ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA27

(following a hearing held at Meridian House, Smallbrook Queensway, Birmingham on 20 January 2016)

Hearing Chair Andrew Long

The Parties

For West Coast Trains Ltd ("WCTL" or "Virgin Trains" or "Virgin")

Darren Horley	Commercial & Operations Strategy Manager
Phil Bearpark	Executive Director - Operations & Projects
Jonathan Dunster	Head of Operations
Craig Tevendale	Partner, Herbert Smith Freehills LLP
Jennifer Hartzler	Associate, Herbert Smith Freehills LLP

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Carew Satchwell	Route Contracts Manager (LNW)
John Rowland	Legal Advisor
Paul Stewart	Partner, Bond Dickinson LLP
Jonathan Gribben	Associate, Bond Dickinson LLP

In attendance

Tony Skilton	Secretary

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1 Introduction and procedural history of the dispute

1.1 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

"ADA" means Access Dispute Adjudication
"FA" means the Franchise Agreement
"GBTT" means Great Britain Passenger Timetable
"LNW" means London North Western
"NR" or Network Rail" means Network Rail Infrastructure Limited
"ORR" means the Office of Road and Rail (formerly Office of Rail Regulation)
"RoU" means Restriction of Use
"Rule" refers to the Access Dispute Resolution Rules
"Secretary" is the Committee Secretary of the Access Disputes Committee
"TAA" or "TAC" means Track Access Agreement/Contract
"TOC" means Train Operating Company
"WCML" means West Coast Main Line
"WCTL" or "Virgin Trains" means West Coast Trains Ltd
"WTT" means Working Timetable

1.2 This dispute arises out of the refusal of Network Rail to accept liability to settle the sum requested by WCTL in relation to payment of compensation for the provision of amended train services over the weekends of 14/15 and 21/22 February 2015. These services offered passengers a through journey opportunity between London and the West Midlands following a landslip in the Harbury Tunnel area (between Banbury and Leamington Spa) which commenced in January 2015. WCTL also reinstated services through Watford along the West Coast Main Line.

1.3 Original longstanding plans in connection with major engineering works at Watford Junction - "a blockade" - had involved WCTL withdrawing its services into and out of London (Euston) over the two weekends and passengers between London and the West Midlands being advised to use Chiltern Railways' services from/to London (Marylebone), which pass through Harbury Tunnel; this advice to passengers included a major publicity campaign.

1.4 The revised operational arrangements for the two weekends concerned involved the cancellation by Network Rail of the blockade in the Watford Junction area and the reinstatement of services by WCTL between the West Midlands to and from London (Euston) through Watford Junction, together with other WCML services. Other operators also reinstated services serving Watford Junction.

1.5 The extent to which WCTL reinstated its train service is considered below.

1.6 A basis for compensation to WCTL had been agreed upon between the Parties and confirmed in a letter sent to WCTL (using its trading name of "Virgin Trains") by Network Rail's Interim LNW Route Director dated 6 February 2015 - "the Letter" - which is reproduced as Annex "A". WCTL alleged that subsequent refusal by Network Rail to accept liability under the terms of this letter when payment was first requested in a letter dated 15 July 2015 amounted to a breach of good faith, contravening Clause 4.2 of the Track Access Contract (Passenger Services) between the Parties dated 1 September 2011, which reads:

1.6.1 "The parties to this contract shall, in exercising their respective rights and complying with their respective obligations under this contract (including when conducting any discussions or negotiations arising out of the application of any provisions of this contract or exercising any discretion under them), at all times act in good faith."

1.7 Following service by WCTL of a Notice of Dispute with Network Rail dated 6 November 2015 pursuant to Clause 13 of the TAC, the Parties completed a Procedure Agreement on 19 November 2015 in which they agreed to refer the dispute in the first instance to an ADA. In

view of the Procedure Agreement being silent regarding right of appeal against this ADA determination, either Party has a right of appeal to arbitration (Rule G67).

1.8 I was appointed as Hearing Chair on 19 November 2015. Mindful of the approaching Christmas/New Year holiday period, I exercised my powers as contained in the Rules to adjust the standard timescales laid down for the ADA process; the Parties were informed on 19 November 2015 of the dates by which their various documents were to be served and after consultation between the Secretary and the Parties, 20 January 2016 was subsequently set as a convenient hearing date.

1.9 WCTL served its Statement of Claim on 3 December 2015. Network Rail served its Statement of Defence on 17 December 2015 and WCTL served its response statement shortly after close of business on 23 December 2015.

1.10 Both parties served legal submissions on 8 January 2016.

1.11 My own review of the material provided to the hearing (as required by Rule G9(c)) identified several points of law as having been raised and the list was advised to the Parties on 12 January 2016. In that communication, the Parties were also reminded to be alive to the existence of conflicts of fact between them and to be prepared for these to be explored at the hearing.

1.12 On 19 January 2016, WCTL provided items of public domain material to which it was intended that reference would be made in its opening statement at the hearing.

1.13.1 The hearing took place on Wednesday 20 January 2016. The Parties each gave opening statements, responded to my questioning and made closing statements.

1.14 Having thoroughly read and understood the Statements and submissions served by the Parties, I concluded that I possessed the relevant railway knowledge necessary for reaching a fair determination of the dispute and, as permitted by Rule G3, I ordered that no Industry Advisors were to be appointed for this ADA. The necessary knowledge of law is not expected from within the pool of Industry Advisors retained by the Access Disputes Committee. In contrast, my legal practice and judicial experience has included significant involvement in matters directly relevant to the issues raised in this dispute.

1.15 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarised in the course of this determination.

1.16 In my consideration of the parties' submissions and my hearing of the dispute, I was mindful that, as provided for in Rule A5, I should reach my determination "on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

2 Jurisdiction of this ADA

2.1 Although there was a signed Procedure Agreement referring this dispute in the first instance to an ADA, Network Rail sought to challenge the jurisdiction of an ADA in relation to this matter.

2.2 There were two related issues arising out of the legal nature of the agreement contained in the letter of 6 February 2015 and its relationship to the TAC. The first is whether there is jurisdiction for an ADA; the second is whether the agreement constitutes a TAC or a variation to a TAC.

2.3 Jurisdiction WCTL and NR are parties to a TAC. WCTL seeks to rely on the terms of that TAC and in particular Clause 4.2 thereof to enforce the 6 February 2015 agreement. By Clause 13 of that TAC an ADA has jurisdiction over 'any difference between the parties arising out of or in connection with the [TAC]'. However, the agreement is encapsulated and documented in the Letter, not in the TAC. So what is the relationship between them?

2.3.1 WCTL categorised the 6 February 2015 agreement as a 'Collateral Agreement' in both its written submissions and at the hearing. NR said that, in effect, WCTL was on the horns of a dilemma. If the agreement was outside of the TAC then WCTL could not rely on the TAC. In earlier pleadings and evidence WCTL had described the agreement as 'outside the TAC', 'alongside the TAC' and 'a bespoke agreement'.

2.3.2 Conversely, NR contended, the agreement was therefore a TAC or a variation to a TAC. But in that case certain important formalities were required without which the agreement would be void.

2.3.3 It was common ground that (a) a TAC requires approval from ORR pursuant to s18(1)(b) of the Railways Act 1993 and that (b) a variation to a TAC must be approved by ORR pursuant to s22 of the Railways Act 1993 and that the procedure under Clause 18.2 of the TAC for varying the TAC must be followed. It was also common ground that these approvals had not been sought nor obtained nor such procedure followed.

2.3.4 The TAC provides for compensation in the events that happened here (late cancellation of a long planned RoU). The 6 February 2015 agreement would not have existed but for the existence of the TAC. The parties decided for their own purposes to agree a different compensation outcome on this occasion. The dispute therefore arises because of the terms of the TAC and because of what the TAC does *not* say.

2.3.5 It seems clear to me therefore for the reasons in the preceding paragraph that this dispute arises 'out of *or in connection with* the TAC' (emphasis added). Those items demonstrate the connection with the TAC.

2.4 Is the agreement a TAC? The 6 February 2015 agreement does not purport to be a TAC. It does not give the rights associated with a TAC (such as track access!). The Parties did not treat it as a TAC. The Parties did not seek ORR approval. It seems clear therefore that it is not a TAC.

2.5 Is the agreement a variation to the TAC? This issue is less straightforward.

2.5.1 First, there is an issue whether there *could* in principle be, in such circumstances, a collateral agreement. WCTL cited a passage from Chitty on Contract at 22–036 which says "A variation of an existing agreement should be distinguished from a collateral agreement concluded before the main agreement is entered into under which one-party agrees not to enforce a term of the main agreement or assumes obligations in addition to or at variance with those contained in the main agreement.... There seems to be no reason why such collateral agreement should not be held to exist even if entered into after the conclusion of the main agreement, provided that there is present (and not merely past) consideration". WCTL's case that there could in principle be a collateral agreement therefore relies heavily on the final sentence of the above quote. NR criticise that proposition; NR contends that Chitty does not cite case or other legal authority in support. It is perhaps surprising at first sight that there is not formal authority cited for the proposition. However the passage above is taken from Chapter 22 of Chitty headed "Discharge by Agreement" and under a section headed "5.Variation". The passage is therefore primarily discussing variation of contract, but the relevant paragraph 22-036 contrasts "variation" with "collateral agreement". It is not a passage that discusses the concept of collateral agreements other than in contrast to variation.

2.5.2 I accept that the statement in Chitty accurately states the law. I accept that in principle this may amount to a collateral agreement. I do so for two reasons. First the statement in Chitty is sufficiently persuasive. It is a clear statement from the learned authors. Although no authority is directly cited, equally there is no authority to the contrary relied on by NR. Secondly, it corresponds with modern commercial reality and practice. There are numerous examples of agreements providing for multiple subsequent situations (for example for the supply of goods or a master compensation agreement between parties). When parties accept, as a one off, for their own purposes, a different

outcome or specific settlement than might have been provided for by the master agreement or call off agreement then there is an enforceable contract, separate from, but standing alongside(collateral) to the main contract.

2.5.3 Having concluded that it is *possible* that this may be a collateral agreement, the question for decision is whether the Letter is best interpreted as a variation (to the TAC) or a collateral agreement. Is it a variation? On its face the wording does not purport to be a variation to a TAC. There is no mention in the Letter or elsewhere that it is intended to amend the TAC. The existing TAC remains in full force and effect. This includes the compensation provisions; the agreement does not change the compensation provisions for the future. If the same circumstances (late removal of a long planned RoU) happened again, then the existing unvaried terms of the TAC would apply. In fact the agreement sets out a different measure for compensation for this one occasion arising from the Harbury landslip and associated removal of the Watford blockade. (It is also the case that the Parties including NR did not treat this at the time as a variation to a TAC which would have required the formalities set out in item (b) of para 2.3.3 above.)

2.5.4 It seems to me therefore that it is not a variation to the TAC. It is an agreement that is collateral to, and sits alongside, the TAC. But it does not vary its terms nor operate as a variation. Indeed as mentioned above, such agreements are commonplace and familiar; commercial parties often agree in particular circumstances a different outcome to that which the main contract would have provided (or is silent about). When this happens, as here, there is an additional collateral agreement, not a variation to the existing agreement, which remains in full force and effect for the future.

2.6 I therefore conclude that this dispute properly falls within the jurisdiction of an Access Dispute Adjudication.

3 Submissions made and outcomes sought by the parties

3.1 WCTL's principal submission was as follows:-

3.1.1 There was a valid and binding agreement (collateral to the TAC) between WCTL and NR as evidenced by the February 2015 letter. None of NR's defences worked. WCTL had provided consideration by going beyond their pre-existing contractual obligations. NR's officers had had sufficient authority in law to enter into the agreement and to bind NR. There had been no illegitimate pressure by WCTL; NR had made a bargain which it should keep to (even if NR now regretted making the agreement). NR was in breach of the obligation of good faith in Clause 4.2 of the TAC.

3.1.2 In concluding its written submission, WCTL sought determination that:

3.1.2.1 the collateral agreement upon which WCTL acted created a liability that Network Rail should honour by compensating WCTL for the revenue loss incurred in accordance with the terms of the Letter of 6 February 2015; and

3.1.2.2 an order should be made against Network Rail in respect of costs incurred as a result of the unacceptable conduct of Network Rail in causing this dispute; and

3.1.3 WCTL did not wish any other issues - such as the quantum of revenue losses or interest - to be determined by this ADA; WCTL was proposing that any necessary determination regarding these matters would be pursued separately following discussions between the Parties.

3.2 Network Rail's principal submissions were as follows:

3.2.1 Any agreement was not legally binding nor enforceable in law. Consideration from WCTL was absent because WCTL was already contractually and legally bound to operate the services which it did. WCTL was aware that NR's officers did not have

sufficient authority to bind NR (this contention about authority was made in NR's defence but withdrawn, for the purposes of this ADA, before the hearing). Further, WCTL was on the horns of a dilemma. Either the agreement was outside of the TAC, in which case neither Clause 4.2 of the TAC could apply nor could there be jurisdiction for an ADA. Alternatively, the agreement must be either a TAC or a variation to a TAC, in which case it was void because the necessary formalities for entering into or varying a TAC had not been followed. Finally, WCTL had applied illegitimate pressure and had itself not acted in good faith (by asking for compensation to fulfill existing obligations).

3.2.2 Network Rail's written submission sought a determination that:

3.2.2.1 dismisses WCTL's claim for compensation in respect of its alleged revenue losses; and

3.2.2.2 orders that WCTL pays Network Rail's costs in relation to the claim, this to be summarily assessed at the ADA.

4 Oral exchanges at the hearing

4.1 At the hearing the Parties' respective representatives orally provided further evidence and made a number of submissions and observations in the course of various exchanges. The substance of the points made is discussed below.

4.2 The main background facts were agreed. The Watford blockade for February 2015 had been long planned. There had been discussions which led to the Letter and there was no suggestion that the Letter did not reflect those discussions. The discussions were led respectively by Mr Gisby (NR's Managing Director, Network Operations) for NR and by Mr Bearpark (a statutory director) for WCTL. Mr Gisby has worked for NR (and its predecessors) since 1997 and has been a Board member since 2008. The Letter was written by Mr Syddall, NR's Interim Route Managing Director for the LNW Route. It was copied to NR's LNW Route Finance Director, to NR's Area Director South and (via a covering email) to NR's Route Contract Manager.

4.3 The parties also agreed the contractual position in relation to compensation to a TOC when there was a late cancellation of a RoU. The effect of the TAC (Schedule 4 - Section 3) is that a TOC can recover ' RoU Direct Costs' (as defined) but not (in these circumstances) Revenue Loss. This was known to NR and WCTL in February 2015, because it had happened on a previous occasion. In that instance WCTL's claim for revenue compensation had been (successfully) rejected.

4.4 Mr Bearpark made a written statement for this ADA. His written evidence related the telephone conversation leading to the Letter. The call of 4 February 2015 at 10 30 included Mr Gisby and Mr Syddall plus the Chiltern Railway's Operations Director and Mr Dean (NR's Director, Route Asset Management).

4.4.1 Mr Bearpark's statement says "The conversation moved to the mounting pressures on NR to provide a West Midlands - London passenger service during the 14/15 and 21/22 February weekends as both routes would be closed. Robin Gisby shared his intended decision to postpone the engineering works at Watford, consequently re-opening the WCML; he then asked if we were prepared to reinstate a train service over those two weekends. He went on to clearly state; it would be futile for NR to cancel the planned possession at Watford without Virgin Trains reinstating a service. I advised that we would review to what extent we could reinstate the service at such short notice.....I then went on to express clearly to Robin Gisby that the TAC would not cover us for any revenue losses of which I was not prepared to suffer should we accept NR's request to reinstate a full service. Robin Gisby agreed that this was equitable and mandated Jim Syddall to make contact with me and comprise a separate agreement outside the TAC."

4.4.2 The documentary evidence shows that Mr Bearpark sought and obtained advice within WCTL on the compensation provisions applicable when there is late cancellation of a

RoU. The reply - in an internal WCTL email dated 5 February 2015 - stated 'Basically the contract is clear in that, if we decide to operate a service after NR has cancelled a possession (RoU) it is considered that there wasn't an RoU in the first instance – thus no compensation payable for the services we operate. We can however recover costs that are committed, already incurred or likely to be incurred; but no delta in revenue'.

4.4.3 Mr Bearpark's statement continues " [on 5 February] Jim Syddall made contact and we discussed over the telephone the financial agreement I was looking for. Basically this held WCTL 'harmless' to any financial detriment to its business for reinstating a service late notice at NR's request (the words - "no net loss no net gain" were used) and guaranteed NR would not over-compensate WCTL for operating the service at short notice. A bespoke arrangement to this effect was drafted in the form of [the Letter]. On this promise and the signed letter issued by NR I instructed my team to reinstate the train service on a follow up (internal) teleconference at 12 00."

4.4.4 The correspondence also shows an email dated 10 February 2015 from Mr Bearpark to Mr Syddall in response to the Letter. It states 'Thanks for the attached letter. I can confirm that Virgin Trains are content with this approach'.

4.4.5 Mr Bearpark's oral evidence As a witness before the hearing, Mr Bearpark confirmed he was a statutory director of WCTL. He was asked to explain what action WCTL took in relation to the Harbury slip situation. He told the hearing that planning of train services is a complex and lengthy process, typically starting 5 or 6 months before the date and resulting in train services being published in the passenger timetable 12 weeks before the date to meet regulatory requirements.

In the Harbury case, the 12 weeks' notice timescale could not be met and in order to accede to NR's request to run services on the two weekends, WCTL was faced with a manpower challenge in undertaking the necessary train planning; resource issues because of traincrew staff expecting time off work because of the lower resource requirement of the published reduced service; issues with third party suppliers in that Alsthom and Bombardier were planning for more train units than usual to be available for maintenance and catering suppliers were expecting a lower level of activity.

4.4.6 Mr Bearpark was asked what WCTL would have done in the normal course under the TAC if it were not for the agreement in the Letter. He explained that:
"The thought did not occur at the time. A conference call was arranged with urgency by Robin Gisby of NR, with discussion prefaced with "Guys, I need your help". He asked what could be done if NR cancelled the Watford work. I said we would not want to lose revenue and this led straight to his offer of an agreement. Thinking about it now, we would otherwise have run a West Midlands service but Robin was very clear in the call - if we (NR) cancel the engineering works, we want a full WCTL service reinstated. Following the conference call, we got straight on with the necessary planning - we did not wait for the written agreement of the no net gain, no net loss arrangement."

4.4.7 Mr Bearpark was asked "When the need for service changes arises in emergencies, what would WCTL do normally? Would you "pull out all the stops" as has been reported in this case?" He replied "This case was about two particular weekends and we were already carrying Chiltern's customers displaced by the Harbury slip. In normal circumstances we would have tried to run West Midlands services as these were the customers who were being inconvenienced by the slip."

4.4.8 The Working Timetable It was put to Mr Bearpark that WCTL's obligation on cancellation of the RoU was to reinstate the services in the WTT. It subsequently appeared that NR was not relying on the WTT in its technical sense. The WTT for the relevant weekends was that which incorporated the (lack of) services due to the Watford blockade. Once the RoUs were lifted there was (as Mr Bearpark explained) no WTT. A replacement WTT was only finalised just before the first of the weekends and well after the Letter. The question then put to Mr Bearpark was to the effect "surely everyone knows what service normally runs so your target would then be a default back to that?" Such services would be, for example, set out in the passenger timetable

(the GBTT). Mr Bearpark's response was that the GBTT and the WTT are different creatures, every weekend is different and no weekend runs to the same timetable because of the volume of engineering works. Moreover any plans for those weekends would have to take into account other late changes to engineering work and services on the Network. Insofar as these points put to Mr Bearpark about the WTT were relied on by NR, they did not succeed. There was no WTT for WCTL to implement at the time of the Letter.

4.5 Evidence from NR Perhaps somewhat surprisingly, and disappointingly, there was no witness evidence from NR. This was despite the fact that it was NR's case that WCTL had wrongly refused to supply or reinstate train services. In an ADA the formalities about evidence are not as strict as might apply in some other, particularly court, settings. However, there was nothing either by way of oral testimony or in writing from any of those involved on behalf of NR at any stage setting out their version of events. Mr Stewart on behalf of NR made strenuous and valiant efforts to make the best of this, but in some respects he was trying to make bricks without straw.

4.5.1 There was therefore a serious gap in NR's case. NR, through Mr Stewart, contended that Mr Bearpark had made an outright refusal to reinstate train services and had applied illegitimate pressure. There were two big unanswered questions. The first was as to the evidence in support of that interpretation of events from NR witnesses. One would have expected at least someone who was present or party to say that that was what had happened and how they interpreted what Mr Bearpark said. Instead, Mr Stewart asked us to accept that the evidence of Mr Bearpark and of the documents should be interpreted in the way that NR contended, even without a witness contemporaneous to the events, saying that this was how it had been been interpreted at the time. Such evidence could have responded to the contemporaneous evidence that pointed in the opposite direction - for example to Mr Bearpark's description of having made his point about revenue compensation to Mr Gisby 'in a non threatening way and he (Mr Gisby) immediately agreed to address it'.

4.5.2 The second big unanswered question was why NR had not taken at the time the points that they now take. NR protested, loudly and clearly, that what Mr Bearpark was doing was applying illegitimate pressure and saying that WCTL would refuse to comply with its contractual obligations unless NR entered into a compensation agreement. If that were the case one would have expected NR to have said so at the time. The agreement was entered into orally by senior (indeed very senior) officials of NR and subsequently confirmed in writing and copied across senior NR officials. There were also opportunities after entry into the agreement for NR to take these points; it was accepted at the hearing on behalf of NR that the points now raised in these proceedings had not been raised until many months after the agreement had been made and after WCTL had provided the relevant train services.

4.5.3 It was said that NR accepted that it should have raised the points now made at the time and that, in effect, it was mistaken in not doing so. NR said at the hearing that NR was in a pressured situation and, with hindsight, NR should have said that this was not a *request* but that WCTL had *obligations* to do so. What has however not been supplied is any reason why it did not do so. At one stage WCTL suggested that this was because the arguments did not occur to the commercial principals of NR at the time in any event. This must remain a matter of speculation in the absence of direct evidence from NR. It was a surprising and disappointing omission that NR did not confront this issue by giving a proper explanation or evidence to this ADA of how it came to make what it now described as a mistake.

4.5.4 NR was also asked at the hearing when it had first taken the points now made at this hearing and whether it was only shortly before the commencement of the dispute process. NR's representatives were uncertain but acknowledged that it was not until after the WCTL letter of 15 July 2015. In fact the correspondence before the ADA included no correspondence from NR in response to WCTL's letter of 15 July 2015. There was a letter dated 3 September 2015 from WCTL 'in response to the Letter dated 6 February' setting out amounts claimed. There was no indication in that letter

that NR had by then indicated any intention not to abide by the terms of the Letter. I conclude therefore that NR did not, at any time in the period of around six months after the Letter, take the points that NR now takes, nor indicate that NR would not stand by the agreement contained in the Letter.

4.5.5 Moreover, NR did not explain when the 'mistake' was discovered nor why it took so long to convey NR's current position to WCTL. NR was asked whether there was a good reason why it took six months to realise the 'mistake'. NR could only say that it was accepted there had not been such discussion, but 'if it had gone through the relevant panel within NR it would have been picked up'. This is, of course, not a substantive answer to why it was not picked up by those officials (of which there were a number, mainly very senior) who did know about the Letter.

4.6 Witness evidence I should say what I made of the witness evidence. Mr Bearpark was the only witness to give a statement. He also attended the hearing to give and confirm his evidence. Much of his evidence as to the facts of what happened were not in dispute, although interpretations thereof and consequences were plainly potentially contentious. I found Mr Bearpark to be a straightforward, clear and helpful witness. He intended to assist the ADA by telling the truth to the best of his recollection. Whilst his evidence supported that of WCTL's case, Mr Bearpark was prepared to discuss in an open and constructive way (and if necessary concede) points that might be against WCTL's case.

In conclusion therefore I found Mr Bearpark's evidence to be honest, reliable and consistent. I accept his evidence as accurate.

4.6.1 In the context of personal credibility, I welcomed an observation from WCTL that it believed Messrs Gisby and Syddall of NR to be honest men whom WCTL would expect to conduct themselves with good faith.

4.7 The facts on the agreement I accept Mr Bearpark's version of the telephone call (the facts of which were not directly contradicted by NR). I find that the events happened as set out in Mr Bearpark's statement. A legal analysis of the effects of those facts is set out below, especially as to whether consideration was given and/or there was illegitimate pressure.

4.8 The facts as to reinstatement of services The evidence on behalf of WCTL (not challenged) was that WCTL, following the Letter, reinstated approximately 95% of the typical weekend services so as to run over the two relevant weekends in February 2015. Significantly the services reinstated were not limited to the West Midlands - London route; they also included services along the WCML between London and Glasgow/Liverpool/Manchester.

4.8.1 There was some dispute at the hearing about what had happened with other operators. The evidence on this was largely oral and not documented. NR contended that other operators, notably "London Midland", reinstated usual weekend services in full. Conversely WCTL stated that they knew of "no comparable examples of other TOCs offering similar levels of passenger services" in such circumstances - and that there are other occasions when, following a late cancellation of a ROU, either a limited service or no service at all have been provided. WCTL did not, however, give examples.

4.8.2 The difference between the parties is largely due to the word "comparable". This is because WCTL contended that the operation of services along the entire WCML is a very different and far more complex operation than that run by London Midland. WCTL also contended that factors for London Midland were very different; there was a suggestion that London Midland could get staff working on train services again comparatively easily because many had been rostered for training courses during those weekends.

4.8.3 For the purposes of this ADA I accept on the limited evidence that some other operators may well have reinstated a full service, equal to 100% of a normal weekend service. However it seems to me that such finding is of limited assistance. The circumstances of different TOCs, and the nature of the services they provide and the complexities and interactions with other parties are fundamentally different as between

different train operators. Accordingly what happened with other TOCs (although useful background) does not in itself establish that all TOCs were therefore obliged to provide the same percentage of services.

4.8.4 WCTL listed the actions it had taken (at comparatively short, just over one week's, notice) to reinstate such services. The items (which had best been summarised in NR's opening statement), included compressed timetable planning, enhanced payment rates for additional planning resources, and calling in driver and train staff, third-party contractors and suppliers. Those included caterers and the companies maintaining trains - who had thought they would have the opportunity to do much more maintenance/servicing than usual because of the availability of rolling stock due to the Watford blockade. Conversely NR say WCTL's actions and activities were not "out of the ordinary" nor beyond what WCTL should have been doing following the Harbury landslip. NR understandably contended that these are the type of activities that would need to be undertaken after the cancellation of any RoU. For some of these any extra direct costs would be recoverable by WCTL under the TAC.

5 Analysis and consideration of issues and submissions

5.1 The facts underlying this dispute are straightforward and described in paras. 1.2 to 1.6 above and as set out and considered in Section 4 above. The refusal of Network Rail to accept liability for paying compensation to WCTL on the terms set out in the Letter then becomes a matter of law. I have addressed the question of jurisdiction of this ADA as a preliminary in Section 2 above; it is now necessary to address other issues of law identified as relevant to this dispute.

5.2 Was there a contractually binding agreement?

5.2.1 The principal issue between the Parties was whether there was a contractually binding agreement. The classic statement of the requirements for a contract binding in law is that there has to be three elements: (a) agreement, (b) an intention to create legal relations, and (c) consideration. Each of those three requirements is then the subject of further detailed case law as to how those requirements are met. There are also other aspects of contract law that might render an otherwise legally binding contract void, voidable or unenforceable. Examples include the law relating to mistake, to duress, or those contracts requiring specific formalities.

5.2.2 Helpfully in this case the parties were clear as to what aspects were in dispute. WCTL contended that there was a fully binding contract; NR said that there was not, but only for the specific reasons set out (and which are dealt with in this determination). Notably NR did not dispute that an agreement had been reached, nor that there had been an intention to create legal relations.

5.3 Was there consideration given by WCTL?

5.3.1 The main argument between the parties related to whether WCTL had provided consideration. NR submitted that ' if a party performs an act which is merely discharging an existing obligation, that does not *constitute* consideration'. NR cited *Stilk v Myrick (*1809) 179 ER 1168, in which the captain of a ship promised to divide the wages of deserting crew members among the remaining crew members. However in that case the court held that the claim for the extra promised wages failed because that crew member only did what he was already bound to do.

5.3.2 Notwithstanding that the decision is over 200 years old, *Stilk v Myrick* remains good law. WCTL did not challenge the statement of law set out above. (In fact there have been some academic commentaries and some lines of case authority that may seem to diminish, at the fringes, the full rigour of *Stilk v Myrick.* For example in Chitty on Contract at paragraph 22–035 the reference to *Stilk v Myrick* is described as starting "a line of authority of respectable antiquity" but is followed by the comment "But a more liberal approach has been adopted in more recent cases and the courts have been

prepared to find consideration and enforce the agreement where it has conferred a practical benefit upon the promisor". At the hearing, and in response to a specific question, WCTL confirmed that it was accepted that this ADA should simply apply *Stilk v Myrick* as set out above).

5.3.3 The key issue then becomes whether WCTL did more than it was already contractually and legally bound to do. To determine this, the first step is to determine what WCTL's exisiting obligations were. NR submitted that 'the apparent failure by WCTL to appreciate the extent of its existing contractual obligations is at the heart of this dispute'. This echoed NR's criticism of Mr Bearpark's response to Mr Gisby's request to reinstate services.

5.3.4 It transpired that the Parties (broadly) agreed on which provisions applied; their main disagreement was as to what those provisions meant in practice.

5.3.5 NR relied on provisions in the TAC, to which both NR and WCTL were parties. By Clause 4.1 *'Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of its obligations under, this contract,* ***act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced ..... (b) train operator'*** (emphasis added by NR).

5.3.6 By Clause 6.1 (a) WCTL should '*maintain and operate the Specified Equipment used on the Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Routes in accordance with the Working Timetable..'*

5.3.7 WCTL acknowledged and accepted the existence of those provisions but pointed to the lack of an express obligation to operate the passenger services. In particular WCTL referred to Clause 2.9 (Changes to Restrictions of Use) which contains no express obligations stipulating the level of service to be provided following a change in a RoU.

5.3.8 NR also relied on the provisions of the FA, to which WCTL is a party but NR is not. WCTL did not seek to argue that, for the purposes of whether WCTL had provided consideration, there was any difference between WCTL's obligations under, respectively the TAC and the FA (other than to observe that NR was - in WCTL's view - wrongly interpreting an agreement to which it was not party).

5.3.9 The provisions in the FA relied on by NR were, first Clause 5.1 whereby WCTL was required to '*perform its obligations under this FA in accordance with its terms and* ***with that degree of skill, diligence, prudence and foresight which would be exercised by a skilled and experienced Train Operator of the Franchise'*** NR accepted and contended that this amounted to the same contractual duty to the DfT under the FA as to NR under the TAC.

5.3.10 NR also relied on Schedule 1.2 at Clause 8.1 which provides that *' in the event of any planned or unplanned disruption to railway passenger services operated on the Routes, or on other parts of the network which are reasonably local to the Routes, the Franchisee shall (b) co-operate with Network Rail and other Train Operators to act in the overall interests of passengers using such railway passenger services, including using all reasonable endeavours to ensure that such disruption is not concentrated on a particular part of the network, except where such concentration either (i) would be in the overall interests of passengers using such Passenger Services or railway passenger services and would not result in disproportionate inconvenience to any group of passengers ; or (ii) is reasonably necessary as a result of the cause or the location of the disruption'.*

5.3.11 More importantly the parties differed as to what this meant in practice. NR contended that the provisions of the TAC meant that it was incumbent on WCTL to reintroduce its normal service, so far as it was possible. By contrast WCTL contended that the

contractual obligation was mainly of 'reasonable measures' and that what WCTL provided went (well) beyond reasonable measures.

Interpretation of the TAC and FA provisions

5.3.12 There are a number of aspects to bear in mind in relation to the interpretation of the obligations owed by WCTL as set out above. First it remains important to apply the words themselves, rather than a précis thereof.

5.3.13 Secondly, the wording does not impose any absolute obligation to run all services, whatever the circumstances of a RoU cancellation. It is well established that neither a best endeavours nor a reasonable endeavours obligation gives rise to an absolute obligation, since, if that were the intention, the Parties would have agreed to include a more definitive term during the negotiations (see *Phillips Petroleum United Kingdom Ltd v Enron Europe Limited* [1997] CLC 329). This point also follows naturally from the wording of the TAC and the FA - the test is not by reference to any specific outcome; the wording focusses on "endeavours" and "efforts". (I do recognise that the TAC and FA are very detailed and complex documents which have been adopted by the ORR and DfT respectively for wide use within the rail industry. However, where substantial commercial organisations have adopted a document as the basis for a legal relationship, courts and others are entitled to assume the parties meant what they say in it.)

5.3.14 Thirdly, the obligations are largely expressed as "*reasonable* endeavours" (albeit that these are of a "skilled and diligent TOC" and there is also reference in the FA to "*all* reasonable endeavours"). This is to be contrasted with a "*best* endeavours" clause familiar in (some) commercial agreements. Whilst each clause must be interpreted on its own merits and wording, a "best endeavours" clause typically imposes a higher level of obligation than a "reasonable endeavours" clause. It is clear that a reasonable endeavours obligation is less onerous than that of best endeavours (see for example *Jolley v Carmel Ltd* [2000] 2 EGLR 154). A best endeavours obligation has been held to constitute an obligation to "leave no stone unturned"(*Sheffield District Railway Company Ltd V Great Central Railway Company* (1911) 27 TL 451). However in the Canadian summary of English and Canadian jurisprudence on "best endeavours" clauses it was also concluded "the meaning of "best endeavours" is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract overall purpose as reflected in its language" (see the judgment of Justice Dorgan of the British Columbia Supreme Court in *Atmospheric Diving Systems Inc.*) By contrast in relation to reasonable endeavours clause "all the relevant commercial criteria may be taken into account in determining what reasonable endeavours are e.g. costs uncertainties and practicalities relating to compliance" (*UBH (Mechanical Services) Ltd v Standard Life Assurance Co* The Times 13 November 1986 and *P&O Properties Ltd v Norwich Union Life Assurance Society* (1994) 68 P&CR 261).

5.3.15 Fourthly, WCTL's obligations must be viewed at their highest – some clauses may (in isolation) be less onerous than others. However, what needs to be considered is the totality (and high point) of WCTL's pre-existing obligations.

5.3.16 Fifthly and conversely, WCTL only needs to show that it has gone *by some degree* beyond its existing obligations. In contract law, consideration needs to be present but does not need to be adequate. The main test for the courts in determining whether there is consideration is to be satisfied that there is *some* consideration, not whether the parties have made a good or bad bargain. As WCTL contended therefore, the provision of consideration worth only one pound beyond existing contractual obligations would be sufficient consideration. Chitty on Contract at Chapter 3 (Consideration) 3–014 states "Courts generally will not judge adequacy. Under the doctrine of consideration, a promise has no contractual force unless some value has been given for it. But as a general rule courts do not concern themselves with the question whether adequate consideration has been given".

5.3.17 Sixthly, there is the 'all reasonable endeavours' provision in Clause 8.1 of Schedule 1.2 of the FA. The courts have not found interpretation of such 'all reasonable endeavours' provisions to be straightforward. They are fact specific, as are other obligations qualified by a phrase including the word 'reasonable'. Some have considered it over-simplistic to position 'all reasonable endeavours' as simply somewhere between 'reasonable endeavours' and 'best endeavours'. Some have thought that 'all reasonable endeavours' may in some circumstances approach or even be equal to a 'best endeavours' obligation. Two points arise; first the use of this different phrase implies a different level of obligation and one that has not been chosen for the other obligations listed above. Secondly, the ambit of the obligation; it is within the context a duty to 'cooperate' with NR and other TOCs in the event of disruption 'in the overall interests of passengers'. The 'all reasonable endeavours' part of the obligation is then 'to ensure that such disruption is not concentrated on a particular part of the network'. This sounds far more like, in these circumstances, ensuring that West Midlands services run so as to ameliorate the effect of the Harbury slip blocking the Chiltern route than an obligation to reinstate every service on the WCML. Moreover, if that had been the intent of the obligation, far more simple and express words could have been used.

5.3.18 Finally, there are the contemporaneous actions of the Parties. WCTL's actions were consistent with their contractual interpretation. By contrast NR's actions did not appear consistent with an understanding that WCTL was already bound. According to Mr Bearpark, whose evidence I accept, Mr Gisby asked for help. There was no need to ask for help if NR could simply have insisted that WCTL carry out existing contractual obligations. When asked by WCTL for revenue compensation NR appear to have agreed without demur and not taken any point that WCTL was already so obliged. Further the terms of the Letter included "Thanks for your *positive* response.." (emphasis added) and "I appreciate the effort you and your team are putting into re-introducing your services". Whilst it is possible (and may well be courteous) to thank someone for doing only what they should or must do in any event, it is a strange response by NR, compared to its position in these proceedings. There were also NR's contemporaneous public statements. These included Network Rail's press release of 6 February 2015 which stated 'Train companies on the route are currently looking at what services can be reinstated at such short notice. Special timetables for these weekends will be published by individual train companies over the coming days..' Conversely Mr Bearpark's public statement alongside that of NR said "We are working very hard with Network Rail and other train operators to put in place a timetable that makes best use of the space now available...But we are reacting to fast moving events and I would ask that customers bear with us over the next few days as we clarify details of which trains will be available".

Application to the facts

5.3.19 So, drawing together the principal points above and applying them to the facts, what was the extent of WCTL's obligations in relation to the reinstatement of services on the relevant February weekends *as at the time immediately before the making of the agreement?* The first important point is that the obligation was not drafted as an absolute obligation. Secondly it was not drafted at the highest level that a qualified obligation could have been (it did not use phrases such as "best endeavours" when it could have done). Thirdly the extent of the obligation was very fact specific; it was to be determined by what is 'reasonable' - the courts have held that this means looking at the particular circumstances at the time including the situation is which the obliged party finds itself. Fourthly and most importantly, the full extent of the facts were not known at that stage. No one had envisaged the February 2015 weekend services having to be reinstated. Mr Bearpark's evidence is that he had not thought about it by the time of the call. NR knew even less about what was practically achievable than did WCTL; what could be achieved in practice depended on a whole matrix of facts most of which were the subject of arrangements that WCTL had made or would have to make. In the call Mr Bearpark said that WCTL "would review to what extent we could reinstate the service at such short notice."

5.3.20 Consequently, there was uncertainty (perhaps considerable uncertainty) about both the practical factual situation as to what services could be reinstated and therefore also the practical effect of the legal obligations upon WCTL. This is also demonstrated in the public statements of NR and WCTL on 6 February 2015 – neither knew exactly what services could or would be provided.

5.3.21 The verbal agreement and the Letter did two important things; first WCTL in effect agreed not to rely on any limitations in the TAC and FA on its obligations. This is a point made at 5.7 of WCTL's Statement of Claim – the parties agreed in this one-off set of circumstances not to rely on all of their respective rights under the TAC; WCTL could have relied on the terms of the TAC as to what services should be run, consistent with those obligations. Secondly the effect was to remove any uncertainty as to what WCTL would be setting out to achieve and also this in itself was valuable; WCTL was indicating that it would not subsequently use those contractual provisions to undermine the intent of operating a full WCML service. This was a considerable benefit to NR which now could and did make public pronouncements and full plans on that basis. NR also knew that WCTL would not (and would no longer have any reason to) take points about the commercial aspects of "reasonable endeavours" or "all reasonable endeavours" because WCTL would now be covered for the consequences of revenue losses by virtue of the terms of the Letter.

5.3.22 I conclude that WCTL's agreement in the telephone call and Letter (which amounted to giving up any issues or legal arguments arising from the TAC and FA) constituted valuable consideration. It was a concession by WCTL; on the facts it was seen as such at the time, as indicated by the correspondence and the terms of the telephone call. NR was at the time indicating by its behaviour that it had both received something of value and that WCTL had given something that contributed to that. I conclude that NR was right to do so; the important things that it had achieved included certainty, clarity and entitlement as to WCTL's unfettered intent and commitment. Conversely WCTL had given up something, which was the right to refuse to reinstate services save as insofar as WCTL was already under obligation to do so (the precise extent of which could only really be determined after fully detailed analysis of the factual situation, practical difficulties and methods of overcoming problems).

5.3.23 The conclusion in the previous paragraph is sufficient to establish that WCTL gave consideration. However it may also be useful to set out some conclusions on the actual obligations of WCTL at the time. So what would have happened in practice if the agreement had not been entered into and WCTL had complied with its obligations? The first and most important point is that the evidence on this is inevitably limited. WCTL (and NR) did not have to confront the issue at the time because the agreement was entered into. Secondly, no one had to consider the issue of what additional steps beyond its contractual obligations WCTL was undertaking, nor preserve any evidence about it, because it was thought that the agreement set out in the Letter would operate. This only became a point on which evidence might be needed some six months or so after the events to which it relates. Mr Bearpark's evidence was "thinking about it now, we would otherwise have run a West Midlands service". He also said "in normal circumstances we would have tried to run West Midlands services as these were the customers who were being inconvenienced by the slip".

5.3.24 It seems to me that there is considerable force in Mr Bearpark's after the event views on this. The most obvious and practical consideration at the time is that otherwise both the Chiltern and Virgin (WCTL) services between London and Birmingham would have been unavailable at the same time. There was obvious huge practical sense in focusing on the West Midlands service. Similarly the contractual obligation contained in Clause 8.1 of Schedule 1.2 of the FA would have made parties focus on the West Midlands service. That obligation includes the phrase "Using all reasonable endeavours to ensure that such disruption is not concentrated on a particular part of the network". On the limited evidence available it seems to me and on the balance of probabilities, that WCTL would have been obliged to operate as full a West Midlands service as possible. This would have been for both practical and contractual reasons;

both common sense and the FA would point toward first resolving and establishing a West Midlands service.

5.3.25 The position is different and far less certain in terms of the remainder of the WCML. Again the evidence is limited and I take into account the fact that other operators may have operated a full service. But on balance I accept the thrust of Mr Bearpark's evidence that there was a whole series of practical considerations to overcome in running a full WCML service. This also coincides with what NR and WCTL were saying publicly on 6 February 2015. The challenges were beyond those such as might well be fully overcome by efforts only in accordance with the TAC and FA obligations. Whilst there is only evidence of the category of a challenge which would have to be (and was) overcome, on a common sense basis those challenges were obviously very considerable. In many cases this is likely to result in companies in the position of WCTL having to go beyond ordinary or reasonable steps and 'pulling out all the stops' or 'leaving no stone unturned'. This will also be against the backdrop that the priority for WCTL would have been the West Midlands services.

5.3.26 I therefore conclude, on the balance of probabilities and on the evidence available, that if assessment had been made in February 2015 of the extent of WCTL's obligations to run WCML services, it would have transpired to have been somewhat less than the 95% of services that did run.

5.3.27 I therefore conclude that WCTL did provide valuable consideration for the 6 February 2015 agreement. It did so in what can be viewed in two alternative ways, either of which on its own would be sufficient for WCTL's case to succeed. These are respectively by (a) agreeing not to rely on its existing contractual position (and thereby removing much uncertainty) and (b) by running more services than it would actually have been obliged to.

5.4 Did Network Rail's representative have the necessary authority?

5.4.1 In its written submissions to the hearing, Network Rail sought to assert that its (Interim) Route Managing Director did not have authority to commit the company in the terms expressed in the Letter and that WCTL would be aware of this lack of authority due to previous experience with issues involving internal Network Rail decision-making committees (the Route Claims Panel and Commercial Claims Group) as long ago as 2010.

5.4.2 This point regarding authority raised issues of law both as to the general law of usual, apparent and ostensible authority and as regards sections 39 and 40 of the Companies Act 2006. NR's argument on this issue was unattractive. It proceeds on the basis that an internal restriction on authority of a senior NR official not mentioned by (and presumably therefore also not known or appreciated by) that relevant senior NR official should have been known by parties external to NR, such that those external parties should not have relied on what the senior NR official said and wrote. Network Rail appeared to expect WCTL to assume that personal delegated authorities within Network Rail had not changed even with the accelerating pace of devolution (and contrary to public relations information circulated by Network Rail itself).

5.4.3 One week before the hearing Network Rail withdrew its assertion regarding the authority point and it forms no part of this determination. I would comment, however, that the party best placed to set out the level of authority and internal restriction is the party that imposes that limitation. If a contractual agreement is subject to authorization elsewhere in the organization, then the relevant letter/offer/conversation should say so. It would have been easy for the Letter to have said " this Proposal is subject to authorization by..." . That would be a far more helpful process than was adopted here. I would urge parties, and Network Rail in particular, to be clear, open and fair with others when there are internal restrictions on authority levels which may (or may not) be known by others.

5.5 Was there an equitable agreement based on estoppel?

5.5.1 This was included in the list of legal issues because NR interpreted some statements in WCTL's material as (possibly) raising an argument that there was an equitable agreement based on estoppel. As explained in Chitty on Contract at 3-013, certain promises that do not have contractual effect due to a lack of consideration may still have some other limited legal effects. One example is promissory estoppel, which is a legal concept from the law of equity. WCTL confirmed at the hearing that it did not intend to raise or pursue such an argument.

5.6 Did WCTL apply illegitimate pressure?

5.6.1 NR alleged (in various different ways) that WCTL had applied illegitimate pressure in asking for compensation (to run services) to which it was not entitled. Particular exception was taken to Mr Bearpark's statement 'I expressed clearly to NR that the TAC would not cover us for any revenue losses and I was not prepared to suffer should we accept NR's request to reinstate a full service'.

5.6.2 This allegation fails. Firstly and importantly - and contrary to NR's case - I have already concluded above that WCTL did provide consideration. WCTL was therefore entitled to ask for an agreement about provision of that additional consideration. Whilst it was clear that NR (and others) were under pressure, it was not illegitimate to enter into commercial negotiations about the terms on which services would be provided.

5.6.3 Secondly, there is no evidence as to the fact or effect of the alleged "pressure". There is no witness evidence from NR as to the alleged pressure. The contemporaneous evidence points to an absence of pressure ("thanks for your *positive* response. I appreciate the effort..." The evidence from Mr Bearpark, which I accept, and the terms of the Letter (expressing thanks for a "positive response") together with other contemporaneous evidence suggest (and I find) that there was no such illegitimate pressure applied. What happened was that WCTL asked for compensation on a "no net loss and no net gain basis' and NR agreed to give it, without NR saying either that WCTL was already under such obligation or that illegitimate pressure was being applied.

5.6.4 Thirdly, the legal requirements for rendering an agreement void for economic duress are onerous and the evidence provided to this ADA falls very far short of establishing it.

5.7 Good faith

5.7.1 By Clause 4.2 of the TAC "the parties to this contract shall, in exercising their respective rights and complying with their respective obligations under this contract (including when conducting any discussions or negotiations arising out of the application of any provisions of this contract or exercising any discretion under them), at all times act in good faith". The Letter arose when 'conducting discussions or negotiations which arise out of the application of the provisions of the TAC'. Accordingly I conclude that both parties are subject to the obligation of good faith in relation to the Letter.

5.7.2. The obligation to act in good faith requires the parties to (inter alia) "observe reasonable commercial standards of fair dealing". This is established by the cases cited by WCTL. These were *Berkeley Community Villages Ltd and Anor v F Pullen and Anor [2007] 1330 Ch*, (of which I found paragraphs 86-98 particularly helpful) and *CPC Group Ltd v Qatari Real Estate Investment Company[2010] EWHC 1535* (see the analysis at paragraph 237 – 248).

5.7.3 The obligation to observe reasonable commercial standards of fair dealing should mean that agreements are adhered to, especially when they are legally binding. NR submitted, and I accept, that not every breach of a binding agreement amounts to bad faith; the consequence would be that a genuine dispute over subsequent events,

properly conducted, could result in the unsuccessful party being found to have acted in bad faith.

5.7.4 However, that is not what happened in this case. Here the Parties entered into an agreement that was confirmed in writing (and, as I have found, without illegitimate pressure). Subsequently, however, NR has sought to go back on and deny the validity of the agreement on grounds (principally consideration) that have failed and which could and should have been mentioned before the agreement was entered into and (on WCTL's part) performed. That point was not taken until some 6 months later when WCTL submitted its claim.

5.7.5 As WCTL submit, if NR at the time knew that WCTL was not giving consideration and NR had no intention of fulfilling its part of the agreement, then that would clearly constitute bad faith. Fortunately WCTL did not urge that finding on this ADA.

5.7.6 However, that still leaves unexplained by NR why it did not say this ("you already are obliged to run the services") at the time and instead of entering into the agreement. (WCTL submitted that a possible reason was that the point about consideration (and authority) had simply not occurred to the commercial principals at the time and the point is the product of legal advice about the claim after NR got " cold feet" about the agreement. I make no finding about this).

5.7.7 NR voluntarily entered into the agreement, which I have concluded is enforceable - because NR's points of defence fail. In addition NR waited until (long) after the agreement had been performed by WCTL before refusing to honour the agreement. NR did so by taking points which could (and should) have been mentioned before the contract was entered into. This seems to me to be a breach of reasonable commercial standards; there is a breach of "reasonable commercial fair dealing". Therefore NR is in breach of the obligation of good faith in Clause 4.2 of the TAC.

5.7.8 NR also submitted that WCTL was in breach of its own obligation to act in good faith, for reasons similar to those relating to illegitimate pressure (above). That allegation fails, for reasons similar to those relating to illegitimate pressure.

5.8 Remedy

5.8.1 Both parties indicated a wish to be awarded costs in the event of its position being supported by this ADA determination.

5.8.2 Rule G55 states that

"An order for costs may only be made where the Hearing Chair is satisfied that either

(a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or

(b) the conduct of the relevant Dispute Party before or during the references was such as to justify an award of costs being made against it (or them)."

5.8.3 At the hearing the Parties were invited to, and agreed to, defer submissions on costs until the determination and its terms were available to them. However it is to be noted that costs do not simply follow the event but are only to be awarded in the circumstances set out in Rule G55 above. The bar for awarding costs is therefore set at a high level. If either Party wishes to pursue an application on the principle of an order for costs then written submissions should be made within 21 days of the date of this determination, with a right of reply in writing within 14 days thereafter. Any such application for costs will be dealt with on the papers and a Schedule of Costs is not required at this stage.

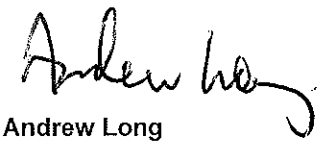
6 Determination

Having considered carefully the submissions and evidence as set out in sections 3 and 4, and based on my analysis of the legal and contractual issues as set out in section 5,

I DETERMINE that:

6.1 there is a legally binding and enforceable agreement between the Parties as evidenced by the 6 February 2015 letter. Network Rail should pay compensation pursuant to that agreement and pursuant to the obligation of good faith within the Track Access Contract.

I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Andrew Long
Hearing Chair

10 March 2016

ANNEX "A"

Network Rail's letter to WCTL dated 6 February 2015 - the "6 February letter"

Phil Bearpark
Director, Operations & Customer Services
Virgin Trains
Meridian House
Smallbrook Queensway
BIRMINGHAM

6th February 2015

Network Rail
11th Floor
The Mailbox
100 Wharfside Street
Birmingham B1 1RT

Tel: 0121 345 3086

Dear Phil

Watford Blockade Cancellation

Thanks for your positive response to cancelling the two February Watford weekend blockades. I appreciate the effort you and your team are putting into re-introducing your services.

As discussed we would prefer to reimburse you for the difference between the average revenue per day for this time of the year and the amount of actual revenue you take on the day. This would be adjusted for growth over the period, effect of half term holidays and any other pertinent factors that would have an impact on the calculation of the average revenue.

There are also associated abortive costs that we would pay on the basis of actual cost incurred and evidenced and we would also be prepared to pay reasonable advertising costs incurred, associated with notifying customers of the revised service arrangements.

I trust this is acceptable to you.

Yours sincerely

Jim Syddall

Jim Syddall
Interim Route Managing Director,
London North Western

cc: Debbie Francis, LNW Route Finance Director
Terry Strickland, Area Director South