Under Appendix 1 to Annex 4 of the Station Access Conditions, Railtrack is responsible for maintenance and repair of plumbing installations where they are not accessible or visible.
4. Investigation of the leaks, which did not manifest themselves in any visible way, followed from consideration, in 1998, by CSE, of its past water bills. These reflected an apparent increase in consumption, and had led CSE to allege that:
 - 4.1. the leaks must have dated from sometime in 1996; that therefore
 - 4.2. Railtrack had been in breach of its obligations to maintain the underground water system (as prescribed in Station Access Condition D4) since that time; and that, as a consequence
 - 4.3. Railtrack should meet the increased cost of CSE's water bills for that whole period.
5. Railtrack contended that maintenance was not possible on underground pipes. Unless advice was given by the Station Facility Owner (whether as a result of failure of supply, or based on meter readings or other observations), that there was evidence of a water leak, Railtrack would not expect to undertake work on the pipes. Railtrack's view was that this approach to the maintenance of water services was reasonable, and consistent with general practice.
6. At Ramsgate Railtrack had repaired the pipes promptly when notified of the leaks and, therefore, did not admit any liability to meet CSE's increased water bills. Where there is a delay between notification and repair, Railtrack would accept liability for any period of delay between a report of a possible leak and the completion of successful remedial action. However, in the present case, the leaks had lasted for such a long period because CSE did not report them in a timely way.

7. The parties, in making their cases, cited a number of established legal precedents in order to support the following contentions:
 - 7.1. For Railtrack, that under general law an obligation on a landlord does not generally arise until his tenant has given notice of disrepair. The only exception is where the landlord actually knows of the disrepair. The general rule still applies where the tenant has agreed that the landlord may enter and inspect the premises. Since Railtrack had promptly repaired the leaks when notified they were not in breach of contract.
 - 7.2. For CSE, that, under the Defective Premises Act (1972), an exception to the general rule also arises where the landlord ought reasonably to have known of the defect. Since the definition of “maintenance” in the Station Access Conditions includes an express provision for inspection, Railtrack could, and should, have carried out regular inspections, and made themselves aware of the leaks. By failing to do so, Railtrack were in breach of Contract. Moreover, the condition of the plumbing, as assessed, should have led Railtrack to anticipate problems.
8. The Committee noted that the cited provisions of the Defective Premises Act (1972) appeared to relate only to instances of personal injury and property damage. No evidence had been presented of either, whilst the plumbing in question had been assessed as being in “fair to reasonable” condition.
9. In arriving at a determination the Committee took account of these general principles, as well as the following aspects of the behaviour of the parties:
 - 9.1. the Station Access Conditions agreed by the parties for Ramsgate Station contain, in Annex 1 Appendix 4, references to Railtrack’s obligations to maintain plumbing installations where they are “not accessible or visible”, that are discrete and separate from the references to obligations to repair those installations. It is reasonable for the CSE to anticipate that Railtrack would give discrete and separate consideration as to how such maintenance obligations might be discharged;
 - 9.2. it is Railtrack’s practice that, where it is responsible for pipes carrying water for which it is the purchaser, the nature and timing of the maintenance/repairs is informed by the information gleaned from the monitoring of meters and accounts. Where a Train Operating Company is the water purchaser, Railtrack does not seek to inform its actions on the basis of such monitoring; instead it relies on the initiative of the Train Operating Company to identify problems, and assumes that no advice implies that there are no grounds for investigation or action;
 - 9.3. Railtrack’s annual Station Inspection Regime does not normally include any positive testing of the integrity of the underground water pipes, albeit that it is normal practice to make a visual inspection of all services; in this respect it conforms with general practice in respect of buried water pipes. However, when questioned, Railtrack conceded that, between the inspection in March 1996, and one in October 1999, the normal annual inspection of Ramsgate station had been subsumed by other inspections in connection with Station Regeneration works. Railtrack was unable to provide a complete schedule of such inspections;
 - 9.4. CSE’s monitoring arrangements in respect of Ramsgate water consumption did not cause CSE to raise the matter before August 1998, notwithstanding that, on the evidence of the figures presented (and on which the claim for liability was based) there had been a significantly higher (and unexplained) level of consumption for around two years prior to that date.

10. The Committee noted that Station Access Condition L10 reminds the parties that they retain the general obligation in law to mitigate loss or damage resulting from breach of contract. Whilst noting the extent of the case law on the interpretation of landlords' obligations to their tenants, and that the essence of one party's case is that there has been no breach of contract, the Committee took the view that the parties' behaviour should, in part, be assessed against such a general obligation. In this regard
 - 10.1. the annual station inspection provides Railtrack with the opportunity to give some consideration to the integrity of the underground water pipes at stations. This could be assisted by formally asking Station Facility Owners whether there was any evidence of leaks in either their own meter readings or the water company's bills. Such a practice, even in those cases where the Station Facility Owner did not examine records of water consumption frequently, would be likely to focus attention on detecting wastage over a shorter time span than the two years at the centre of this dispute. It would be reasonable to expect Railtrack to do this since it would amount to no more than Railtrack seeking, from its customers, the same information that it uses where the pipes in question convey water on its own account;
 - 10.2. it would not be reasonable, given general custom in relation to buried pipes, to expect Railtrack to attach loggers to every tenant's meter, or to carry out regular testing of the pipes, as had been proposed by CSE;
 - 10.3. there was a duty on CSE, both as the party with the direct interest in monitoring the consumption of water, and as the only party in a position to influence levels of consumption, to identify its potential loss at the earliest practicable stage, and to give Railtrack the earliest opportunity to meet its obligations. The two years taken by CSE to identify its possible loss, during which time Railtrack was not prompted to take remedial action, was not reasonable; and
 - 10.4. Railtrack is entitled to decide, on commercial grounds, that, given industry practice in regard to the maintenance of buried water pipes, it will aim to discharge its obligations to maintain those pipes by taking action only when notified of a leak; however, Railtrack is not entitled to presume that that decision will be supported as reasonable in every, or indeed in this, case.
11. The Committee therefore determined that
 - 11.1. Given that there had been some significant leakage of water, leading to increased costs over 2 years, and that this had reduced following the carrying out of repairs, the arrangements made to maintain the underground water system could be considered to have been ineffective, and that both parties had, to differing degrees, contributed to that ineffectiveness.
 - 11.2. CSE has not, on the basis of the evidence presented, demonstrated that they have acted with reasonable promptness and rigour to protect their own interests as the body responsible for paying water bills.
 - 11.3. It would not be reasonable to make any award that encouraged the view that the Train Operator has no responsibility in this area (e.g. for sharing information that might indicate problems) and can expect to pass on any costs to the landlord.
 - 11.4. By the same token, Railtrack, as landlord, with the responsibility for maintenance, cannot reasonably rely exclusively on the principle that if it is not notified of a problem it does not have to take action; this is not the principle that it adopts in relation to its own water

supplies, and it would be reasonable that it adopt a comparably pro-active role in relation to the supplies to its tenants.

- 11.5. Railtrack should, therefore, consider including within its station inspection regime the consideration, as a matter of course, of all information in respect of usage, whether produced by Railtrack or by the Train Operating Company, as an aid to better discharging its obligations to maintain the underground water system. However, this does not mean that Railtrack, to pursue this course, should reasonably be required to read again meters already being read by a Train Operating Company. Similarly it would not be reasonable to require Railtrack to have to obtain (on its own account) any relevant information that is already received by that Train Operating Company, or to expect that Railtrack would, without good cause, set up a (e.g. ultrasonic) pipe monitoring process;
- 11.6. However, had Railtrack had in place reasonable arrangements to seek information in respect of water consumption from CSE, but CSE's arrangements to track and analyse that consumption had remained only as described in the submission, then, even taken together, they would not, in practice, have resulted in any earlier detection of the leaks at Ramsgate.
- 11.7. Whereas there is more Railtrack could have done, on behalf of the interest of its tenant, there is much that CSE did not do to protect its own interest; for this reason, the greater proportion of any cost for excess water, arising out of the now repaired leaks at Ramsgate Station, should fall on CSE.
- 11.8. Railtrack should reimburse CSE's costs, in respect of water wasted at Ramsgate station, between 1996 and 1998, to the sum of £3,000. The remainder of the costs should be borne by CSE.
- 11.9. In respect of the obligation to mitigate loss, the Committee suggested that there might be an option for CSE to seek abatement of the sewerage element of the disputed bills: were such a reduction to be obtained, the benefits should be shared with Railtrack, pro rata to the sums in 11.8 above.
12. To the extent that either party shall be dissatisfied with the decision of this Committee, as set out in paragraph 11 above, then, as required by Station Access Condition H5.1, this Committee specifies that that party may refer the matter for Expert Determination, as provided for under Access Dispute Resolution Rules A8 and D1 to D2.

Bryan Driver,
Chairman,
Access Dispute Resolution Committee