ACCESS DISPUTE ADJUDICATION

Determination in respect of Dispute ADA30

Hearing held at 1 Eversholt Street, London NW1 on Wednesday 13 July 2016

Present:

The appointed Adjudication Panel (the "Panel"):

Hearing Chair:	Peter Barber
Industry Advisors:	John Boon Robert Howes

Dispute Parties:

GB Railfreight Ltd ("**GBRf**")

Ian Kapur	National Access Manager

DB Cargo (UK) Ltd ("**DBC**")

Nigel Oatway	Access Manager

Network Rail Infrastructure Limited ("**Network Rail**")

Angela Berrisford	Sponsor
Spencer Gibbens	Principal Sponsor - Route Investment
Thomas Bacon	Project Manager
David McMahon	Programme Manager
Nick Coles	Customer Relationship Executive (GBRf)
Martin Hunt	Senior Route Freight Manager
Clare Dwyer	Legal Director, Addleshaw Goddard LLP, solicitors

Interested Parties:

Freightliner Ltd ("**FL**"), Freightliner Heavy Haul Ltd ("**FLHH**") (together "**Freightliner**")

Jason Bird	Track Access Manager, Freightliner Ltd

East Midlands Trains Ltd ("**EMT**")

Lanita Masi	Track Access & Network Change Manager

XC Trains Ltd ("**XCT**")

Richard Thackray	Head of Timetabling & Diagramming

In attendance:

Tony Skilton	Secretary, Access Disputes Committee ("**ADC**")

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1. INTRODUCTION, SUBSTANCE OF THE DISPUTE AND JURISDICTION

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

"**ADA**" means an Access Dispute Adjudication in accordance with the ADRR.

"**ADRR**" means the Access Dispute Resolution Rules (edition dated 23 September 2015), and references to a "**Rule**" or "**Rules**" are to an individual rule or rules of the ADRR.

"**Claimants**" means GBRf and DBC, each a "**Claimant**".

"**DfT**" means the Department for Transport.

"**ORR**" means the Office of Rail and Road (formerly the Office of Rail Regulation).

"**Parties**" means the Dispute Parties and the Interested parties.

"**Transcript**" means the official transcript taken of the proceedings at the Hearing of this dispute - incorporating all oral statements of the Parties and the oral exchanges between the Panel and the Parties, and in a form approved by the Panel and the Dispute Parties - which is provided as an Appendix to this determination.

1.2 This dispute arises out of the failure of Network Rail to comply with, and in particular to carry out specific remedies as directed in, the determination of the Access Dispute Adjudication registered as ADA17, in respect of which I was the Hearing Chair. The dispute in ADA17 concerned the "Clay Cross Down Loop", also referred to as the "Down Goods Loop", as more specifically defined at paragraph 1.4.1 of the ADA17 determination (the "**Loop**"). In ADA17 the claimant was Network Rail; the defendants were the Claimants in the present dispute together with Freightliner. The Hearing of ADA17 took place on 17 October 2013; following the provision of further information by and discussions between its dispute parties, I issued a Summary of Decisions on 15 November 2013 and issued my final written determination on 3 January 2014.

1.3 The ADA17 determination held that Network Rail was not entitled to remove but, in breach of Network Code Condition G10.3.1, had actually implemented the removal of the Loop from the Network in May 2013, by carrying out what Network Rail had referred to as "Stageworks" comprising the physical disconnection and removal of the points (i.e. the cutting out of the switches and crossings and replacing them with

plain track) on the main line at either end of the Loop (the "**Implementation Stageworks**"). Contrary to its original contention in ADA17, Network Rail had eventually conceded that the Implementation Stageworks did amount to the physical and technical "removal" of the Loop from the Network, rather than merely putting it temporarily "out of use", notwithstanding that the track of the Loop itself and the signalling for it remained in place.

1.4 The Implementation Stageworks had been carried out by Network Rail in connection with an improvement scheme designed to increase line speeds along a 110 mile length of the "Midland Main Line" which runs from London (St Pancras International) to Sheffield ("**MML**"), in respect of which scheme Network Rail had issued a Network Change proposal dated 25 January 2013 setting out all the changes envisaged (the "**MML Network Change**"), including the removal of the Loop, but had not yet (as at the time of the Implementation Stageworks) duly established the MML Network Change.

1.4 The ADA17 determination also held that Network Rail was not entitled to and, subject to paragraph 7.5 of that determination (as set out below, envisaging a possible distinct new Network Change proposal just for the Loop), should not take any further action, beyond the Implementation Stageworks by then already physically carried out and completed, to dismantle the Loop or render it unusable or otherwise such as to preclude its future reinstatement and reconnection to the Network. This was considered a worthwhile direction because Network Rail had confirmed that the Implementation Stageworks had been planned and limited specifically with the intention of being compatible with either of the then possible outcomes of the MML Network Change proposal, namely whether completing its establishment and leaving the Loop removed, or failing to establish it and therefore having to reinstate the Loop. Although, Network Rail had said in ADA17, there had been a physical change to the rails at the points of connection, the necessary signalling was still available and the Loop could easily be reconnected if the switches and crossings were replaced.

1.5 The ADA17 determination directed the following specific remedies in relation to the situation concerning the Loop:

1.5.1 At paragraph 7.3: "Network Rail is required, and is permitted specifically pursuant to this decision, to withdraw completely and exclude from the MML Network Change proposal the removal of the Loop from the Network. Such withdrawal and exclusion shall not prejudice or affect Network Rail's entitlement, subject to and in accordance with the procedures prescribed in Network Code Part G, to maintain the rest of the MML Network Change proposal apart from the removal of the Loop and at any time to

establish and implement the whole or any part of the rest of the MML Network Change."

1.5.2 At paragraph 7.4: "Subject to paragraph 7.5 below Network Rail is required to reinstate and reconnect to the Network the Loop in its full length (as now made known and confirmed at the Hearing) of 649 metres and in a form at least equivalent to the physical form and layout in which it stood immediately prior to the Implementation Stageworks, and otherwise is permitted specifically pursuant to this decision to reinstate the Loop in its modern equivalent form at the time of reinstatement, in either case without being obliged to establish or implement a new Network Change solely in respect of such reinstatement and reconnection."

1.5.3 At paragraph 7.5: "Any such reinstatement and reconnection shall be commenced and completed prior to the date of commencement of the Timetable coming into effect in December 2014, and Network Rail shall observe all such procedures and take all such actions as are required of or permitted to it under the Network Code and any relevant Track Access Agreement in order reasonably to enable or facilitate such reinstatement and reconnection, unless prior to such date Network Rail shall have duly established and implemented in accordance with Network Code Part G a new Network Change, distinct from the MML Network Change, consisting solely of or comprising the removal of the Loop."

1.6 Neither Network Rail nor any of the defendants appealed the ADA17 determination. Network Rail thereafter maintained and duly proceeded to establish and implement the rest of the MML Network Change apart from the removal of the Loop which had already been effected in practice. Network Rail took no steps, however, towards establishing a new distinct Network Change for removal of the Loop.

1.7 Following issue of the ADA17 determination, in the course of and notwithstanding an extensive sequence of communications and discussions between Network Rail and the ADA17 defendants addressing various proposals from Network Rail for deferment or postponement of reinstatement, it became evident to the Claimants that Network Rail did not intend to reinstate the Loop nor otherwise comply with that determination, nor did Network Rail in fact reinstate the Loop or otherwise take any steps so to comply, first in 2014, then in 2015, and then in the first quarter of 2016. On 6 April 2016 GBRf wrote to ORR noting that, despite Network Rail over a long period having been suggesting plans for reconnection of the Loop, in fact it had still not carried out work in accordance with the ADA17 directions, and that at a recent East Midlands Route Schemes Review meeting Network Rail

had actually stated that it had no money allocated to the reconnection of the Loop and that it did not wish to carry out the work. GBRf requested ORR's advice on how it should proceed further in these circumstances, noting that at the same time it was instituting a new ADA to try to find out why Network Rail had not carried out the ADA17 directions, which it had not appealed. ORR apparently did not reply to GBRf's enquiry.

1.8 Rule G51 states "If a Dispute Party fails to comply with the terms of the determination, that failure will be dealt with by way of a new dispute through the appropriate mechanism." GBRf accordingly instituted the present dispute on 6 April 2016 as a new dispute by reference to Rule G51. DBC subsequently joined the dispute as a Claimant.

1.9 I am satisfied that the matter in dispute raises an issue which may properly be heard and determined by an ADA duly convened in accordance with Chapter G of the ADRR to hear a dispute pursuant to Rule G51, the ADA forum having been chosen by the Dispute Parties from amongst those available under the ADRR and a Procedure Agreement having been entered into accordingly.

1.10 In its consideration of the Parties' documents and submissions and at the Hearing of the dispute the Panel has been mindful that, as provided for in Rule A5, "each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

2 HISTORY OF THIS DISPUTE PROCESS AND DOCUMENTS SUBMITTED

2.1 GBRf constituted the present dispute with ADC by notice dated 6 April 2016 requesting that it be referred to an ADA for determination. Following various exchanges between the ADC Secretary, Network Rail and GBRf, a Procedure Agreement effectively dated as of 21 April 2016 was entered into between GBRf and Network Rail agreeing that the determination procedure would be an ADA in the first instance, and the dispute was registered as ADA30.

2.2 During the course of finalising the Procedure Agreement, the ADC Secretary wrote to ORR on behalf of the Dispute Parties requesting that ORR should confirm the issues (including matters about funding and also possibly of a regulatory nature) which might potentially arise in the course of this ADA as constituting "exceptional circumstances" for the purposes of Rule B11(c), making it appropriate for any eventual appeal to be heard by ORR rather than default to arbitration. ORR responded that after due consideration it had concluded that the dispute did not raise any "exceptional circumstances" that would merit ORR taking on the role of appeal forum in this situation. Accordingly, any appeal against this determination must proceed by way of arbitration in

accordance with the Rules, unless ORR is persuaded to revise its conclusion.

2.3 Having been informed of the dispute, in accordance with Rule G17 DBC on 23 May 2016 notified its request to become a Claimant in the dispute. FL, FLHH, EMT, XCT and Arriva Rail North Ltd ("**ARN**") subsequently notified their requests to become Interested parties in the dispute.

2.4 In accordance with Rule G16 and within the time limits set by the ADC Secretary with my concurrence, GBRf and DBC served their respective statements of claim, Network Rail served its statement of defence and GBRf and DBC then served their respective replies to the defence. Network Rail was the only Dispute Party subsequently to take the opportunity to serve further written submissions prior to the Hearing pursuant to Rule G16(g), which in some significant respects modified the propositions in its statement of defence.

2.5 Whilst maintaining its right generally to contest the Claimants' reference of the matter to dispute, Network Rail proposed within both its statement of defence and, in somewhat different terms, its further written submissions under Rule G16(g), a process for reinstating the Loop. On the day before its statement of defence was due to be served, Network Rail had requested of ADC an extension of time for service, stating its hopes of embarking on discussions with the Claimants concerning a newly offered reinstatement process and of persuading the Claimants to withdraw the dispute in the light of this; the Claimants however had indicated to ADC that they wished to be able to serve a reply to the Defence within the required time and would not in any event agree to withdraw the dispute as they would not at this stage be content with a bare promise from Network Rail to reinstate the Loop, especially in view of Network Rail's internal process hurdles now being raised which the Claimants considered should have been pursued promptly following the original ADA17 decision. I had accordingly rejected Network Rail's request for an extension on the grounds that it was not justified by the circumstances.

2.6 In accordance with Rule G9(c), following receipt of all final further written pre-hearing submissions I reviewed the dispute to identify and itemise in written form for consideration by the ADA all relevant issues of law raised by the dispute and a copy was provided to the Dispute Parties on 8 July 2016. I stated that I considered the following issues of law to arise out of this dispute:

2.6.1 Enforcement: What are the legal consequences of failure (whether voluntary or not) by a party, subject to the jurisdiction of the ADRR contractual dispute resolution process, to implement or comply with a determination duly resulting from that process.

What legal mechanisms or sanctions for enforcement are available, in principle and in practice, either at the suit of a party affected by the failure or otherwise in order to maintain the validity and efficacy of the ADRR dispute resolution process.

2.6.2 Remedy: Where such a failure to implement a determination is acknowledged by the defaulting party (or otherwise conclusively determined to have occurred), what remedies are available of either an injunctive or a financial nature. In the case of injunctive remedies, what (if any) constraints are applicable, whether practical, fiscal or legal? In the case of financial remedies, the same issue as to constraints arises, plus whether there is scope under the process for deterrent as well as compensatory awards.

2.6.3 Remedy: Where the defaulting party proposes its own remedy which in time (inevitably), scope or substance falls short of implementing the original determination, what tests are appropriate to be applied of practicality, financial effect, internal regulation and external impact?

Also on 8 July 2016, under the terms of Rules A9 and A10, Network Rail was required to provide at the Hearing a timeline document setting out what it asserted to be the key critical path items for delivering its lately offered reinstatement process. Additionally, the three Dispute Parties were all required to attend the Hearing with any other available material which supported their arguments regarding the issues raised in relation to the now proposed process of reinstatement.

2.7 The Hearing of this dispute took place on 13 July 2016, when all the Dispute Parties were represented. Apart from ARN, all the Interested parties were also represented. The Dispute Parties each provided written opening statements and also delivered them orally; the written versions are included in the documents published together with this determination as listed below, and the oral statements are incorporated within the Transcript. Network Rail's external legal adviser (Ms Dwyer) provided a helpful separate written statement of opening submissions on the issues of law I had identified as raised by the dispute, and also delivered this orally; these written and oral submissions also are respectively included in the separately published documents and incorporated in the Transcript. Network Rail also produced at the start of the Hearing the timeline document required of it entitled "Reinstatement and Reconnection of the Loop"; this stated its aim as being to provide detailed information as to the timetable for its offered reinstatement process, citing key items along the critical path, and it included photographs of the Loop. The Dispute Parties were then questioned by the Panel and the Interested parties present were also given opportunities to comment. At the conclusion of these oral exchanges the Dispute Parties and the Interested parties present were

each invited to make a closing statement; no further written statements were produced but they all took the opportunity to deliver extempore some final remarks, which are also incorporated within the Transcript.

2.8 As previously noted, Network Rail's successive statements of case and further written submissions, followed by its responses during the oral exchanges at the Hearing, had demonstrated to a greater or lesser degree some recognition of its general failure to fulfil its obligations under the ADA17 determination and had asserted an intention in principle at least to reinstate the Loop in some form and in due course, albeit in an extended timescale maintained as necessary to be consistent with Network Rail's internal funding and other required processes and taking into account Network Rail's perception of the best interests of the railway industry as a whole and not just the contractual interests of the Claimants. Since by definition no reinstatement could now be achieved fully in accordance with ADA17, the original prescribed time for reinstatement being already some two years past, discussion in the oral exchanges on the appropriate practical remedies had centred not on the principle but on the genuine practical, fiscal and legal constraints governing, and the otherwise acceptable details of, the new process, timing, format and layout of reinstatement of the Loop now to be required of Network Rail (collectively the "**Reinstatement Issue**"), with successive indications having been given that it might prove possible for the Dispute Parties to reach agreement on the Reinstatement Issue in the course of further discussions, at first during and thereafter following the Hearing. This significant possibility of eventual agreement, therefore, had given rise to several requirements for further information to be provided and responded to by the Dispute Parties following the Hearing.

2.9 Consequently at the end of the Hearing we revisited, listed and set timescales for the production by the Dispute Parties of the various further items of information and documents which had emerged as required in the course of the previous oral exchanges. These comprised: (a) specific material referred to by Network Rail to assist the Panel's understanding of Network Rail's claimed reclassification of its legal status in September 2014 to a public body amenable to judicial review; (b) any relevant Group Standard informing Network Rail's internal Standard stated to govern the resignalling of the Loop; (c) a written itemisation of the Claimants' specific requirements of Network Rail's claimed as necessary in order to enable a sufficient independent technical assessment to substantiate Network Rail's asserted irreducible minimum constraints and target timescale for the Reinstatement Issue, such requirements to include (at the Panel's request) a diagrammatic representation of Network Rail's proposed critical path; (d) Network Rail's response to the Claimants' such requirements; and (e) the Claimants' analysis and assessment of that response. All these further documents and materials were duly

provided by the Dispute Parties respectively responsible for them in accordance with the timetable set at the Hearing for their provision.

2.10 In anticipation of the further information required and consequent potential agreement on the Reinstatement Issue, I was unable to indicate my view in principle on that issue at the close of the Hearing as I would normally have wished to do. In those circumstances I also considered it inappropriate at that time to indicate a position in principle on the legal issues of remedy and enforcement of ADRR Forum decisions, which had also been debated extensively in the submissions and in the course of the Hearing. I noted at that stage, therefore, that the Reinstatement Issue would have to remain open for determination in due course both in principle and in detail, having due regard to the further information to be produced and any agreement that might be reached as a consequence between the Dispute Parties, as would the other issues of remedy and enforcement considered. In thus postponing final decision on the Reinstatement Issue I emphasised to the Parties my acceptance of and reliance on Network Rail's express assurances that it now accepted the need for reinstatement of the Loop and would press on with the necessary procedures as quickly as possible, pending the exchange of further information, possible further agreement on the timing and other details, and my eventual issue of the full written determination taking into account such agreement. Network Rail during the Hearing had also undertaken to provide to the Claimants fortnightly updates as to progress made in the reinstallation of the Loop, and as far as I am aware these updates have since been duly provided.

2.11 Following receipt and consideration of the further information requested to be provided by the Dispute Parties after the Hearing regarding the Reinstatement Issue and the Dispute Parties' respective responses to the information provided by each other, on 9 September 2016 I issued a preliminary Summary of Decision in respect of the Reinstatement Issue. I noted then the reasons for publishing this in advance of the full written determination, as follows:

2.11.1 In its covering email of 12 August 2016 sending the further information as required, Network Rail had made the following request: "that the chair provides his view as to which option Network Rail should follow by the 9th September 2016 (two weeks after the claimants are required to provide a response). Network Rail appreciates that this is unlikely to be sufficient time to provide a full determination, however the chair's confirmation as to which option Network Rail should proceed with is essential to ensure that the correct option is followed and costs are not inappropriately incurred as a result of following the incorrect route." Network Rail's covering email had included reference to a proposed meeting between the Dispute Parties to try and agree on a particular solution to the Reinstatement Issue

proposed and preferred by Network Rail, referred to as the "**Alternative Option**", which involved reconfiguration of track and signalling at the ends of the Loop so as to maintain the current main line speeds, and which Network Rail said should be completed by November 2018. This was now distinguished by Network Rail from the "**Simple Option**" involving the Loop being reconnected on a like for like basis, which it said could be completed by the start of the May 2018 timetable.

2.11.2 That meeting had taken place on 23 August 2016 and the Claimants' subsequent response sent on 26 August 2016 had indicated their agreement in principle, albeit subject to certain conditions, to Network Rail's proposed Alternative Option. The Claimants' response described their conditional acceptance of the Alternative Option as seeking "to balance the overall best interests of all route users by seeking to reinstate the Loop with a view to maintaining the current enhanced line speeds on the Derby to Chesterfield mainline in the vicinity of the Loop". The stated conditions of this acceptance of the Alternative Option indicated by the Claimants included letters of assurance of completion of reinstatement of the Loop by November 2018 from Network Rail's relevant Route Managing Directors, and confirmation that Network Rail would ensure that reinstatement of the Loop would become an ORR recognised regulatory milestone. These letters and confirmation were duly received by the Claimants in August, and we later received copies of them. The Network Rail Route MD letters stated: "I confirm Network Rail will complete the reinstatement of Clay Cross Loop. The timing of the work will be in such a manner as to provide overall balanced industry solution on the back of the Derby remodelling project. This means the reinstatement will be complete by 20th October 2018 to coincide with the conclusion of partial block of Derby station." However, the Claimants' conditions of acceptance of the Alternative Option had also included a satisfactory outcome to a further meeting between them and Network Rail arranged for 11 November 2016 (though this was subsequently advanced to 31 October 2016) "to discuss the detail and choices for the Alternative Option and to select the preferred option".

2.11.3 Rule G5 requires the Hearing Chair, where appropriate, to adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and value. Accordingly, in view of Network Rail's request to me on 12 August and the conditional agreement apparently reached on 23 August, and in order generally to enable all the Dispute Parties to arrange their businesses efficiently, I had considered it necessary and expedient to adapt the dispute procedure so as to

inform the Dispute Parties as soon as possible of the substance of the specific decision upon remedy that I had now reached regarding the Reinstatement Issue, based on the terms (but still subject to the further meeting conditions yet to be satisfied) of the Claimants' agreement to Network Rail's Alternative Option. I noted that this was in advance of preparation and publication in due course of the full written determination of the dispute which would set out my reasons and conclusions both on that and on the other issues of entitlement and remedy raised by the dispute; the full determination would also incorporate and take into account the satisfaction (or otherwise) of the further meeting conditions that had been required by the Claimants for their agreement to the Alternative Option.

2.12 Having regard to the fact that the further meeting then arranged for 11 November 2016, assuming that it would happen, could result in a material alteration to the terms of the Claimants' conditional agreement to Network Rail's proposed Alternative Option, I considered it appropriate in any event not to conclude my final written determination until after the outcome of that meeting was known, in order that this could be properly taken into account. Subsequently having learned from the Dispute Parties in late October (initially only via Network Rail's 5 October Update) that the meeting had been advanced to 31 October 2016, I confirmed that this would still be the case and reminded them that an agreed joint statement of the result of the meeting would be required, whenever it was eventually held, stating the definitive "option for the reconnection" of the Loop to be incorporated in the full determination of the dispute, in order to give proper effect to the Claimants' conditions previously stipulated for their provisional agreement to Network Rail's proposed Alternative Option.

2.13 The 31 October 2016 meeting duly took place, in a form characterised by Network Rail as a "Value management meeting" producing an "Option Selection Report". This meeting and the Dispute Parties' subsequent accounts of its conclusions were not what I had understood to be intended, from the previous information provided by the Dispute Parties as to the proposed means of resolving their conditional agreement to Network Rail's proposed Alternative Option for the timing and format of the Loop reinstatement, on the basis of which I had issued my Summary of Decision on the Reinstatement Issue. The 31 October 2016 meeting seemed to have been convened by Network Rail not as intended to reach final agreement between the Dispute Parties for the purpose of resolving the Reinstatement Issue between them under ADA30 having regard to legal rights and obligations, but still as part of Network Rail's 'business as usual' general process involving various other "stakeholders" in what Network Rail considered overall practically to be "in the best interests of the railway", a phrase much heard during the Hearing, which in this case seemed to be directed

entirely towards maintaining the MML new line speeds and postponing any Loop reinstatement so as to coincide with Network Rail's already planned Derby Remodelling Scheme.

2.14 In the circumstances, nevertheless, having regard to the time elapsed since the Hearing and not wishing to prolong this ADA30 dispute resolution process any further, I declined to require another meeting between the Dispute Parties, let alone a supplementary Hearing. I confined my response to Network Rail's bare summary of the 31 October 2016 meeting (in Update No,7) to reminding all the Dispute Parties yet again of the requirement for a clearly articulated joint statement of the outcome of the meeting in line with the requirements for producing an injunctive determination of ADA30, therefore fully clarifying and detailing what was to be provided and by when. Regrettably, however, such a joint statement proved impossible eventually to obtain. It still needed several reiterations of the information requirements and further requests for clarification and certainty as to exactly what had finally been agreed between the Dispute Parties, in order eventually to produce, first in a statement sent by Network Rail on 10 November 2016 said to have been "jointly compiled" with the Claimants and then through several further emails culminating on 23 December 2016, a series of further individual party communications amounting broadly in aggregate to what had actually been asked for, but in form and content not suitable to be incorporated directly and without editing into this determination (as the requirement had been clearly explained several times to the Dispute Parties). Network Rail's final information contributions on 21 and 23 December, moreover, expressly refused to give the confirmation discussed at the Hearing and previously agreed to be provided, that the terms of reinstatement now at last settled seemingly to Network Rail's satisfaction were sufficiently certain, clear and practicable to fulfil the legal requirements for an enforceable mandatory injunction, as submitted on behalf of Network Rail itself at the Hearing. I address the consequences of this in section 5 below.

2.15 I confirm now that the decisions and conclusions on the Reinstatement Issue recorded below in this determination are the same in substance as those indicated in my preliminary Summary of Decision on 9 September 2016, but subject to such editing and modification as in the event has proved necessary to take account of the new or revised details of implementing Network Rail's Alternative Option as apparently agreed between the Dispute Parties at their further meeting which took place as rearranged on 31 October 2016 and as gleaned from the subsequent correspondence listed in paragraph 2.16 below.

2.16 In summary, then, the documents and written material, including relevant correspondence, considered by the Panel over the course of this dispute process have been as follows:

2.16.1 Notice of Dispute served by GBRf on 6 April 2016.

2.16.2 Email from GBRf to ORR on 6 April 2016 requesting advice on how to proceed in the face of Network Rail's apparent disinclination to comply with the terms of the ADA17 determination.

2.16.3 Email from ADC to ORR on 27 April 2016 inviting ORR to accept the role of appeal forum for this dispute, and ORR's reply on 11 May 2016 declining to do so.

2.16.4 Statement of Claim served by GBRf on 3 June 2016.

2.16.5 Statement of Claim served by DBC on 3 June 2016.

2.16.6 Email from Network Rail to ADC on 16 June 2016 requesting an extension of time for serving its Statement of Defence, and ADC's reply on 17 June 2016 forwarding the Hearing Chair's rejection of Network Rail's request.

2.16.7 Statement of Defence served by Network Rail on 17 June 2016.

2.16.8 Reply to Statement of Defence, served by GBRf on 23 June 2016.

2.16.9 Reply to Statement of Defence, served by DBC on 23 June 2016.

2.16.10 Further written submissions pursuant to Rule G16(g), served by Network Rail on 6 July 2016.

2.16.11 Conclusions of the Hearing Chair in accordance with Rule G9(c) regarding relevant issues of law raised by the dispute, and requirement by the Hearing Chair under Rules A9 and A10 for additional documents and information to be provided by the Dispute Parties at the Hearing, issued on 8 July 2016.

2.16.12 Reinstatement timeline document by Network Rail in response to the Hearing Chair's 8 July 2016 requirement, produced at the Hearing on 13 July 2016.

2.16.13 Written versions of opening statements by all three Dispute Parties, produced at the Hearing on 13 July 2016.

2.16.14 Written version of opening submissions on issues of law on behalf of Network Rail, produced at the Hearing on 13 July 2016.

2.16.15 Email from DBC to Network Rail on 14 July 2016 attaching the Claimants' joint requirements for further information from

Network Rail following the Hearing to enable their assessment of Network Rail's proposals to address the Reinstatement Issue (item (c) listed in paragraph 2.9).

2.16.16 Email from Network Rail to ADC on 27 July 2016 attaching further information concerning Network Rail's alleged status as a public body and certain group signalling standards, as required by the Hearing Chair at the conclusion of the Hearing (items (a) and (b) listed in paragraph 2.9).

2.16.17 Email from Network Rail on 12 August 2016 to ADC and the Claimants attaching its response to the Claimants' further information requirements of 27 July 2016 and incorporating Network Rail's proposals for the Alternative Option regarding the Reinstatement Issue (item (d) listed in paragraph 2.9).

2.16.18 Email from ADC to the Dispute Parties on 23 August 2016 noting that the Claimants had informed the ADC of a provisional agreement to Network Rail's proposed Alternative Option reached at a meeting that day, and reporting the Hearing Chair's view for the record that the Claimants were under no legal obligation to do so.

2.16.19 Email from DBC to Network Rail on 25 August 2016 attaching the Claimants' joint response to Network Rail's further information provided on 12 August 2016 (item (e) listed in paragraph 2.9), confirming the Claimants' agreement to Network Rail's proposed Alternative Option subject to certain conditions, including (a) letters of assurance of completion of reinstatement of the Loop by 20 October 2018 from Network Rail's relevant Route Managing Directors, (b) confirmation that Network Rail would ensure that reinstatement of the Loop would become an ORR recognised regulatory milestone, and (c) a satisfactory outcome to a further meeting between the Claimants and Network Rail arranged (then) for 11 November 2016 (as referred to in paragraph 2.11.2).

2.16.20 Emails from Network Rail to ADC on 6 and 9 September 2016 attaching letters and/or emails from Network Rail to the Claimants in satisfaction of conditions (a) and (b) referred to in paragraph 2.16.19.

2.16.21 Preliminary Summary of Decision by the Hearing Chair on the Reinstatement Issue, issued on 9 September 2016.

2.16.22 Emails of 26 October 2016 between ADC and Dispute Parties seeking and receiving confirmation of rearrangement of parties' meeting from 11 November to 'option selection' meeting on 31 October 2016.

2.16.23 Updates by Network Rail of its progress in the process leading to reinstatement of the Loop (undertaken by Network Rail to be provided as noted in paragraph 2.10), issued (to date) on 27 July, 10 and 23 August, 6, 8 and 21 September, 5 October, 2 November (including summary of further 'Option Selection Workshop' meeting between the Dispute Parties and others on 31 October 2016) and 30 November 2016.

2.16.24 Emails of 4 and 8 November 2016 between ADC and Dispute Parties seeking and offering clarification of conclusions of 31 October meeting.

2.16.25 Email from Network Rail to ADC on 10 November 2016 apparently setting out a jointly compiled statement of all three Dispute Parties as to the reinstatement 'option' chosen at meeting on 31 October 2016.

2.16.26 Emails between ADC and Dispute Parties on 14,17,18 and 23 November 2016 and 21 and 23 December 2016 seeking and either offering or refusing further clarification and confirmation of Parties' agreement from 31 October 2016 meeting.

2.17 Of the documents and written material listed in paragraph 2.16, all fall to be published and available on the ADC website together with this determination, with the exception of any confidential information and material required to be excluded from publication under Rule G60.

2.18 I confirm accordingly that I have taken into account all of the statements, 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 be specifically referred to or summarised in this determination.

3. SUBMISSIONS MADE AND OUTCOMES SOUGHT BY THE DISPUTE PARTIES

3.1 As noted above, the Statements of Claim, Defence and Reply, and all other submissions and documents listed in paragraph 2.16, are published in full on the ADC website together with this determination. Other than below rehearsing, therefore, the decisions, resolution of principles (including legal issues), and other outcomes discussed and sought by the Dispute Parties, and the sequence of documents, events and conduct giving rise to these in the course of the ADA30 proceedings, I do not further summarise or relate the detail of their submissions in the body of this determination, except insofar as reference is made to them later in the course of my discussion of the

oral exchanges at the Hearing and the analysis and consideration of the issues raised by the dispute.

3.2 GBRf in its Statement of Claim referred to and annexed copies of a series of communications and discussions with Network Rail following the conclusion of ADA17, between early 2014 and early 2016, in which Network Rail appeared to propose a variety of bases for deferring or postponing reinstatement of the Loop beyond the timescale and otherwise outside the parameters required by the ADA17 determination. Such proposals included a Short Term Network Change notice issued on 4 November 2014 to permit the Loop to remain "out of use" until a then proposed reinstatement by the summer of 2015. These discussions apparently culminated, however, with a statement by Network Rail at a meeting on 30 March 2016 that it was not going to reinstate the Loop, as there was no money to do so.

3.3 GBRf accordingly made a number of submissions of principle in its Statement of Claim regarding the nature and consequences of Network Rail's conduct in relation to its stated failure to comply with ADA17. Such submissions, whilst not in substance seeking specific decisions, invited an analysis that necessarily informed consideration of the outcomes of this ADA as to entitlement and/or remedy. These submissions included that:

- "it is purely this specific and deliberate non-compliance of ADA17 Directions that is the subject of this Access Dispute Adjudication";

- "Network Rail has never given this matter the priority it has needed which shows contempt for the Access Disputes Determination";

- [Network Rail's conduct and statements with regard to reinstatement of the Loop have] "shown a total disregard for the Network Change and other industry processes";

- "Network Rail's East Midland Route, in particular, does not feel it needs to adhere to the Network Change process";

- [Network Rail's conduct in removing the Loop] "shows a blatant disregard for the Network Change process and Network Rail's own Licence Conditions and this behaviour needs challenging"; and

- "Network Rail's non-compliance of ADA17 directions is likely to have put it in breach of its Network Licence Conditions, specifically Condition 1 *Network Management*".

3.4 In its Statement of Claim GBRf sought the following decisions, that:

3.4.1 "The Defendant must comply with the determination and directions of ADA17 and therefore ensure that [the Loop] is now reinstated, as per the stated conditions, as soon as possible. GBRf suggests that the Loop is reinstated for use no later than the start of the May 2017 Working Timetable."

3.4.2 "The Claimant be awarded costs of this dispute (ADA30). In this case, Network Rail's clear lack of carrying out the direction of ADA17, between 3rd January 2014 and the present day, has solely lead to this dispute being heard."

3.5 Like GBRf, DBC in its Statement of Claim referred to and annexed correspondence and records of its dealings with Network Rail demonstrating a continuing deferment of reinstatement of the Loop beyond the ADA17 determined timescale and other parameters. These dealings similarly concluded apparently at the same meeting on 30 March 2016, recorded in Network Rail's 'MML/EM Route Schemes Review - Action Log', with Network Rail's statement that the action regarding reinstatement of the Loop was "Closed", as the matter was "being raised through ADRC process".

3.6 DBC like GBRf made several submissions of principle in its Statement of Claim concerning the significance of Network Rail's conduct in failing to comply with ADA17, which necessarily informed consideration of the outcomes of entitlement and/or remedy to be considered. These included that:

- "ADA30 is intended to focus on the Defendant's non-compliance with Determination ADA17 in respect of [the Loop] and should not be used as an opportunity by the Defendant to reopen ADA17 by way of a rehearing";

- "it is now over 28 months since determination ADA17 was issued.... and the Defendant is no nearer to reinstating and reconnecting the Loop to the Network. In fact, it appears that the Defendant has no intention of complying with Determination ADA17 in this respect";

- "disregarding an ADA determination is a serious matter that can only undermine and reduce confidence in this key dispute resolution process in the ADRR";

- "in addition to seeking the Defendant's compliance with... Determination ADA17..., the purpose of this dispute reference is also to ensure that this issue of non-compliance by the Defendant does not go unnoticed and left unchallenged"; and

- "disregard of an ADA Determination may also constitute a breach of the Defendant's Network Licence".

3.7 In its Statement of Claim DBC sought the following decisions, that:

3.7.1 "The Defendant should comply with determination ADA17 and reinstate and reconnect the Loop to the Network as soon as possible and in any event no later than the time needed for it to be available for use from the May 2017 Working Timetable."

3.7.2 "The Claimant should be awarded costs given that this dispute reference has only become necessary due to the Defendant's blatant disregard of determination ADA17 in respect of the Loop."

3.8 As noted in paragraph 2.5 Network Rail on 16 June 2016, the day before its Statement of Defence was due, had requested an extension of time for service on the grounds that it was still formulating proposals for reinstatement of the Loop and was hoping shortly to be able to have a discussion with the Claimants "to find an acceptable way forward". Network Rail had said it required first, however, "to obtain Executive Authority to progress the reinstatement of the Loop" and also wanted "to be able to confirm whether we can comply with the reinstatement date of March 2017". The request for extension was rejected on the following day, but Network Rail's Statement of Defence, duly served later that day, appeared to be predicated on the assumption that it regarded discussions with the Claimants on its newly offered reinstatement process as ongoing and likely to reach fruition.

3.9 In its Statement of Defence, Network Rail stated that the subject of the dispute was "the proposed reinstatement of the Clay Cross Down Loop". Network Rail did not seek to address the sequence of communications over the past two years cited by both Claimants as having ended with Network Rail's assertion that the matter of reinstatement of the Loop was closed, beyond stating that it had had "a number of communications with the… Claimants with regard to the Clay Cross Loop, some of which are referred to in… each of the respective Statements of Claim". Nor did Network Rail annex to its Defence any evidence of its own regarding communications or dealings with the Claimants, or any other documents, stating simply that it "confirms that it has complied with… Rule G16(b)(iv)", which I understood as a somewhat oblique statement that it had no further documents which it wished to annex, presumably because all the relevant documents had already been annexed to the Statements of Claim. However, Network Rail stated that it was "now finalising arrangements for the reinstatement of [the Loop] as soon as this is possible", and that "the timetable for the reinstatement… will be completed by mid December 2018" in accordance with a timetable set out in the Defence.

3.10 In its Statement of Defence Network Rail sought the following decisions:

3.10.1 "Given the Defendant's indication that it will reinstate [the Loop], Network Rail requests that the Adjudication make no determination in respect of ADA30, given that Network Rail is to do that which the First and Second Claimants have asked, namely reinstatement of [the Loop] as soon as can practically and safely be arranged."

3.10.2 "No order for costs should be made."

3.11 In their Replies to Network Rail's Statement of Defence, the two Claimants identified various inconsistencies in Network Rail's position as to its then newly proposed timescale and form for reinstatement of the Loop. Both Claimants questioned whether some or all of the processes (authorities and approvals stated to be required) or new Network Change compliances (maintenance of MML current line speeds) listed by Network Rail were in fact necessary. They affirmed an underlying scepticism that reinstatement of the Loop would actually be implemented, whether to the timetable set out by Network Rail in its recent proposals - namely mid-December 2018 - or at all. DBC noted that this suggested completion date was "a full four years after the date that the reinstatement should have taken place (as directed by Determination ADA17), nearly five years after Determination ADA17 was published, three and a half years after the previous reinstatement date advised by [Network Rail] (i.e. Summer 2015) and around two and a half years from now".

3.12 The Claimants in their Replies also identified an unwillingness by Network Rail in its Statement of Defence to respond to any of the points of principle raised in the Statements of Claim, particularly inasmuch as Network Rail had omitted to offer any reasons or justification for its failure to carry out the directions of ADA17. GBRf stated: "Network Rail has not addressed, in any way, GBRf's main issue... as to why Network Rail believes it did not have to carry out the Directions from ADA17 and, indeed, actively contravene[d] them from January 2014 to the present day. The behavioural aspect as to why Network Rail believes it does not have to abide by the Network Change process, and then actively ignore[s] Directions from ADA17 determination, needs examining in detail at the hearing." Both Claimants in their Replies maintained their requirements for the decisions and considerations of principle as sought in their respective Statements of Claim.

3.13 In its further written pre-hearing submissions pursuant to Rule G16(g) Network Rail did not respond directly to any particular points in the Claimants' Replies, but adopted a markedly different course - and tone - from that of its previous Statement of Defence. Indeed somewhat remarkably these further submissions seemed largely intended to ignore and substitute themselves for, rather than supplement, the Statement of Defence, being materially at variance with it in several

respects; I formed the strong impression that they were the first of Network Rail's communications or other documents in the ADA30 proceedings to be drafted by, or possibly even to have involved at all, Network Rail's external legal advisers. The further submissions addressed for the first time, albeit briefly, the issues of principle raised by the Claimants' Statements of Claim and Replies as to the nature and consequences of Network Rail's (by now) acknowledged failure to comply with ADA17. The submissions still did not explain any reasons for Network Rail's non-compliance, preferring instead to offer a brief apology, a concession to pay the Claimants' costs of ADA30, and several assertions (repeated later in diverse terms in the oral exchanges) that, essentially, there was simply no point in otherwise revisiting what had or had not occurred in relation to ADA17. The submissions then concentrated mainly on substantiating the detail of the practical but necessarily incomplete remedy of Network Rail's new proposals to deal with the Reinstatement Issue; incomplete, because still proposing a varied physical format and a very different timescale from those contemplated by ADA17, though with optimism as to a slight completion time improvement now on Network Rail's last proposition, to September 2018. And by contrast with the Statement of Defence, Network Rail's submissions now acknowledged that at least some form of determination was required in respect of ADA30.

3.14 Network Rail's further written pre-hearing submissions thus included the following newly stated objectives, acknowledgements and desired outcomes, as well as proposed limitations on outcome, of the determination:

- their aim "is to summarise briefly the remaining issues to be determined by the Hearing Chair in the determination of this Access Dispute Adjudication";

- [reinstatement of the Loop as ordered in the ADA17 determination] "did not take place before December 2014, nor has it since, a failure which Network Rail accepts should not have occurred, and for which Network Rail apologises";

- "Network Rail is wholly committed to reinstatement and reconnection of the Loop to the Network in accordance with the requirements of ADA17 as soon as can reasonably and practically be achieved, in accordance with the constraints set out in these submissions";

- [the Claimants seek] "as their main remedy... reinstatement and reconnection of the Loop. Network Rail has agreed to do so. No determination is therefore required as to whether Network rail should reinstate or reconnect the Loop: that issue has already been concluded";

- "That leaves only two subsidiary matters to be considered by the Hearing Chair: (a) Timing of the reinstatement and reconnection of the Loop; and (b) Costs incurred by the Claimants in bringing ADA30, pursuant to Rule G53";

- "If the Hearing Chair is minded to set a timescale... beyond as "soon as reasonably possible"..., [it] should be that the Loop is reinstated and reconnected for use no later than the start of the December 2018 Working Timetable";

- "As to costs, Network Rail is prepared to pay the reasonable and properly vouched costs of each of the Claimants incurred in bringing this ADA30, to be assessed by the Hearing Chair summarily if not agreed";

- "Taking into account all of the requirements, the anticipated costs of reinstating and reconnecting the Loop is estimated at £10 million";

- "Network Rail completely accepts that the Loop should have been reinstated earlier, but this does not detract from the fact that the Claimants have managed without it";

- "The outcome [of ADA17] rested rather on an analysis of the Claimants' reasonable expectations as to the future use of the Loop, so it is reasonable to conclude that the Claimants do not need to use the Loop yet"; and

- "Any determination as to timing of the reinstatement should look at the present position, and, taking into account all reasonable and practical considerations, the earliest date at which the Loop can be reinstated and reconnected. The earliest realistic time at which the Loop can be reinstated and reconnected is September 2018".

3.15 GBRf in its opening statement at the Hearing (as recorded in the Transcript and also supplied on the day in a written version) did not depart from or qualify the outcomes stated as sought in its statements of case, but addressed the new proposals in Network Rail's most recent written submissions. GBRf challenged several aspects of the timescale and process for reinstatement now proposed by Network Rail, as being respectively excessive and largely unnecessary, having regard to the requirements of the ADA17 determination and events that had taken place since then. GBRf noted that the Loop, having not been removed from the Network pursuant to a duly established Network Change, was still part of the Network and therefore funding for maintaining its capability throughout the previous and current Control Periods 4 and 5 (2009-14 and 2014-19) was already in place. GBRf said it could not believe Network Rail's quoted £10 million figure as "being the best

possible price were Network Rail to actually want to carry out the job at the best possible rate".

3.16 DBC's opening statement at the Hearing (also both recorded in the Transcript and supplied on the day in a written version) likewise did not vary the outcomes sought in its statements of case, except now to request that the time for a newly directed reinstatement of the Loop should be the May 2017 Timetable or such other date that may be determined by the Hearing. DBC summarised the lack of progress with reinstatement of the Loop since ADA17 and strongly challenged the timescale of Network Rail's latest proposals, expressing doubt as to Network Rail's commitment to ever actually implementing the reinstatement, in the light of its previous record, and thereby expressly refuting Network Rail's previous submission that no determination was required from the Hearing in respect of the reconnection and reinstatement of the Loop. DBC also reverted to the points of principle requiring resolution as raised in its statements of case, submitting that:

- "the disregard of an ADA Determination is a serious matter that can only undermine and reduce confidence in the industry access disputes resolution process. Therefore, in addition to seeking the remedies already stated, the purpose of this dispute reference is also to ensure that this issue of non-compliance by Network Rail does not go unnoticed and left unchallenged"; and

- "disregard of an ADA determination may also constitute a breach of [Network Rail's] Network Licence, a fact that has already been recognised by Network Rail in past correspondence, as well as being a breach of DBC UK's track access contract with Network Rail".

3.17 Network Rail's opening statement at the Hearing (also both recorded in the Transcript and supplied on the day in a written version) did not revert to the conclusions of its Statement of Defence but repeated a summary of its new position and outcomes sought, as presented in its latest previous written submissions. Network Rail thus commenced its statement as follows:

- "These proceedings have been brought about following Network Rail's failure to comply with the direction made on 3rd January 2014, ADA17. Network Rail apologises for that failure which it is clear should not have occurred. Network Rail wishes to provide assurances that Network Rail is committed to the reinstatement and reconnection of the Loop to the Network in accordance with the requirements of ADA17 and as soon as can be reasonably and practically achieved taking into consideration all the relevant constraints."

Network Rail then summarised "the remaining issues for consideration and determination" as seeming to be as follows:

(1) Timetable for the reinstallation: ..."Network Rail appreciates that criticism can be made regarding Network Rail's failure to comply with the order, but respectfully submits that the determination... should look at the present position, taking into account all reasonable and practical considerations. The earliest realistic date at which the Loop could be reinstated is September 2018."

(2) Length of the Loop to be installed: ..."Network Rail cannot state that it would be confident of the exact length of the Loop which would be installed. This is because the design now has to take into consideration the new Standards along with an increase in the line speed. Network Rail is conscious that ADA17 required reinstatement at 649m and is committed to making extensive efforts to ensure that the Loop is, if not 649m, as close to it as reasonably practicable."

(3) Possible line speed reduction: "The speed on the Main Line was increased as part of a Network Change between St Pancras and Sheffield. The Loop now needs to be designed and constructed so as to ensure safe entry and exit from the Loop, taking into account that increase. ...This will obviously have an impact upon current performance but also on any future journey time improvement projects such as Derby Journey Time Improvement."

(4) Costs: "Network Rail is prepared to pay the reasonable and properly vouched costs of each of the Claimants' cost in bringing this ADA30, to be assessed by the Hearing Chair summarily if not agreed."

3.18 Network Rail's additional opening submissions at the Hearing, delivered by Ms Dwyer (and also, as previously noted, supplied on the day in a written version), commenced with an introduction to the timeline document produced by Network Rail (as referred to in paragraph 2.7) and then addressed the issues of law previously identified by me (as set out in paragraph 2.6), whilst commenting that such issues were thought unnecessary to be considered in the light of Network Rail's now conceded agreement to comply with the determination of ADA17 and to pay the Claimants' legal costs. That comment notwithstanding, I found Ms Dwyer's legal submissions most helpful in clarifying my own thinking and (though they are also recorded fully in the Transcript) summarise them here more fully than the previous statements, since the need to address them fully is central to the conclusions of this determination.

3.18.1 On the first issue of law I had identified, the means of enforcement of ADRR dispute resolution, Ms Dwyer said the failure to implement a determination was dealt with under the ADRR itself as presently written. In summary, the legal mechanisms for enforcement were confined to those in the ADRR and were as prescribed by law as remedies for breach of

contract, so the only relevant remedies available were the payment of compensation or an order to take action or an order to pay costs.

3.18.2 As already recognised by the Claimants in bringing the dispute, the ADRR in Rule G51 expressly prescribed that failure to comply with an ADA determination "will be dealt with by way of a new dispute through the appropriate mechanism". Accordingly there was no further jurisdiction for enforcement beyond what the parties had agreed in the ADRR.

3.18.3 The ADRR in Rule G47 provided four options for remedies: an order to pay an amount of money including damages; an order to take or not take any specified action; a determination as to the meaning of any agreement; and the payment of interest. There was also the power to award costs under Rules G52 to G55.

3.18.4 The power to grant these remedies in Rule G47 was expressed to be "without limitation" but these words, Ms Dwyer submitted, required consideration; they did not permit the Hearing Chair unfettered discretion, but his orders must still comply with English law, with the "Principles" set out in Rule A5 (requiring every ADRR Forum to act and make decisions in accordance with the law), and with any relevant decision of the courts or ORR, as required by Rule A7(b).

3.18.5 Furthermore Rule A6 provided that an ADRR Forum should: either grant any specific remedy available under the Access Conditions or Underlying Contract; or, where a specific remedy was provided for at law, grant that remedy; or, where the choice of remedy was not a matter of entitlement but a question properly falling within the discretion of the Forum, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Underlying Contract after due consideration of all remedies and orders that could properly be made. This, Ms Dwyer submitted, brought you back via the Track Access Contract full circle to the incorporated ADRR provisions for remedies, therefore subject to the limitations just previously described.

3.18.6 Those remedies were limited by law and therefore, since this was a matter of contract between the parties, were limited to damages for breach of contract (compensation to put the party back in the position he would have been in had the contract been performed), or, in the limited circumstances where it was available, specific performance of the contract. Ultimately any Claimant could ask the Court to enforce a contract but where, as here, the parties had agreed to submit to Adjudication under

ADRR, the Hearing Chair could not go beyond what the Court could order as a matter of English law.

3.18.7 In the context of this Adjudication (i.e. by way of enforcement of the ADRR dispute resolution process following a party's failure to comply with an ADA determination), the only relevant remedies available to the Hearing Chair were therefore, Ms Dwyer submitted, the payment of compensation (with or without interest) and/or an order to take an action, and/or an order to pay legal costs.

3.18.8 On the second issue of law identified by me, concerning the scope of and constraints on injunctive and financial remedies available for an acknowledged failure to implement an ADA determination, Ms Dwyer noted again that the relevant remedies in this Adjudication were confined to the payment of compensation and an order to take an action, the latter being an injunctive remedy. A failure to honour such an order, being a breach of contract, could ultimately be enforced through the Courts. Under Rule G66, in appropriate circumstances such an application could be made during the Adjudication itself, as an application for interlocutory relief, Rule G66 excusing what would otherwise constitute an interference with the contractually agreed exclusive dispute mechanism of submission to the ADRR. There was no equivalent Rule expressly covering enforcement after the Adjudication had been determined, because then, it was said, the parties could somehow apply to the Court for enforcement in any event, without the need for a Rule to that effect.

3.18.9 The legal constraints and principles to be considered by an ADA Hearing Chair contemplating whether to exercise his discretion to grant such an injunctive remedy, in the absence of any further express guidance in the ADRR, Ms Dwyer submitted would be the same as those to be considered by the Court with regard to the proposed grant of a mandatory injunction. Those were, that the order must be very precisely defined and clearly set out; must be capable of being performed; and must be within the power of the person to whom it is directed. Accordingly such an order must take account of all relevant practical and fiscal constraints, because ultimately it could be taken to the Courts for enforcement.

3.18.10 The only financial remedy available to an ADA, it was submitted, was the payment of compensation, which neither of the Claimants had expressly asked for in their statements and submissions. The legal constraints on such a remedy were those applying to the award and assessment of damages for breach of contract; such damages were to compensate for loss,

not to punish a wrongdoer; and the established legal principles of proof, mitigation, causation and remoteness applied in assessing the loss to be compensated.

3.18.11 As regards the question of a "deterrent" award, an ADA had no power to make such an award because, Ms Dwyer submitted, the ADRR did not provide for such awards to be made. And as a matter of English law an ADA did not have the power otherwise to make such an award, for several reasons. First, such an award would be in the nature of a "penalty", which was unenforceable under English law. Secondly, punitive or exemplary damages were not provided for under the ADRR, and English law only permitted such awards of damages in three very specific circumstances, set out in the leading case of *Rookes v Barnard* ([1964] AC 1129). The three permitted categories were: misconduct in public office; where expressly authorised by statute; and where the conduct was calculated by the defendant to make a profit for himself which exceeded the damages payable to the claimant. None of these categories, it was submitted, applied in this case.

3.18.12 Thirdly, said Ms Dwyer, it was not the role of the ADRR or Adjudication to issue "deterrents", because the ADRR were a means to resolve disputes between parties and, here, the parties had only sought orders to carry out a previous Determination; and the power to issue deterrent awards would have been written into the ADRR if intended. Fourthly, to issue deterrent awards would trespass on the jurisdiction of ORR, which had the power as regulator (in appropriate circumstances) to issue penalties and fines.

3.18.13 Finally among Network Rail's submissions at the opening of the Hearing there was my third issue of law identified, concerning the proper assessment of a defaulting party's own proposed remedy which was necessarily inadequate in some respect because the time for completion directed by the original ADA determination had already passed. Ms Dwyer submitted that this issue reverted to the scope of an ADA Hearing Chair's power to grant an order. The power was constrained by legal, practical and fiscal constraints as previously discussed. The Hearing Chair had to act within the law and take account of those practical constraints, so the most he could now order Network Rail to do was that which it had already agreed to do, namely to implement reinstatement of the Loop as soon as it could within its power and having due regard to the applicable fiscal and practical constraints.

3.19 It is necessary to include reference here, with some additional background, to certain further post-hearing submissions by Network Rail. They were introduced via its final information offerings in emails of 21 and 23 December 2016 in response to my repeated requests for clear joint articulation of the result of the 31 October 2016 meeting at which the final details and, crucially, timescale of the agreed Alternative Option proposed by Network Rail for reinstatement of the Loop had supposedly been settled definitively with the Claimants and (apparently) other involved parties (see paragraph 2.14 above). I am not sure whether Network Rail was actually conscious of this, but these new submissions amounted in substance to a complete contradiction of its submissions at the Hearing as to the enforceability, conditions and process for enforcement of ADRR awards, in the following context:

3.19.1 At the Hearing, both in opening submissions as noted in paragraph 3.18.9 above and in the later oral exchanges, Ms Dwyer on behalf of Network Rail had made extensive submissions as to the necessary ingredients for an enforceable order to "do" something, having the characteristics and therefore legal requirements of a mandatory injunction. At the end of the oral exchanges, as noted in paragraph 4.24 below, without demur from Network Rail I indicated that I would submit my draft of the section of this determination concerning the Reinstatement Issue to Network rail specifically in order to obtain its confirmation that the draft satisfied these submitted legal requirements – or if not, to supply the necessary further detail or clarification that would enable it to satisfy them. As it happened, this method of attempting to resolve the Reinstatement Issue on undeniably enforceable terms had later become all the more appropriate after the form and timing of the eventual conclusion on the Reinstatement Issue had been proposed by Network Rail itself and settled at the final necessary level of detail by Network Rail's persuading the Claimants to agree to it. Consequently, knowing that the main intention of the ADA had been to produce an enforceable award on the Reinstatement Issue, it could have come as no surprise to Network Rail or its legal advisers, that Netwiork Rail should be asked to provide confirmation that its own propositions for the detailed terms of that award satisfied its own previously submitted requirements for such enforceability.

3.19.2 Among other elucidation of Network Rail's "jointly compiled" statement of 10 November 2016 regarding the outcome of the 31 October 2016 meeting, I had therefore requested the following:

- "confirmation from Network Rail that, as far as it is concerned, this statement if duly incorporated into an order will satisfy the

legal requirements for an enforceable mandatory injunction as submitted at the Hearing by its legal adviser Ms Dwyer, namely that: it is sufficiently certain and precisely defined as to be absolutely clear what is to be done and by when; it is absolutely capable of being performed; and it is within the power of the person to whom it will be directed i.e. Network Rail"; and

- "all three Dispute Parties to confirm that 20 October 2018, as apparently agreed at their previous meeting on 23 August 2016, still stands as the agreed final date by which Network Rail is to complete the reinstatement of the Loop in the now agreed form of the selected 'Option 4'."

3.19.3 Contrary to expectation, after all the discussion we had gone through in both ADA17 and ADA30, Network Rail's eventual responses (apparently after seeking further legal advice), so far from giving any such confirmation or offering any alternative text or other detail that it did feel able so to confirm, appeared to deny the possibility of Network Rail's ever being amenable to any enforcement jurisdiction at all, on the ground that nothing could ever eventually be confirmed as being wholly within its power, which had been claimed as an essential ingredient for injunctive enforceability. It is worth citing Network Rail's responses on these points here in full (from the emails of 21 and 23 December 2016 listed at paragraph 2.16.26 above), as follows :

- "With respect to the second paragraph of your email of 14 November 2016, Network Rail is not in a position to provide the written confirmation which you seek that the statement we provided to you on 10 November would, if incorporated into an order, satisfy the legal requirements for an enforceable mandatory injunction, as explained below. That being the case, the statement of 10 November represents the parties' agreement as to what should happen, and the parties are now all working towards that end. The usual process with regard to issues regarding the network is reaching an agreement which the parties then work to implement, so this reflects normal practice."

- "The reinstatement of Clay Cross Loop is a complex project. It is neither absolutely capable of being performed, nor wholly within the power of Network Rail, being the person to whom an injunction would be directed. This was explained in submissions at the hearing on 14[sic] July 2016. There are practical and fiscal constraints. By way of example, at the moment the Department for Transport (DfT) is not persuaded

that funding for the reinstatement of the loop should come from the control period 5 enhancements funding (because the DfT is not convinced that the need for the loop in CP5 or CP6 has been evidenced), which means that the funding of the loop is presently not available. That is the subject of continuing discussions between the freight operators, Network Rail and the DfT, and it illustrates that funding is not within Network Rail's control. Another example is the delays which are common to all construction contracts. Something as simple as several week's bad weather can put a construction period back by several weeks. Accordingly, it is submitted that the Hearing Chair should note the parties' agreement as to what is to be done, as set out in our email of 10 November 2016."

- "As explained in the joint statement set out in our email of 10 November 2016, Network Rail confirms that the main works to reinstate the loop will be carried out between July and October 2018. Please note our comments in our email of 21 December 2016 that this timing is not, and is not capable of being, wholly within Network Rail's power and control."

3.19.4 In the context of the whole ADA17 and ADA30 saga I find these responses, and the submissions in them, quite extraordinary. In effect, as I sumarised at paragraph 2.14 above, they are wholly at odds with Network Rail's previous submissions by refusing point blank to give any confirmation with respect to any of the matters previously discussed at the Hearing so extensively and with such apparent seriousness and commitment. I address this anomaly further in the analysis at Section 5 below.

4. ORAL EXCHANGES AT THE HEARING

4.1 Having considered the Dispute Parties' written statements, submissions and documents as listed in paragraph 2.16, and heard their opening statements and further submissions at the commencement of the Hearing as summarised in paragraph 3, the Panel questioned their representatives to clarify, test and supplement a number of points arising out of their submissions or otherwise relevant to the issues in dispute. In line with the practice adopted at previous ADA hearings, although the individuals' answers to questions were not taken as sworn evidence (in common with the Dispute Parties' written submissions and statements), I consider that we are entitled and (in the absence of any indication to the contrary) obliged to accept them as true and accurate statements. Accordingly I have taken them all fully into account in reaching this determination.

4.2 The Transcript appended to this determination includes the oral evidence in full, including all questions, answers and incidental observations by the Panel and the Parties, and constitutes an integral part of this determination. I do not, therefore, further digest the Q&A in detail here other than to signpost and summarise the themes addressed, following the sequence of issues and principles discussed.

4.3 For practical reasons, in conducting our questions of the Parties we found it expedient to take the themes in reverse order from that expressed in my previously identified issues of law and reflected in Network Rail's opening submissions on those issues. We thus commenced with exploring the practical remedies available to deal with the Reinstatement Issue; then moved to the issue of principle regarding available additional legal remedies to address Network Rail's previous failure to comply with an ADRR determination, ADA17; and concluded with an examination of the adequacy of legal processes available under ADRR in general to enforce an ADA determination.

Reinstatement Issue practicalities – general constraints on Network Rail

4.4 Our agenda for examining the practicalities of the Reinstatement Issue in detail, and the applicable and (as of now, at least) genuinely unavoidable constraints on it in principle and practice, commenced with Network Rail's Timeline Document as produced on the day. This described a complex programme containing several different stages and processes to be completed, all said by Network Rail to be absolutely necessary for seeking authority, obtaining funding, engineering option selection, development and detailed design, construction, testing and commissioning for the reinstatement of the Loop; several of these processes were designated as being stages in Network Rail's "GRIP" process, namely "Governance in Railway Investment Projects". The Panel's questioning in this area was mainly directed at testing and establishing what was the legal basis for all these stages and processes, whether they were internally or externally imposed on Network Rail, and just how essential and unavoidable they really were. The questioning proceeded to examine first the fiscal, then the legal, and then the practical or operational constraints asserted to be binding on Network Rail in planning its programme for the reinstatement.

Reinstatement Issue – fiscal constraints

4.5 As regards fiscal constraints, Network Rail explained first, the determining consideration was that it had been the subject of an accounting "reclassification" as a public body in September 2014, i.e. nine months after the ADA17 determination, which had had the effect of significantly changing - by tightening up - the procedural requirements it had to go through to obtain funding for work to the network. In the

peculiar circumstances of the Loop reinstatement work this could have been categorised either as renewal and maintenance, or as enhancement; under Network Rail's new status these categories had different sources of budget and associated constraints on allocating funds. Funding for renewals and maintenance was governed internally within each of Network Rail's individual Routes and prioritised against need and safety requirements, whereas funding for enhancements now had to be prioritised by reference to Network Rail's governance by the DfT. Because the original removal of the Loop in May 2013, rightly or wrongly, had been implemented for the purpose of the MML line speeds enhancement project, Network Rail had categorised its now intended reinstatement also as an enhancement, thus engaging, among other constraints, the DfT governance on funding.

4.6 In the course of this discussion Ms Dwyer explained that it was considered, by reason of the reclassification, that Network Rail had become a public body amenable to judicial review. An extended and at times somewhat circular debate proceeded as to:

- whether and to what extent this amenability to judicial review was the result of Network Rail taking actions of a public nature or using public funds to do so or both;

- whichever of the above was the case, whether this had implicitly been Network Rail's role all along previously and the reclassification had simply made it explicit, or it amounted to a completely new legal status;

- whether Network Rail's electing to categorise the late reinstatement of the Loop pursuant to ADA17 as part of an enhancement programme (rather than as maintenance and renewals) was appropriate, particularly given the additional external fiscal and other constraints this apparently now entailed;

- whether the alleged judicial reviewability meant in any case that there was no materially different significance between internally and externally imposed fiscal and other disciplines on Network Rail;

- whether sources of authority and/or funding available as a matter of unquestioned priority for maintaining the network in cases of emergency, such as severe weather events, could or should be available to Network Rail (under its new public status) with the same priority to enable it to comply with an absolute legal obligation to reinstate the network; and

- whether the fact of Network Rail, through its improper failure to act on the ADA17 determination, having in effect volunteered to bring new constraints upon itself which would not previously have obtained,

including having to look to a by now overspent enhancement pot, had any consequences in terms of remedy.

4.7 At all events, it was maintained on behalf of Network Rail, however you looked at it the position in reality was the same, whether the fiscal approval stages in the proposed reinstatement timeline were imposed on Network Rail under its own internal set procedures or through external governance, and whether they were in effect applicable previously or resulted from the 2014 reclassification. One way or another, it was said, compliance with these procedural stages was now necessary for Network Rail as a public body carrying out undoubtedly public functions within the tests established by the *Datafin* leading case in this area *(R v Panel on Take-overs and Mergers, ex parte Datafin plc, [1987] QB 815*), therefore judicially reviewable, therefore required to behave in a proper and responsible way, and therefore expected to conduct itself reasonably and in accordance with due process. Treating the reinstatement as part of an enhancement project, albeit with all the additional fiscal constraints and delays that now entailed, was still the only reasonable way of doing it, Ms Dwyer maintained; in a nutshell, Network Rail "can't simply pull the money out of a bag, it's not there". And Network Rail confirmed that whereas "putting ourselves back in 2013, we would just have got out the credit card and borrowed some more money and put [the Loop] back", now "you simply cannot do that, our credit card has been replaced with a debit card in effect".

4.8 Summing up on the fiscal constraints and the effect of the September 2014 reclassification on Network Rail, Ms Dwyer acknowledged that this had altered the position generally and with regard to the reinstatement of the Loop; although previously it had been arguable that Network Rail was spending public money, it had never been actually discussed explicitly, so that in practice Network Rail had then had more freedom with its spending. "What the reclassification did was to make the position absolutely crystal clear so that Network Rail cannot now simply go out and borrow money; and the fact of the matter is that it would have cost far less to reinstate then. We are where we are." I suggested that this in itself reinforced the view that it would have been preferable for Network Rail to have gone ahead with getting any approvals necessary to complying with ADA17 before September 2014. The response was that in effect, whatever was the position before September 2014, it was irrelevant to present considerations because the regime after that was very different; Network Rail could not now simply borrow money, or find the money from somewhere else, or ignore the procedures it was supposed to go through. As had previously been said, whilst Network Rail had apologised for not implementing the ADA17 decision and would continue to apologise, the irreversible position now was that "We are where we are".

4.9 From this discussion attempting to clarify the exact constitution and therefore legal effect of Network Rail's alleged change of status through "reclassification", we concluded that Network Rail should produce for examination by way of further information after the Hearing the documentation establishing its new status and its legal consequences. This was said to consist of a Memorandum of Understanding and some other related agreement or document with the DfT setting out the governance requirements for Network Rail's enhancement budgeting and spending, following the "Reclassification of Network Rail as a public sector company for accounting purposes", this apparently being the actual nomenclature applicable. Network Rail duly provided that information by email on 27 July 2016 (as listed at paragraph 2.16.16 above), consisting of the DfT Memorandum of Understanding, which turned out to date from 17 December 2013, and a separate Framework Agreement (as foreseen by the Memorandum of Understanding) between the DfT and Network Rail dated September 2014 setting out "how the Department and Network Rail will interact in terms of corporate governance and financial management".

Reinstatement Issue – legal constraints

4.10 Moving from the fiscal to the legal constraints on Network Rail's proposed timeline for reinstatement, the issue of development of a new signalling scheme for the Loop arose under NETWORK RAIL's 'GRIP 4' stage. Network Rail's timeline document said that due to the passage of time (i.e. since ADA17) any plans previously drawn up in respect of the Loop could not be relied on; the original scheme would not be compliant with today's standards. Accordingly we enquired regarding what was said in the document as to the need for compliance with new signalling Standards.

4.11 A significant issue emerging here was whether compliance with the most recent update of Network Rail's Signalling Handbook was legally mandatory, because driven by associated Group Standards, or effectively a matter of choice for Network Rail, and therefore not truly on the critical path governing the programme for reinstatement of the Loop. Whatever the position regarding the true interpretation of vague Group Standards, Network Rail said, what was really driving the timeline as far as it was concerned was "making sure we get to an option that everybody can work with". I noted this implied that the legal constraints of compliance with signalling standards were not by themselves determinative of the timescale; and, as with consideration of all the matters said to be on the critical path, what I was really trying to get to in real terms was whether it was sensible to be looking at 2017 or 2018, as being the two target dates contended for on either side (up until the Hearing) as the practical remedy.

4.12 In further discussion on the legal constraints it became clear that Network Rail did not have information to hand at the Hearing as to whether the signalling Standards asserted as now necessary to be complied with were Group Standards or Network Rail Standards, nor whether the applicable Network Rail Standards were based on (and to any extent a gold plating of) Group Standards. Network Rail was requested to provide this information after the Hearing; again, as previously noted, it did so on 27 July 2016, but consisting of Network Rail's own Level 2 Business Process Signalling Principles Handbook intended to show only that Group standards had changed.

Reinstatement Issue – practical and operational constraints

4.13 From there we moved on to a consideration of the practical and operational constraints on reinstatement of the Loop appearing from Network Rail's timeline and critical path document - development, design, access, construction, testing etc.- featuring largely in Network Rail's GRIP stages 4, 5 and 6. Network Rail had said in reality these should be considered in parallel with the signalling standards also in GRIP 4, which we had categorised as potential legal constraints, if they turned out to be genuinely mandatory; each set of constraints would be on the critical path if the other were removed, both therefore dictating the achievable timescale for completion of the reinstatement.

4.14 This led to a detailed discussion regarding what actually was required to be done, technically and physically, at the two ends of the Loop in order to reinstate it, with explanation again being given by Network Rail (photographs had been provided with its timeline document) as to what components, equipment and work would now be necessary to reinstate it. Returning to the signalling in particular, Network Rail maintained that due to various changes in requirements it would now no longer be possible to put the Loop back like for like; the signalling would need almost totally new design, which would require personnel resources that Network Rail might not have internally so would have to contract out under the terms of one of its existing framework contracts; and contrary to what had previously been said by Network Rail and believed by all concerned, not only were certain physical elements of the previous signalling removed and now no longer intact, but the 'interlocking' software controlling the signalling had been rewritten and would now have to be written anew. This was what accounted for the lengthy time ascribed to Network Rail's approval stages, particularly 8 months for GRIP 4, in its critical path timeline document.

4.15 In all it appeared from this that Network Rail's original description (in evidence given to the ADA17 Hearing) of what had actually been done to the Loop when cutting it off from the Network had not been particularly accurate or complete; and that since 2014 and the ADA17 determination various other things had happened to the Loop which

resulted in much more having to be done generally to reinstate it now than would have been the case if Network Rail had just got on and done it when directed to. Asked why this had been allowed to happen, why the process leading to reinstatement as ordered had apparently been discontinued during or after 2014, Network Rail referred to "a series of errors, mistakes, ...misjudgements in terms of what the adjudication meant", which was what it had now apologised for at this Hearing. Network Rail declined to be drawn further on what this meant or offer any further reasons or explanation for its non-compliance, beyond saying that things were not progressed in the way they should have been, the focus went away from the project, and there was no "deliberate attempt" by or within Network Rail not to obey the ADA17 decision. I suggested that even if there had been no deliberate attempt to disobey the decision (of which I was not entirely sure), the problem was still that there was no deliberate attempt to obey it.

4.16 Reverting to the issue of why, as of now anyway, the stages in Network Rail's timeline document seemed to be projected to take so long, it emerged that a central part of Network Rail's thinking was that the increased line speeds previously achieved through the MML Network Change (minus the Loop) could not be maintained if the Loop were to be simply reinstated as it was before, i.e. like for like and without improved signalling. Network Rail was insistent in its submissions that a new Network Change would be legally required now to permit it to reduce the current line speeds (by imposing speed restrictions), if this were physically necessary to take account of the Loop once reinstated. This was challenged by both the Claimants and the Panel on two grounds: that the increased line speeds pursuant to the MML Network Change had not themselves been properly established insofar as they failed to take account of the Loop as a relevant part of the Network as then legally constituted and therefore incorporating the Loop, since its removal had never been sanctioned; and that, in any case, this ADA30 had the power to make a determination permitting or indeed mandating the doing of something which might otherwise constitute Network Change, without being required to establish it through the Network Change process - as indeed had the ADA17 determination, in permitting the original unauthorised Loop removal to be carved out of the rest of the MML Network Change in order that that might proceed, a determination requested and accepted by Network Rail.

4.17 A yet further issue arising out of debate as to the achievable MML line speeds concerned the actual historical and current length of the Loop and whether it was or should be designated a passenger and goods or goods only loop. This, like so much else, had been examined quite closely during the Hearing of ADA17, whence the conclusion of the parties had been that it had a length of 649 metres and was a passenger and goods loop, though its length was not at that time correctly recorded in the Sectional Appendix. From the evidence given

in ADA30 it now appeared preferable, from the point of view of maintaining line speeds, that it should be designated a goods only loop; it also appeared that its length was still stated incorrectly in the Sectional Appendix, at 600 metres, but that in any case there had been a misunderstanding between the parties to ADA17 (therefore including the present Dispute Parties) as to the meaning of the 'length' of the Loop. Network Rail had understood it to mean 649 metres total usable length, whereas the operators had taken it to mean, as apparently was conventional industry terminology, the 'trailing' length, i.e. the length of a train excluding locomotive and brake van. The conclusion of this discussion was that these factors needed to be taken into account and made precise in the eventual 'option selection' for the exact format and configuration to be arrived at for reinstatement of the Loop, which was an exercise Network Rail said it had built into its timeline.

4.18 Network Rail having reiterated that its timeline demonstrated and took into account the scope of the options available to try to get to a consensus for all affected parties, including maintaining the current line speeds, I had previously reminded the Parties repeatedly that the subject matter of this dispute was not balancing the competing interests regarding the Loop of all different parties and operators on the line. That exercise had been undertaken exhaustively in ADA17. The subject of the instant dispute, I had noted, was Network Rail's acknowledged (by now at any rate) failure to implement the determination of ADA17, the consequences of that failure, and an endeavour to arrive at the most sensible practical remedy for getting that determination implemented (as nearly as possible given current circumstances) without regard to all the external considerations and interests of other parties which had been considered previously.

4.19 Network Rail in the latter stages of the discussion on genuine constraints on its timeline continued to express in various different ways its apparent main object for the reinstatement of doing the job properly taking into account its obligations as a network operator and as a spender of public money, getting to the best option, not putting something in place that was not best overall for the industry, giving the public policy implications due thought and consideration, and acting in everybody's best interests. I felt compelled accordingly to remind Network Rail at various points that this ADA, like all ADRR Forums, was required to determine the dispute on the grounds of the legal entitlements of the Parties, not on much wider grounds of public policy considerations; and that it was not our proper purpose to attempt to adjudicate on the whole world's best interests.

Reinstatement Issue – further information required

4.20 We concluded this section of the oral exchanges by going through the required further information from Network Rail on the timeline and the

critical path for reinstatement of the Loop to enable the Claimants to evaluate these and then inform the Panel what they accepted were the genuine constraints and critical path, so that we could ascertain and decide from that what was a practicable target or deadline to set for the reinstatement, and also how the reinstatement obligation could be expressed with sufficient clarity to make it practicable and therefore injunctable. For this we decided that we would require the Claimants in the first place to identify what further information they believed they needed from Network Rail to enable them to make that assessment and evaluation.

4.21 I noted that in the course of what would be, in effect, an exchange of further critical information between the Claimants and Network Rail, it might be possible for them to reach some agreement as to time limits which took into account some of what I might conclude were, strictly speaking, the extraneous considerations advanced by Network Rail. The goal was to determine an absolute end date and undisputably clear format for the reinstatement; if any such agreement could be reached, so much the better; if not, I would decide it in the determination. Following an adjournment a timescale for production and exchange of the further information was discussed.

Legal issues

4.22 The remainder of the Q&A oral exchanges with the Dispute Parties at the Hearing was concerned with a lengthy debate on the legal submissions provided by Ms Dwyer at the outset of the Hearing on the issues of law raised by me as to available remedies and enforcement under the ADRR processes; with a brief exchange also on the issue raised by the Claimants regarding a possible breach by Network Rail of its Network Licence; and finally with further submissions and exchanges on the matter of an award of costs. I have summarised the legal submissions above in paragraph 3.18 and address the further oral discussion of these in my analysis in section 5 below. I address the issue of costs in section 6 below. I do not therefore summarise further the oral exchanges on these matters in this section of the determination; like the rest, they are in any case fully recorded in the Transcript.

Closing Statements

4.23 At the close of the oral exchanges with the Dispute Parties I invited all the Parties to make any closing statements or further comments they wished to:

4.23.1 GBRf said it would like the Panel to determine clearly whether it believed that finding additional money for the reinstatement of the Loop should come from an enhancements or a renewals pot

of money. GBRf submitted that it should come from a renewals portfolio pot, not enhancements, and that Network Rail's CP5 enhancements programme should not be adversely affected by the reinstatement [as Network Rail had previously submitted it would be], given that the Loop still constituted an existing part of the national Network.

4.23.2 DBC said it was encouraged that Network Rail had admitted its mistakes of the past and was now seemingly on a course to reinstate and reconnect the Loop to the Network, though the parties were still discussing the proposed timescale. DBC referred to the discussion had about Network Rail's asserted new status in being a public body and having to be very careful with public money, and suggested that an issue about care of public money might also arise from the fact that, had Network Rail reinstated the Loop in 2013, it would only have cost £2 million whereas now it would cost £10 million.

4.23.3 Network Rail said, in response to GBRf's comment, that the renewals side of its business had never contemplated having to do the reinstatement. The problem had been caused by a poorly executed enhancement scheme, and that enhancement scheme had now looked to put it right. Network Rail was not sure that how it funded the reinstatement was particularly relevant. Ms Dwyer as Network Rail's legal representative added that Network Rail knew it had to do the reinstatement and would do it.

4.23.4 XCT noted that, had Network Rail complied with ADA17 in a timely manner, it would not have reached the situation where it was effectively robbing Peter to pay Paul [i.e. having now to prejudice the current enhancements programme in order to fulfil what it should have done some years previously], to the detriment of the rail industry's end users, whether passengers or freight.

4.23.5 Freightliner said it agreed with the views of the other freight operators at the Hearing [i.e. the Claimants]. It regarded the reinstatement of the Loop, whether "plain vanilla" or an enhanced version, as very important, in signalling terms at least, but not a large thing to do.

4.23.6 EMT, as a passenger operator, wanted to echo the comment of XCT.

4.24 Though unable at that stage to give an indication of the results in principle of the dispute, I then briefly summarised the anticipated areas to be covered in my eventual determination, and we settled the content and arrangements for delivery of the further information required for the

Dispute Parties, as referred to in paragraphs 2.9 and 2.10 above. I also noted then that, since the practical remedy for the Reinstatement Issue would now necessarily be informed by this further information and any agreement reached between them on the basis of it, I would in due course invite the Dispute Parties' comments on a draft of the relevant part of my eventual award in order to secure confirmation that it satisfied all their requirements (as previously submitted) of clarity, certainty and practicability, so as to make it undoubtedly enforceable as an injunctive remedy.

4.25 That concluded the oral exchanges at the Hearing between the Panel and the Parties.

5. ANALYSIS, CONSIDERATION OF ISSUES AND SUBMISSIONS, CONCLUSIONS

Background and issues in dispute

5.1 To my knowledge this is the first occasion on which a rail industry Access Dispute before any Forum - whether an ADA or otherwise and whether under the present ADRR regime or under the previous disputes system administered by the ADC - has been concerned with establishing the consequences of a simple total failure by a Dispute Party to implement or comply with a previous unequivocal and unappealed decision of an ADRR Forum. Somewhat contrary to expectation, that has made this dispute rather more complicated to deal with than usual, since it has been necessary to consider not only the specific ad hoc entitlements and remedies regarding that failure as between the Dispute Parties but also the potential consequences of such a failure for other industry operators, as well as the broader repercussions of the dispute for the efficacy of the whole ADRR process.

5.2 It is also by definition, therefore, the first ADRR dispute where the substance of the principal rights and obligations in issue has already been conclusively determined in a previous dispute between the same Dispute Parties. In this case it was always beyond question that there was a fundamental obligation to reinstate the Loop come what may, the difficult task having already been completed, in ADA17, of giving due and indeed exhaustive consideration to balancing the competing interests of all potentially involved parties in a complex Network Change situation. That obligation in principle at least was eventually conceded by Network Rail before the Hearing, albeit only fully in its final pre-hearing written submissions, where the concession was accompanied by an apology. It might have been thought that this would make matters relatively straightforward for decision at or following the Hearing, but the task of identifying and settling on the practical detail

necessary to convert the general reinstatement obligation in principle into a workable and useful remedy in practice proved more challenging, particularly when compounded with consideration of the broader remedy and enforcement issues of principle mentioned above.

5.3 In this analysis I shall follow broadly the same order of issues as taken in the Q&A oral exchanges at the Hearing, namely: first, the specific practical remedy of reinstatement of the Loop (the "Reinstatement Issue" as defined in paragraph 2.8 above and in my previous Summary of Decision); secondly, the available additional legal remedies to address the previous failure to comply with the ADA17 determination; and finally, the enforceability in general of an ADA (or other Forum) determination under the ADRR.

Reinstatement of the Loop – agreed practical remedy

5.4 As described above in paragraphs 2.8 and thereafter, it turned out that the actual detail of the practical remedy for the Reinstatement Issue - the finally required timing and physical format - would largely be determined by the Dispute Parties' eventual agreement reached through their meetings and correspondence after the Hearing. It thus still took, as noted in paragraph 2.14 above, several reiterations with the Dispute Parties to try to persuade them to arrive at a reasonably clear joint, or at least aggregate, statement of that agreement sufficient, in my view at least, to satisfy the requirements for an enforceable injunctive remedy as submitted on behalf of Network Rail during the Hearing (namely, the same as those to be considered by the Court with regard to the proposed grant of a mandatory injunction – see paragraph 3.18.9 above). As recorded at paragraphs 3.19 and 4.24 above, having accepted that particular submission by Network Rail at the time for the purposes of the Hearing, and as at the end of the Hearing I had accordingly stated I would do, I duly required Network Rail's and the Claimants' confirmation that as far as they were respectively concerned their final apparently agreed form of jointly compiled statement and settled completion date of 20 October 2018 did indeed satisfy those and all other relevant requirements of clarity, certainty and practicability. The Claimants gave their confirmation and provided the supplementary detailed information requested. Network Rail's response, however (as quoted in full at paragraph 3.19.3 above), though providing its requested final detailed information contributions, expressly refused to give any confirmation of enforceability according to its own submitted requirements as previously discussed. I have nonetheless incorporated the details of all the information provided by Network Rail and the Claimants concerning the Alternative Option into my final decision on the Reinstatement Issue at paragraphs 7.1 and 7.2 below, supplementing and completing the previously announced Summary of Decision on the Reinstatement Issue.

5.5 I consider that this final decision on the practical remedy of a further reinstatement order does satisfy the requirements, as submitted on behalf of Network Rail at the Hearing, that the Court would have to consider in relation to the grant of a mandatory injunction, and should therefore be enforceable as such. I still hold this to be the case notwithstanding that Network Rail has latterly refused to confirm as much (though I will address the implications of that refusal below, after analysing the constraints previously submitted to inhibit Network Rail's freedom of action in proceeding expeditiously or at all to implement ADA17). I have decided the Reinstatement Issue thus, not as according with my analysis of the evidence presented and of the Dispute Parties' resulting entitlements, but because that is what the Claimants for reasons best known to themselves have agreed to, and I do not think it right or appropriate in this element of the dispute to order something harder for Network Rail to comply with than what has been agreed. I also believe, however, that what the Claimants have actually agreed to as regards both timing and format of the reinstatement goes beyond what in the absence of such agreement I would have decided they needed to accept.

Reinstatement of the Loop - entitlements but for Claimants' agreement

5.6 I therefore think it incumbent on me, and hopefully useful, to indicate the decision that my analysis would have led to on the Reinstatement Issue, had that agreement not been reached and fully articulated. That requires an account of my reasons, having regard to what I have found to be the genuine practical, fiscal and legal constraints governing Network Rail's capacity to carry out the reinstatement. This is particularly relevant because much of the issue turns on the view to be taken of Network Rail's asserted status as a public sector body and the interpretation of the documents provided after the hearing by Network Rail as evidencing both that status and its consequences for Network Rail's legal obligations, all of which are matters of potentially general interest and application. Having heard the Dispute Parties' extensive submissions and evidence, having considered all the documents and further information produced on this matter, and having formed my own opinion on it, it is proper to record this for the purposes of any future disputes where the same matters may be in issue.

Fiscal constraints on timeline for reinstatement

5.7 With regard first, then, to the issue of fiscal constraints on Network Rail's freedom of action, and particularly the effect of Network Rail's asserted new public sector body status from 2014, I have considered Network Rail's stated views and our exchanges on this as summarised at paragraphs 4.5 to 4.8 above (and fully recorded in the Transcript). I have also reviewed the documents subsequently provided by Network Rail to ADC by email on 27 July 2016 (as noted in paragraph 4.9

above), consisting of the DfT Memorandum of Understanding dating from 17 December 2013 (the "**MOU**") and a separate Framework Agreement between the DfT and NETWORK RAIL dated September 2014 (the "**FA**"). My conclusions on this issue of fiscal constraints on Network Rail are as follows:

5.7.1 Network Rail's covering email of 27 July 2016 (q.v. as listed in paragraph 2.16.16 above) set out what were in effect further submissions as to the interpretation of the documents it was providing, by citing extracts from the Framework Agreement that it thought might be "of particular interest"; these referred to Network Rail's being monitored in the public interest, responsible for safeguarding its public funds, and accountable as a public servant for managing public money. I do not find those extracts, nor anything else in those documents, at all persuasive as showing Network Rail to have changed its status and somehow become subject to an unavoidable fiscal regime which overrides its normal legal obligations for the time being, such as the obligation to comply with a duly issued Tribunal order legally binding on it as a matter of contract. On the contrary, several passages in the documents clearly establish exactly the opposite:

> - MOU paragraph 6: "The change in Network Rail's classification by ONS is a statistical decision. It will not affect the Government's commitment to the railways or its plans for investment, including ...its existing rail investment strategy for 2014-19..."
>
> - MOU paragraph 13: "The ONS' decision to reclassify Network Rail for statistical purposes arises only out of the new Eurostat reporting rules. It is not due to any other change in the circumstances or performance of Network Rail."
>
> - MOU paragraph 15: "Notwithstanding the statistical changes to its status, the principle guiding this Memorandum of Understanding is the preservation of Network Rail's ability to continue to manage its business with appropriate commercial freedom within effective regulatory and control frameworks for a company in the public sector."
>
> - MOU paragraph 25: "The ONS' decision to reclassify Network Rail to the public sector is a statistical decision which has no impact on the nature of any existing debt..."

- MOU paragraph 26: "The company's financing decisions will continue to be driven by value for money for taxpayers, with appropriate consideration being given to the fiduciary duties of Network Rail's directors and the long term policy objectives for the railway."

The FA is even more explicit:

- FA paragraph 1.4: "For the avoidance of doubt, statutory provisions (including Acts of Parliament, secondary legislation and directly applicable EU rules), and any order, direction, determination, notice, approval, consent or penalty made under such provisions ***or*** by a Court or Tribunal, take precedence over the provisions of this Framework Agreement. [Network Rail] shall not as [a] result of this document be required to do anything, or be restricted from doing anything, that would result in it breaching a term of the Licences." [my emphases]

- FA paragraph 1.14: "Neither the statistical fact of reclassification, nor anything in this Framework Agreement, is intended to change the railway industry's structure or to affect the day-to-day operations of the rail network. The ONS' decision has no effect on fares, performance, punctuality, safety and timetables. ORR remains the economic and safety regulator for the railways."

- FA paragraph 2.8 (of which the first sentence only was cited by Network Rail in its 27 July 2016 covering email submission): "The Accounting Officer must act in accordance with Chapter 3 (Accounting Officers) of Managing Public Money. In particular, the Accounting Officer must: take action, as set out in Managing Public Money, if the Board, or the Chair, are contemplating a course of action involving a transaction which the Accounting Officer considers would infringe the requirements of propriety or regularity [my emphases], or does not represent prudent or economical administration, efficiency or effectiveness, is of questionable feasibility, or is unethical;

5.7.2 Thus in my view these documents could not have made it clearer that the statistical reclassification of Network Rail had no effect whatsoever so as in any way to override or constrain the company's right and duty to perform its existing legal obligations nor its commercial freedom to incur and perform other legal obligations to which it might become subject in the normal course

of its business. Accordingly on the interpretation of these documents I find as a matter of law that, notwithstanding the statistical reclassification of Network Rail as a public sector body by these documents in 2014, Network Rail was and remained bound by its legal obligation incurred under the ADA17 decision to have reinstated the Loop by the 2013 December timetable date, and therefore at all times after that date had passed, up until now and continuing hereafter, still remained and continues to remain bound to reinstate it by absolutely the earliest time physically possible, without being constrained by any delay in order to undertake any funding or other approvals process occasioned by its altered statistical status as a public sector body.

5.7.3 As I have previously summarised in paragraph 4.6 above, the principal ground of Network Rail's submissions on the fiscal constraints was expressed to be its alleged amenability to judicial review. Although Network Rail's argument proceeded initially on the basis that this was a new situation created by the 2014 reclassification, in the course of the ensuing discussion I have referred to it gradually became clear that Network Rail was being advised that in any event at some previous unspecified time it must already have become judicially reviewable generally under the tests of the *Datafin* case, as a result of taking actions and undertaking functions of a public nature, or using public funds to do so, or both. Eventually it was proposed expressly that this had actually been Network Rail's implicit role all along previously and the reclassification had simply made it explicit. Among other things this meant, it was said, that there was no materially different significance between internally and externally imposed fiscal and other disciplines on Network Rail, because its compliance even with internally imposed disciplines was necessary as constituting the reasonable conduct of a judicially reviewable public sector body complying with due process.

5.7.4 In the end, however, it has not been necessary to reach any firm conclusion on whether Network Rail is generally amenable to judicial review on *Datafin* principles or not, and I express no opinion on that specific issue. This is because the real point is that whether or not Network Rail is judicially reviewable, or why, does not actually affect the Reinstatement Issue one way or the other. Susceptibility to judicial review is not the determining factor here; in my view it is not even relevant. I have found above that the 2014 reclassification, both as expressly stated in and otherwise as properly to be interpreted from the MOU and FA, was subject and made no difference to Network Rail's responsibility to comply with its ongoing legal obligations, including a Tribunal decision such as an ADA. I believe that FA

paragraph 1.4 quoted above, in particular, actually gives effect, as it says, "for the avoidance of doubt" to what would be the general law on the issue if there were no express contractual provision to that effect. I therefore find likewise, as a matter of law, that a general amenability to judicial review, however arising, of a public sector body, however constituted, does not require that body to breach its legal obligations, nor to delay compliance with them, in the name of reasonable or prudent behaviour as a public sector body, and I reject Network Rail's submissions to the contrary.

5.7.5 The second aspect of fiscal constraints, i.e. apart from the question whether there is any need for Network Rail to undergo lengthy funding approval processes, is the question of where the money is actually to come from. As summarised in paragraphs 4.7 and 4.8 above, Network Rail was emphatic that it could no longer just borrow money without going through proper processes – this at least, it said, was a definite result of its 2014 public sector body reclassification. "What the reclassification did was to make the position absolutely crystal clear so that Network Rail cannot now simply go out and borrow money." And, Network Rail said in a number of ways, it had no general immediate source of unborrowed funds: e.g. (oral exchanges) Network Rail "can't simply pull the money out of a bag, it's not there"; and (Network Rail written prehearing submissions paragraph 13) "There is no general fund which can be used".

5.7.6 This matter of funds availability was raised by the Claimants questioning at the Hearing (see paragraph 4.6 above) whether whatever sources of funding and/or authority were available as a matter of unquestioned priority for maintaining the network in cases of emergency, such as severe weather events like the recent collapse of Lamington Viaduct, could or should be made available to Network Rail (under its new public status) with the same priority to enable it to comply with an absolute legal obligation to reinstate the Loop which should never have been removed in the first place. Network Rail sought to distinguish the relative priorities of these situations but eventually conceded that when faced with a new Adjudication award the company should not now be able to refuse the necessary funding; Network Rail seemed unable, however, to explain why this had not been the case before, when the company had been faced with the clear ADA17 determination.

5.7.7 It is noteworthy, moreover, from its successive 'Updates' issued to the Claimants as undertaken at the Hearing (q.v. as listed above at paragraph 2.16.23), concerning current and immediate progress with the reinstatement process, that Network Rail is

now using its "sustainability fund" and/or "contingency fund" (the titles seem to be used interchangeably). This appears directly to contradict the previous statements recorded above, that there simply was no general fund immediately available without going through the various hoops of Network Rail's internal and external DfT approval processes, with the inevitable delays to the timeline that this would cause. No reason has been advanced by Network Rail as to why, if this fund has become immediately available for the work that is now proceeding, it could not have been called upon previously at any time from 2013 onwards to expedite work or just to enable it to proceed in a timely fashion in order to comply with the ADA17 determination.

5.7.8 Still on the question of availability of funds, having reached the conclusion that judicial reviewability is irrelevant to an assessment of Network Rail's obligations to comply with a Tribunal decision enables me to dispose of another point in this area, raised by the Claimants, discussed in the oral exchanges and reverted to in the closing statements (see paragraphs 4.23.1-3 above). This was the question of whether Network Rail, having eventually accepted to plan the reinstatement of the Loop, was justified in electing to treat it as part of an enhancement programme, with apparently greater constraints on funding (through DfT governance) among other things, rather than as maintenance and renewals, so that Network Rail could more easily synchronise it with other enhancement work already planned, such as the Derby Remodelling Scheme. Network Rail maintained throughout that treating the reinstatement as part of an enhancement project, albeit with all the additional fiscal constraints and delays that now entailed, was still the only reasonable way of doing it (and dealing with it in this way turned out to be an intrinsic part of Network Rail's Alternative Option for the reinstatement, to which the Claimants have ultimately agreed).

5.7.9 I accept the Claimants' pre-agreement submissions on this issue. I agree with GBRf that the cost of reinstatement of the Loop should, in principle, come from a renewals portfolio "pot", not enhancements, and that Network Rail's CP5 enhancements programme should not be adversely affected by the reinstatement, given that the Loop still constituted an existing part of the national Network having never been lawfully removed pursuant to an established Network Change. I agree with DBC's suggestion that an issue about care of public money might also be thought to arise from the fact that, had Network Rail reinstated the Loop in 2013, it would only have cost £2 million, whereas now it is estimated to cost £10 million.

5.7.10 I find Network Rail's insistence on dealing with the reinstatement as part of its enhancements programme to be as misconceived as, and actually just another face of, the basically flawed premise of Network Rail's proposition that, in the name of satisfying a judicially reviewable standard of reasonable conduct, it is necessary to subordinate compliance with direct legal obligations to the exigencies and inherent delays of public sector fiscal procedures. Such insistence has compounded the effect of Network Rail's improper failure to act on the ADA17 determination. In effect, by holding off on the reinstatement Network Rail has volunteered to bring new constraints upon itself which it believes, rightly or wrongly, would not previously have obtained and which continue to be advanced not only as a cause for further substantial delay, but also as justifiably incurring vastly increased costs. This seems perverse. I conclude that Network Rail could and should properly, whether before or after its statistical reclassification, have elected to treat the reinstatement of the Loop which it was illegal to have removed in the first place, as a renewal; it should just have got on with it as quickly as possible in time for the next occurring timetable change; and without the Claimants' forbearance it should still now be doing so. I also observe that, were Network Rail's status to result, as in effect was submitted, in some sort of subjugation of its contractual obligations to the fiscal and other policy constraints of public sector conduct, that could have significant consequences for the privatised rail industry as a whole, based as it is on an intricate scheme of checks and balances imposed through a common contractual matrix on all parties, and most importantly on Network Rail itself as the monopoly owner of the essential facility constituted by the Network.

5.7.11 Consequently, in summary, I find as a fact that there were actually no unavoidable fiscal constraints on Network Rail in planning the reinstatement of the Loop; and as a matter of entitlement that, in the absence of the Claimants' accommodating agreement otherwise, this element of delay could and should have been removed from the timeline proposed.

Legal and practical constraints on timeline for reinstatement

5.8 I turn to the validity of the legal and practical constraints built into the programme set out in Network Rail's timeline documents and thereby asserted as necessarily compromising its ability to get on with reinstating the Loop without further delay or in a more timely or efficient manner. Unlike the alleged fiscal requirements, these constraints do not depend primarily on an assessment of Network Rail's status and responsibilities as a body operating in the public sector, but rather

follow from Network Rail's own view of its operational objectives around which it has chosen to plan the reinstatement, having finally accepted that it has to do it at all. Again I have considered Network Rail's stated views and our exchanges on this at the Hearing, as summarised at paragraphs 4.10 to 4.19 above (and fully recorded in the Transcript). I have also reviewed the relevant documents subsequently provided by Network Rail - by email on 27 July 2016, concerning Network Rail and Group signalling standards, and by email on 12 August, attaching Network Rail's response to the Claimants' further information requirements and its revised critical path timeline for the reinstatement, by now incorporating both the Simple Option and the Alternative Option – the latter proving the basis for the Dispute Parties' eventual agreement at and following their meetings on 23 August and 31 October 2016. My conclusions on what would have been the position regarding legal and practical constraints on Network Rail, in the absence of such agreement, follow the direction indicated by the Panel's questioning in our oral exchanges and are as follows:

5.8.1 The only legal constraint maintained by Network Rail was the need to design for compliance with various current signalling standards, during Network Rail's GRIP 4 stage. As part of its further information after the Hearing Network Rail was asked to provide evidence that the standards said now to be applicable were actually mandatory and externally imposed rather than being just Network Rail's own chosen interpretation or elaboration of Group standards. In the event, Network Rail provided instead its latest updated signalling principles handbook, apparently for the purpose of establishing that Group standards relevant to the reintroduction of the Loop had changed. This did not actually assist the point at issue one way or the other, but it did serve as a reminder of Network Rail's general proposition that its reason for requiring compliance with these changed Group standards was so as to be able to maintain the enhanced line speeds achieved as the result of the MML Network Change.

5.8.2 Network Rail's submission was essentially the same regarding the practical constraints - design, construction etc. - built into its timeline and critical path for reinstatement and occurring in Network Rail's GRIP stages 4, 5 and 6. Network Rail said in reality these should be considered in parallel with the signalling standards; each set of constraints would be on the critical path if the other were inapplicable. In either case, however, the significant point was that so far as Network Rail was concerned the critical path was largely if not entirely being directed by the perceived need to maintain MML current line speeds, so militating against effective consideration of a like-for-like reinstatement of the Loop without upgraded signalling.

5.8.3 As noted above in summarising the oral exchanges (paragraph 4.16), Network Rail's drive towards maintaining the current line speeds (leading to what became its Alternative Option requiring upgraded signalling etc.) was significantly informed by its belief that a new Network Change would be required now to permit it to impose speed restrictions on the main line, which would become necessary if it were to go for a like-for-like reinstatement (later dubbed the Simple Option). I conclude that the Panel's and the Claimants' challenges to this supposition were correct and justified, on both the grounds debated by us at the Hearing. First, the increased line speeds pursuant to the MML Network Change were never properly established, because they did not take account of the presence of the Loop in the Network as it was then legally constituted; legally, i.e. technically, the Network incorporated and still incorporates the Loop, because its removal has never been sanctioned by a duly established Network Change. Secondly, in any case, this ADA30 has the jurisdiction (under Rule G47) in its determination to make an order permitting or ordering an action which might otherwise constitute Network Change, without Network Rail being required to establish it through the Network Change process. This was one of the decisions of the ADA17 determination, when it permitted the original unauthorised Loop removal to be carved out of the rest of the MML Network Change in order that the latter might proceed expeditiously, albeit conditionally on the eventual reinstatement of the Loop as ordered; it was an outcome which Network Rail had expressly requested from ADA17 and subsequently accepted.

5.8.4 Apart from the MML current line speeds issue it also became apparent during the oral exchanges (see summary at paragraphs 4.14 and 4.15 above) that in some measure the practical constraints driving Network Rail's proposed extended timeline, particularly during the lengthy GRIP 4 stage, included planning for works necessary to address various other physical changes that had happened to the Loop since its original disconnection, including restoring hardware and rewriting software elements of the signalling needed to restore it even to a like-for-like state. These changes had resulted in much more having to be done generally to reinstate it now, including extensive contracting out of works, than would have been the case if Network Rail had just got on and done it when directed to by ADA17.

5.8.5 If true, this has to be regarded as directly inconsistent with some of Network Rail's evidence to the ADA17 Hearing, where it made light of the physical disconnection of the Loop, describing that as mere "stageworks". When arguing on that occasion

(unsuccessfully) that the Loop had not in fact been technically "removed", Network Rail was adamant that, whilst the switches and crossings had been taken out, the track and signalling of the Loop were still in place and available; and that the Loop could be easily reconnected if the switches and crossings were replaced. As I noted at the ADA30 Hearing this could not have been correct, at the time it was said in 2013 at ADA17, if what was now being asserted as to the need for further extensive work and time-consuming contracting out was also true. Moreover, inasmuch as Network Rail now expressly claimed that things had also been done since 2014 that had actually made it harder for the Loop to be put back, this put Network Rail directly in breach of another of the ADA17 orders, that it "shall not take any further action, beyond the Implementation Stageworks already physically carried out and completed, to dismantle the Loop or render it unusable or otherwise such as to preclude its future reinstatement and reconnection to the Network". Asked for an explanation of all this, and generally as to why it had dropped plans for a process of reinstatement that was at least started in 2014, as I have also previously noted, Network Rail could only say it was due to a "series of errors, mistakes, ...misjudgements in terms of what the adjudication meant", for which it said it had now apologised.

5.8.6 With regard, therefore, to the legal and practical constraints maintained as extending the timescale for Network Rail's GRIP stages leading to reinstatement, I conclude that Network Rail could and should have decided positively to go ahead with the reinstatement of the illegally disconnected Loop, as a priority. It should just have got on with the simplest physically and legally possible reinstatement and reconnection as quickly as possible in time for the next occurring timetable change. As I commented at the Hearing, the problem with Network Rail's attitude and conduct may not have been a deliberate attempt by or within the company not to obey the ADA17 decision, but rather the lack of any deliberate attempt to obey it. The simplest possible reinstatement now would be a like-for-like replacement of the switches and crossings that were taken out, consistently with what was firmly asserted by Network Rail at ADA17 to be entirely feasible. And the quickest possible reinstatement would be so as to be completed in approximately one year, therefore in time for the next annual principal timetable change date; as at the date of the Hearing in July 2016 this was, and still would be, December 2017.

5.8.7 Consequently, as with the fiscal constraints, I find as a fact that there were and as of now still would be no unavoidable legal or practical constraints on Network Rail in planning a least a like-

for-like reinstatement of the Loop by the December 2017 timetable change date. I find as a matter of entitlement that, in the absence of the Claimants' agreement otherwise, the element of delay produced by the introduction of upgraded signalling and other practical changes related to maintenance of current line speeds could and should have been removed from the timeline proposed.

5.8.8 Had the Claimants, therefore, not agreed to a different scheme and timing proposed by Network Rail, I would have decided the Reinstatement Issue broadly in the same terms as for ADA17 - therefore requiring at least the Simple Option but permitting, in effect, the Alternative Option - but in any event with a mandated completion by the timetable change date in December 2017 rather than 2018. I believe that this would have satisfied the necessary requirements of practicality, clarity, certainty and feasibility required, as submitted by Network Rail, to make the decision enforceable if necessary in the same way as a mandatory injunction.

5.8.9 On the contrary, however, what I actually now decide on the practical injunctive remedy on the Reinstatement Issue - at section 7 below - is of course in line with the agreement reached between the Dispute Parties at their meetings on 23 August and 31 October 2016, as supplemented or modified by subsequent correspondence. This does not in my view reflect the legal entitlements of the Claimants in this area, because they are more extensive as I have set out above. However that is what has been agreed and should therefore be respected and implemented.

5.8.10 I have found that, one way or another, the legal and practical constraints said to govern Network Rail's timeline and method of reinstatement were largely self-imposed, in its pursuit of what it still considered to be the 'best' option for reinstatement rather than the contractually binding one. Before leaving the subject of practical injunctive remedies and entitlements I must add some observations of the Panel, for future reference, on Network Rail's apparent general tendency (seen in other cases as well as this one) to seek a "best for the railway industry solution" to a contentious issue, but at the expense of having regard to the strict contractual entitlements of the parties to the process. This tendency, though probably well intended, is misconceived:

5.8.10.1 First, what is "best for the railway industry" - in fact any industry - in a commercial world governed by the rule of law, is the relative certainty and rigour of having clear contracts that the parties know will be legally

interpreted, operated and if necessary enforced, strictly according to their terms. That is preferable to the total uncertainty and vagueness of having rights and obligations determined somewhat randomly according to the relatively unpredictable opinion for the time being of some individual executive or management grouping within an organisation such as Network Rail - or even the DfT - as to what is right for the industry as a whole at that time. This latter process is exactly what the Access Disputes Resolution process was revised some years ago in order to avoid - decisions trying to arrive at a loosely based 'industry' solution, rather than precisely in accordance with the legal entitlements of the parties, as ADRR Forums are now explicitly required to make.

5.8.10.2 Secondly, at a practical level, if only Network Rail were able correctly and fully to apply, and to train its executives to understand and apply, the relevant procedures of the industry's governing contractual matrix (in this case meaning full compliance with the Network Change process), then it should be possible both to achieve an optimal industry solution and at the same time adhere to the requirements of the regulatory contractual framework. In this case, in particular, it appears that Network Rail has made substantial errors with respect to applying the Network Code requirements for Network Change and very possibly has also fallen short of its licence obligations as regards both physical stewardship of the Network and publication (in the Sectional Appendix) of accurate information about the Network; and these failures are wholly responsible for Network Rail's perceived inability to achieve what it regards as 'best for the industry' consistently with contractual compliance.

5.8.11 Finally, still on the general subject of alleged constraints of all sorts on Network Rail's power or freedom to act and therefore to comply with its legal obligations, I noted above in paragraphs 2.14 and 3.19.4, citing and referring to Network Rail's latest submissions in its emails of 21 and 23 December 2016, that I would address further in the analysis here the implications of its refusal in those emails to confirm that even the Loop reinstatement programme it had itself proposed and persuaded the Claimants to agree to was sufficiently within its power to be enforceable by injunction, if necessary:

5.8.11.1 Our entire consideration, at and following the Hearing, of the fiscal, legal and practical constraints submitted as

bearing upon Network Rail's capacity to achieve any particular completion date (see the oral exchanges at section 4 above) had been predicated on Network Rail's own submissions as to what would be necessary and sufficient to secure the enforceability of an eventual award, at least as regards the practical remedy of reinstatement and reconnection of the Loop – the Reinstatement Issue. Prior to Network Rail's 21 December email it had never been suggested or contemplated that there might be circumstances in which an obligation of Network Rail to 'do' something, let alone an agreed obligation, could **never** be enforced or compelled, because "it is neither absolutely capable of being performed nor wholly within the power of Network Rail"; or because (per Network Rail's 23 December email) the completion timing previously insisted on by Network Rail itself, 20 October 2018, "is not, and is not capable of being, wholly within Network Rail's power and control".

5.8.11.2 Nor prior to 21 December 2016 had it ever been canvassed that, instead of having the Panel and the Dispute Parties strive to reach a clear, binding and enforceable decision out of the ADA30 Hearing, on the contrary it would be sufficient that "the statement of 10 November represents the parties' agreement as to what should happen, and the parties are now all working towards that end. The usual process with regard to issues regarding the network is reaching an agreement which the parties then work to implement, so this reflects normal practice." And nor was it ever contemplated that, because the reinstatement of the Loop "is a complex project" which "practical and fiscal constraints" might make it more onerous for Network Rail to perform than anticipated, therefore instead of expressing the ADA decision in a full written determination in accordance with the Rules, the Hearing Chair should eventually simply "note the parties' agreement as to what is to be done, as set out in our email of 10 November 2016".

5.8.11.3 In the context of the whole ADA17/ADA30 history the complacency of these suggestions is astonishing. If Network Rail had actually managed to observe "the usual process with regard to issues regarding the network" in the first place, then this saga of disputes would not have been necessary. And if these suggestions were adopted, then with Network Rail

having already failed to implement the determination of one ADA hearing where it had stated confidently that reinstatement of the Loop if required would be easy, all that might reasonably now be expected out of this second ADA would be an unenforceable agreement in principle for Network Rail to do or not do simply whatever it broadly felt appropriate, in whatever circumstances might arise. Such an outcome would make a complete mockery of the dispute resolution process for any commercial system relying on enforceable contracts and the rule of law.

5.8.11.4 It was to my considerable surprise, therefore, that Network Rail's 21 December 2016 email thus reintroduced reference to alleged practical and fiscal constraints on its freedom of action, but now apparently as a complete bar to its ever having an enforceable commitment or obligation to do anything at all. I have dealt extensively above, at paragraph 5.7, with the submissions as to such specific constraints raised before and at the Hearing; and just the same considerations apply to these constraints when so raised again after the Hearing. Network Rail's 21 December email now also introduced, moreover, a new alleged fiscal constraint, of explicit resistance by the DfT to the reinstatement of the Loop, at least as an enhancement, and the consequent possible lack of DfT funding – "because the DfT is not convinced that the need for the loop in CP5 or CP6 has been evidenced".

5.8.11.5 As to this new proposition regarding the relevance of the DfT's influence on the dispute, I can only reinforce what I have said at paragraph 5.7.10 above in rejecting both the propriety of treating the Loop reinstatement as an enhancement rather than a renewal, with attendant specific funding complications, and any consequent suggestion that, in the absence of express legislative or regulatory provision, ad hoc political funding constraints on a public sector body can somehow generally exempt it from performance of its contractual or other legal obligations. That should be recognised by the funder, therefore the DfT, as much as the funded body. To hold otherwise would drive a coach and horses through not only Network Rail's accountability to manage and maintain the Network in compliance with the contractual framework which is the structural basis of the privatised railway industry, but also the accountability of every other public sector body to comply with the law. Such a

body surely cannot be heard to say that it is unable to perform a particular legal obligation simply because its sponsoring department has not put it in funds to do so, with no consequences for either the body or the department.

5.8.11.6 Accordingly I reject Network Rail's express and implied submissions via its 21 and 23 December 2016 emails (a) that the form, method and timing of reinstatement in accordance with its Alternative Option as agreed with the Claimants (and other involved parties) on 31 October 2016, as expressed in the "jointly compiled" statement issued by Network Rail itself on 10 November 2016 and as supplemented by the further detailed information provided by the Dispute Parties, are not sufficiently certain, clear or within Network Rail's power and control as to make them fully binding on Network Rail and enforceable by injunction if necessary, as opposed to merely an unenforceable agreement to do what it can; and (b) that actually nothing at all is wholly within Network Rail's power, with the possible consequence that eventually it can never be legally compelled to do anything.

5.8.11.7 I find instead, in accordance with established law (*Davis Contractors v Fareham UDC [1956] AC 696*), that a party is not relieved of performance of a contract or of a particular contractual obligation, nor therefore from being injuncted to perform it, merely because the performance of that contract or obligation becomes more onerous, difficult, costly or otherwise financially oppressive; or in other words, merely because performance of the obligation is "a complex project... neither absolutely capable of being performed nor wholly within the power of Network Rail", or merely because the agreed timing for performance "is not, and is not capable of being, wholly within Network Rail's power and control".

5.8.11.8 A party is so relieved – from performance and enforcement by injunction – only where the contract can be said to be 'frustrated'. Frustration of contract, so as to relieve the parties of its further performance, occurs only "whenever the law recognises that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was

undertaken by the contract" (per Lord Radcliffe in *Davis* at p728). That is most definitely not the case with any of the constraints on performance advanced by Network Rail in its submissions during the Hearing nor, especially, with those asserted in its 21 December 2016 email, such as lack of funding commitment on the part of the DfT or "the delays which are common to all construction contracts".

5.8.11.9 Consequently I expect and intend that the decisions regarding the Reinstatement Issue in section 7 below should be enforceable against Network Rail by injunction if necessary, being sufficiently clear, certain and practicable to satisfy the tests for such enforceability submitted on behalf of Network Rail itself.

Rationale for additional remedies for failure to implement ADA17 determination

5.9 Following the practical remedy of achieving actual reinstatement of the Loop at some time and in some form, the second main issue is as to the available additional legal remedies to address the fact and circumstances of Network Rail's previous failure to comply with the ADA17 determination. Network Rail's submissions before and at the Hearing were to the effect that this was a non-issue, because it had by now agreed in principle to the "main" remedy sought by the Claimants, the reinstatement and reconnection of the Loop to the Network in accordance with the requirements of ADA17. Network Rail's opening position in its Statement of Defence was that there should be no determination at all, even to confirm the new extended timescale for reinstatement, "given that Network Rail is to do that which the Claimants have asked", and that no order for costs should be made. Not surprisingly the Claimants by now were not content just to rely on Network Rail's bare promise in the matter and sought a specific determination to confirm the agreement and make it enforceable. Network Rail's subsequent written legal submissions did not go so far as to propose that a determination was wholly unnecessary, but did maintain that because Network Rail was "wholly committed" to the reinstatement no determination was required on that matter; "that issue has already been concluded". Apparently, therefore, the only remaining "subsidiary matters" for consideration were as to the timing of the reinstatement, and as to the Claimants' costs which Network Rail now conceded; and the adjudication did not need to consider any other remedies or means of enforcement.

5.10 The Claimants, however, made a number of submissions of principle in their Statements of Claim, not responded to in Network Rail's Statement of Defence, regarding the nature and consequences of Network Rail's conduct and attitude in relation to its stated failure to comply with

ADA17 – see the summaries in paragraphs 3.3 and 3.6 above. As noted there, these submissions of themselves demand consideration of the additional outcomes of entitlement and/or remedy available. The Claimants have raised this as a matter of principle precisely because the practical remedy of reinstatement in the only timescale now practically feasible – whether that is in 2017, 2018 or later – cannot be a substitute for the original ADA17 order which was to complete it in 2014; and because in any case it is not sufficient to deal with the extraordinary circumstance of what appears to be a total disregard of and contempt by Network Rail for the ADRR process. I accept the Claimants' submissions in this respect.

5.11 As well as the Claimants' raising of these issues, on the basis of the totality of the submissions, evidence and documents in the history of this matter I have also formed my own opinion as to Network Rail's conduct and attitude. I believe these should not go unchallenged, in any legal way possible; this is of major importance to the railway industry and to any party that becomes involved in its dispute resolution processes. I am bound under the Rules to seek to give effect to that opinion. Rule G4(c) requires an ADA, where appropriate, to take the initiative in ascertaining the facts and law relating to the dispute; Rule G5(c) requires that disputes referred to an ADA shall be administered in a way which is proportionate to (among other things) the significance of the issues involved to the railway industry; and Rule G27 entitles the Hearing Chair to draw any inference he wishes from any failure to provide adequate or full disclosure by any party.

5.12 I have accordingly tried to take all relevant matters into account in forming my conclusions as to Network Rail's conduct and attitude and also in assessing the worth of its apology (such matters in many respects reflecting the Claimants' submissions). For example, in the course of discussion in that part of the oral exchanges concerning constraints on Network Rail's timeline, particularly the fiscal constraints and the effect of the September 2014 reclassification, it was said repeatedly that the position for Network Rail had changed in several respects, including importantly that it could no longer just borrow money in the same way, therefore there was nothing it could do beyond what it was proposing and there was no point in looking back to when times might have been easier. Though I have found above that this did not in the end make a difference to Network Rail's position in this matter, owing to the view I take of the irrelevance of judicial reviewability to Network Rail's existing legal obligations, these statements are illustrative of Network Rail's attitude when challenged with the consequences, brought upon itself, of ignoring its obligations. This attitude was summed up several times in the well-worn cliché "We are where we are" (see for example the exchanges summarised at paragraph 4.8 above).

5.13 I have dwelt above at some length on the exercise of evaluating the claimed constraints on Network Rail in arriving at a timely or workable programme for the reinstatement, notwithstanding that the Claimants eventually agreed, against their interests and contrary to their entitlements, to Network Rail's Alternative Option which, based on those constraints, will now delay reinstatement into 2018. I find that the very fact that, upon detailed examination, most of the claimed constraints have proved less than compelling serves to demonstrate that the mantra "We are where we are" is just not good enough as a resolution of the Claimants' legitimate complaints at Network Rail's failure to implement ADA17.

5.14 The repetition of "We are where we are" was backed up by a brief and rather strained apology, bearing every sign of having been coached into Network Rail's executives by its legal advisers at a late stage for the purposes of the Hearing. In this context it came across strongly as meaning "We may be at fault for breaking our contract but that is just too bad; because we have said we are sorry, that should be enough; anyway there is nothing more that can be done about it now". And Network Rail's latest propositions as to its general lack of amenability to an enforceable award, in its December 2016 correspondence, can only cast further doubt on the sincerity or, more significantly, relevance of its previous apology. As I have observed above in relation to that correspondence and otherwise regarding Network Rail's claimed effect of public sector status, such an attitude to the performance of contractual obligations, if sustainable, could have a particularly serious effect on an industry which is based upon all participants buying into a single contractual network.

5.15 There are several other factors to take into account in forming an assessment of Network Rail's behaviour with regard to the matter of non-compliance with ADA17:

5.15.1 The original ADA17 order with which Network Rail failed to comply was in respect of a previously broken obligation, in removing the Loop in the first place without the contractual authority of an established Network Change. So this non-compliance already amounted to a repeated breach.

5.15.2 As mentioned in paragraph 5.8.5 above, Network Rail's confirmation in ADA17 that it had removed the Loop in such a way that it would be easy to reconnect it, was effectively given the lie by its insistence here that the reconnection is now a major, very costly and time-consuming project. And, as commented in DBC's submissions, delaying the performance of an obligation for four years after its intended date (i.e. 2014 to 2018), and thereby increasing its cost fivefold, can hardly be

regarded as prudent or reasonable behaviour with regard to the expenditure of public money.

5.15.4 Network Rail failed to rectify its first breach, the removal of the Loop, when it could have done so within the time in 2014 set by ADA17. When given a second chance, just to get on with the reinstatement expeditiously following the Claimants' first complaining that it had not been done, and without the threat of a further dispute, it then compounded the failure. First, from 2014 to 2016 Network Rail prevaricated over how, when and even whether the reinstatement might be done (as evidenced by correspondence annexed to the Claimants' Statements); and then in contemplation of and finally at the Hearing, Network Rail continued to propose timelines and programmes for the reinstatement that have proved on examination to be unrealistically drawn out and unjustified even by reference to the relevant industry contractual provisions. By securing the Claimants' agreement, however, it has ended up with its originally proposed extended completion period ending in 2018.

5.15.5 As I have noted above at paragraphs 3.9 and 3.13, Network Rail's first Statement of Defence and later further written pre-hearing submissions were remarkably different in tone and content. The Defence omitted to answer any of the Claimants' issues or principles raised in their Statements of Claim; it relied entirely on Network Rail's then proposals to effect a reinstatement; and it relied to previous communications with the Claimants regarding reinstatement whilst ignoring their allegations that all their previous communications with Network Rail concerning reinstatement had led them to believe that Network Rail had no intention at all of reinstating the Loop, ending with Network Rail expressly saying in various ways that it definitely would not reinstate but would instead spend the money on something else. DBC attached the relevant correspondence showing all this. Network Rail in its Statement of Defence, instead of attaching any correspondence or documents to support its statements, just confusingly said it "has complied with" Rule G16(b)(iv), which requires any relevant documents to be attached; I understood this to mean that it had no additional relevant documents to attach, therefore did not refute what was said by the Claimants.

5.15.6 In all, Network Rail has given the impression of believing it is immune to criticism for the way it handles its contractual obligations, particularly when not thinking it necessary to engage external legal advice. Network Rail has seemed to regard itself as the sole arbiter as to what is best for the industry. It refused to be drawn further on any substantive

reasons for the conduct for which it apologised. Asked to explain what "misjudgements and mistakes" had been made (as it said) Network Rail's replies, seemingly with some irritation, were impenetrable: "I really don't see how that's going to take us forward in getting the right answer"..."Just simply, mistakes were made, things were not progressed in the way that they should have been."..."So, work following the scheme plan that we just mentioned was just not progressed and it was not progressed simply because it was within nobody's authority, just within a morass of work that was ongoing"..."There were simply mistakes made. What more can I say?"

5.16 I conclude that the above pattern of corporate behaviour does not demonstrate the responsible conduct of a self-professed public sector body. I find that it evidences an attitude within Network Rail of assumed impunity, resulting in carelessness, disregard and ultimately contempt for the ADRR process. This is not a sound basis for giving effect to the rule of law or the enforcement of a binding contract. I think that attitude has been borne out also to some extent by the manner in which the tone and content of Network Rail's submissions altered during this dispute process – from its negative correspondence with the Claimants, to its stonewalling Statement of Defence, to its further pre-hearing submissions introducing an apology but not much else (and, I suspect, offered only on the basis of too lately sought external legal advice doing the best it could in difficult circumstances to defend the indefensible), to the complacency of its denial of eventual enforceability of an award in its latest correspondence in December 2016. That the Claimants for practical purposes have eventually, in effect, accepted that attitude in agreeing to the Alternative Option, "in the best interests of the industry", is commendable but does not excuse Network Rail's performance in creating a situation where such acceptance has seemed necessary and pressured, even though not owed as a legal obligation.

5.17 These conclusions, particularly with their implications for the whole ADRR process, suggest that Network Rail's failure to comply with ADA17 is a serious matter and not something to be brushed off with an apology and a concession to get around to doing something practical about it when it becomes convenient to fit in with other scheduled projects, completing four years after the originally ordered date intended to remedy a breach of contract from some two years before that. As well as the agreed reinstatement remedy my decision will include an award against Network Rail of compensatory damages for the Claimants if and to the extent that they can prove relevant loss – see section 7 below. It will also include an award of costs against Network Rail – see section 6 below. However, that is not all. The High Court has its established procedures to deal with and discourage contempt of its processes; ADRR Forums do not. Because of the seriousness of this issue for the industry, and the disregard shown by Network Rail for

the process, I think it is absolutely necessary and proper to seek an additional legal remedy to signify the gravity of this behaviour and discourage Network Rail, and indeed any other involved party in the railway industry, from similar conduct in future. That inescapably leads to some form of deterrent, punitive or, as it is often called and I shall mainly refer to it, 'exemplary' award.

Powers to grant remedies for failure to implement ADA17 determination

5.18 For such remedy I look to the powers granted to, but subject to the responsibilities imposed upon, the ADA Hearing Chair under the Rules. I set out here what I consider to be the particularly relevant Rules:

5.18.1 In the 'Principles' section in Part A, Rule A5 states: "Each and every Forum shall reach its determination on the basis of the legal entitlements of the Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including its determinations and decisions on procedure, shall be in accordance with the law." Rule A6(c) states: "Each and every Forum shall... where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Forum, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Underlying Contract after due consideration of all remedies and orders that could properly be made." And Rule A7(b) states: "In reaching its determination each and every Forum shall... be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the Courts."

5.18.2 In Part G which deals with ADAs, Rule G47 states: "Subject to any other provision of the Access Conditions and Underlying Contract, the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute, including, without limitation, that:

(a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the Hearing Chair shall specify;

(b) one Dispute Party should take or not take specified action;

(c) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination; or

(d) [provision for interest]

5.18.3 In the Definitions and Interpretation section preceding Part A, Rule 2(h) states: "the words "include" and "includes" are to be construed without limitation."

5.18.4 I refer also to Rules G4(c), G5(c) and G27, summarised at paragraph 5.11 above.

5.19 I having raised the possibility of exemplary as well as compensatory awards as an issue and possible outcome in my pre-Hearing summary of legal issues, Ms Dwyer on behalf of Network Rail understandably made extensive submissions on the subject, citing and referring to a number of the above Rules, as I have summarised in paragraph 3.18 above. In general, Ms Dwyer submitted, because the context of this Adjudication was by way of enforcement of the ADRR dispute resolution process following a party's failure to comply with a previous ADA determination, the only relevant remedies available to the Hearing Chair were the payment of compensation (with or without interest) and/or an order to take an action, and/or an order to pay legal costs. Payment of compensation was therefore, it was submitted, the only financial remedy available to this ADA, and the legal constraints on such a remedy were those applying to the award and assessment of damages for breach of contract; such damages were to compensate for loss, not to punish a wrongdoer, and the established legal principles of proof, mitigation, causation and remoteness applied in assessing the loss to be compensated. These submissions and the relevant Rules were the subject of our ensuing debate in the oral exchanges on the issue of additional legal remedies (as recorded in the Transcript at pages 88 to 97) and on the correct interpretation of the Rules in this regard. My conclusions in principle, taking due account of all these submissions and exchanges, are as follows:

General limitations on powers to grant additional remedies

5.19.1 The first question is as to the interpretation of the apparent breadth of the general introductory provision in Rule G47, "the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute, including, without limitation, that" etc. I find that this means what it says, a general discretion to make any order considered necessary to resolve the dispute, of which all of sub-paragraphs (a) to (d) following are, because stated to be 'without limitation', only non-exhaustive examples.

5.19.2 I accept Ms Dwyer's submissions that this discretion is not wholly unfettered by virtue of the words "without limitation", but must be exercised subject to English law (as stated in Rule G65), having regard to the Principles in Rule A5 (quoted above) therefore generally "in accordance with the law", and

consistently with any relevant decision of the courts or ORR, as required by Rule A7(b). In the present context, however, namely a dispute resolution process that takes effect pursuant to a contract, with remedial powers spelled out by the express terms of the contract itself, 'the law' applicable is actually constituted first and foremost by those very terms of the contract, which here include the rules for its agreed dispute resolution process, the ADRR, subject only to any supervening legal principle conditioning or invalidating such terms. Under English law and its generally much valued principle of 'freedom of contract', the terms of a contract will normally be considered valid and enforceable, upheld and given effect, unless found to be contrary to public policy – that is to say, void for illegality or immorality – or in restraint of trade. 'Illegality' in this context means a contract to act in a way specifically prohibited by law – statute or common law. None of those public policy restrictions or invalidations apply in principle to an exemplary award by a contractually empowered dispute resolution body.

5.19.3 I find therefore that the introductory provision in Rule G47 by itself grants the power to make, among other orders, an order characterised simply as a general exemplary award, if it is considered "necessary to resolve the dispute". I do consider it so necessary here; contrary to Ms Dwyer's submission that the parties had only sought orders to carry out a previous Determination, this dispute in ADA30 is defined specifically by the Claimants themselves as not being primarily about dotting the i's and crossing the t's of an already committed reinstatement, but as requiring consideration of several other significant matters. For example, I revert to some of the Claimants' submissions previously noted in relation to the general justification for seeking additional remedies. As submitted by GBRf "it is purely this specific and deliberate non-compliance of ADA17 Directions that is the subject of this Access Dispute Adjudication"; and GBRf stated its main issue to be "as to why Network Rail believes it did not have to carry out the Directions from ADA17 and, indeed, actively contravene[d] them from January 2014 to the present day". DBC submitted that "disregarding an ADA determination is a serious matter that can only undermine and reduce confidence in this key dispute resolution process in the ADRR"; and that "the purpose of this dispute reference is also to ensure that this issue of non-compliance by the Defendant does not go unnoticed and left unchallenged". Several other submissions by both Claimants in their Statements of Claim were to the same effect, as I have summarised mainly at paragraphs 3.3, 3.6 and 3.12 above. Consequently I am satisfied that an exemplary award, being something that goes beyond a further newly defined

reinstatement order plus a compensatory award, is both necessary to resolve the dispute as defined by the Claimants, and an appropriate remedy to be granted by me in exercising the discretion accorded to me by the ADRR in the manner required by Rule A6(c) "after due consideration of all remedies and orders that could properly be made".

5.19.4 The next question, also as to interpretation, is as to the breadth of the specific sub-paragraph (a) of Rule G47: "one Dispute Party shall pay an amount of money (including damages) to another Dispute Party". I find that this is a broad provision which expressly contemplates any kind of monetary payment, though still subject (like any other term of the contract) to invalidation by overriding public policy considerations in the manner I have explained above. The word "including" means that the payment may but need not be characterised as "damages", and whether or not so characterised, may be denominated as compensatory or for any other purpose not prohibited by public policy. I reject Ms Dwyer's submission that "including" in this context means limited exhaustively to damages because the Rules do not elsewhere provide for the payment of something other than damages. As I said at the Hearing, this is not a natural interpretation of "including"; the normal and correct interpretation is that it means "including among other things". This conclusion is borne out by the express provision of Interpretation Rule 2(h) that 'include' is to be construed without limitation. That in itself refutes Ms Dwyer's contention during the oral exchanges that if the words of Rule G47(a) had meant to say 'including, but not limited to, damages', they would have said it; Rule 2(h) says it instead. I find therefore that, in addition to the general power in the introductory provision to Rule G47, there is a specific power granted by sub-paragraph (a) to award payment of a sum of money, whether or not characterised as "damages" and whether designated as compensatory, exemplary, deterrent, punitive or for any other purpose that does not contravene public policy. Insofar as this specific power is a subset of and therefore still subject to the general requirements of the introductory provision, those requirements are already satisfied as I have explained in the preceding paragraph 5.19.3.

Specific legal limitations on powers to make exemplary award

5.19.5 Having dealt above with the general existence of powers under the ADRR to make a broad range of orders that does not exclude an exemplary award, I must address the issue of whether the powers are circumscribed by certain particular limitations under English law submitted by Ms Dwyer to

preclude or restrict specifically the making of an exemplary or deterrent award. First, there was the submission that any form of deterrent award would be in the nature of a "penalty", which is unenforceable under English law. I reject that submission on the grounds I stated in the oral exchanges; the well known rule on the invalidity of "penalties" is irrelevant here because that rule concerns penalties sought to be imposed within the terms of a contract, rather than as a matter of determination of dispute resolution. The submission is misconceived, because the rule cited applies only in a situation where the provision in question is preset within the contract prospectively for application to a future possible but as yet unknown breach; not where, as here, it arises as the result of a contractually agreed dispute resolution process providing a remedy retrospectively for a known breach which has already occurred.

5.19.6 To explain further, the kind of provision liable to be struck down as a "penalty" is an express obligation to pay an ascertained or ascertainable sum of money in certain specified circumstances, usually amounting to a breach of contract, which are spelled out in advance by the contract from the point when it takes effect between the parties. As I noted in response to Ms Dwyer's expression, penalties in this context are not just "amounts of money paid in terrorem of a breach", but amounts imposed or sought to be imposed in the contract by one party on another, in terrorem of a breach. This Latin expression "in terrorem" used by the Courts in the old cases on penalties means "in fear of", therefore by definition applies only to contractual provision for the consequences of a future breach of which the imposing party may be in fear. The future-looking nature of a contractual provision properly found to be invalid as a "penalty" is illustrated by the fact that it is usually compared with a contractual provision for liquidated damages, which is only valid if it constitutes, as quoted by Ms Dwyer, "a genuine pre-estimate of loss"; a pre-estimate by definition points to the future. Thus a tribunal decision ordering the payment of a sum of money as a remedy after the event - whether compensatory, exemplary or whatever - for an historic breach of contract, simply does not fall within the sphere of application of the rule against penalties, even if the tribunal's jurisdiction derives from the contract which has already been breached.

5.19.7 As summarised at paragraph 3.18.11 above, Ms Dwyer's second main submission regarding legal limitations on any power to make an exemplary award, at least of damages if not otherwise, was that English law permits awards of exemplary or punitive damages only in the three categories of circumstances defined in the case of *Rookes v Barnard*, namely: misconduct in

public office; where expressly authorised by statute; and where the conduct was calculated by the defendant to make a profit for himself which exceeds the damages payable to the claimant. None of those categories, Ms Dwyer submitted, apply in this case. I have to disagree with these submissions also, on a series of successively and independently applicable grounds.

5.19.8 First, it is established that *Rookes v Barnard*, in the well known analysis by Lord Devlin, actually stated not the revelation of a previously non-existent though still very narrow new jurisdiction for awarding exemplary damages, but a new restriction of a historically well rooted and previously broader jurisdiction for such awards. Consequently there is a clear view that the restricted categories of circumstances delineated by Lord Devlin apply only within the context of the legal subject matter upon which they were decided, and therefore that those categories do not apply so as to limit the prior jurisdiction for exemplary damages outside that context. Thus, because *Rookes v Barnard* in substance was a case on a claim in tort rather than in contract – it established and penalised not a breach of contract but the tort of intimidation (albeit by inducing a breach of contract) – it is not relevant authority for limiting to those categories any residual jurisdiction for exemplary damages for a breach of contract, particularly such a breach as is the subject of this Adjudication.

5.19.9 There are many cases, academic commentaries and a Law Commission Report (in 1997) on the scope of jurisdiction in English law for exemplary damages, including relatively few on damages for breach of contract as distinct from tort. The cases and other materials cited as addressing the issue of exemplary damages for breach of contract are, I consider, inconclusive at best. Most, including perhaps the two best known cases in this area, *Addis v Gramophone Co Ltd [1909] AC 48* and *Johnson v Unisys Ltd [2001] UKHL 13*, relate only to the very specific personal case of breach by wrongful dismissal from employment and therefore are not obviously relevant here. These cases, moreover, are actually examples of claims for 'aggravated' rather than exemplary damages, which have been distinguished as a different head of damage altogether (aggravated damages being compensatory for the hurt, distress or indignity caused by the manner of a breach, rather than punitive for the outrageous, contumelious or contemptuous conduct constituting the factual circumstances of the breach). In all, one way or another I can find no case specifically prohibiting or outlawing as a matter of generally applicable principle the award of exemplary damages for a breach of contract as distinct from a tort, whether or not the factual

circumstances of the particular breach fall within the *Rookes v Barnard* categories.

5.19.10 In response, therefore, to Ms Dwyer's submissions on the limitations imposed by the Devlin categories of circumstances laid down in *Rookes v Barnard*, I find as a matter of law, first, that such limitations are not applicable so as to prohibit or invalidate an otherwise duly empowered (as found in paragraphs 5.19.3 and 5.19.4 above) exemplary award, in respect of the breach of contract constituted by Network Rail's failure to comply with the ADA17 determination.

5.19.11 Secondly, however, independently of the above finding it is in any event clear that a breach of contract per se is not excluded as a cause of action in respect of which any or all of the *Rookes v Barnard* categories, where they are in any event applicable in their own right to the facts, may operate so as to permit an an exemplary award. A series of cases, most notably *AB v South West Water Services Ltd [1993] QB 507* (Court of Appeal) following dicta of a majority of the House of Lords in *Cassell v Broome [1972] AC 1027*, in analysing *Rookes v Barnard* established the 'cause of action test' whereby even in circumstances falling within the Devlin categories, exemplary damages could still only be awarded where the plaintiff's cause of action was one in respect of which, prior to *Rookes v Barnard* therefore 1964, such an award had already been made. This line of cases for a time ruled out, among other things, breach of contract as a ground for exemplary damages. The cause of action test, however, eventually was conclusively rejected by the House of Lords in *Kuddus (AP) v Chief Constable of Leicestershire Constabulary [2001] 2WLR 1789*, in overruling *AB v South West Water* and holding that exemplary damages were not restricted to causes of action for which such damages had been awarded prior to 1964. As a result, *Kuddus* held specifically that any factual circumstances falling within one of the Devlin categories may ground an award of exemplary damages, irrespective of the cause of action for the claim – therefore potentially including not only all torts but also breach of contract. Thus with the cause of action irrelevant, it is not necessary that the act complained of amount to any particular tort, only that the facts of the case fall within one of the Devlin categories.

5.19.12 Further, I disagree with Ms Dwyer's submission that none of the three Devlin categories of circumstances in *Rookes v Barnard* can apply to the factual circumstances of this case. Clearly an exemplary award is not here expressly authorised by any statute; actually it hardly ever has been so authorised in

any circumstance and this is in any case not regarded by the commentators as a true third category of factual circumstances, rather as just an obvious point of law added by Lord Devlin to the other two categories almost as an afterthought. However, I find as a matter of law that Network Rail's breach of contract the subject of this ADA, i.e. failing to comply with the ADA17 determination, can fall properly within both of the other two truly factual categories; what Ms Dwyer described (in footnote no.2 to her written legal submissions) first as "misconduct in public office" and secondly as "where the defendant's conduct was calculated by the defendant to make a profit for himself which exceeded the damages payable to the claimant".

5.19.13 Both these categories were more fully and rather differently described in *Rookes v Barnard* itself and also fleshed out in *Kuddus v Chief Constable of Leicestershire*. The first category, Ms Dwyer's 'misconduct in public office', is actually broader and - which may at least spare Network Rail's sensibilities - perhaps not connoting the degree of moral impropriety which that brief description suggests. In *Rookes v Barnard* Lord Devlin actually defined it as follows:

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category... to oppressive action by private corporations or individuals... In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."

In *Kuddus*, Lord Nicholls clearly extended what was intended to be covered by this category:

> "Lord Devlin drew a distinction between oppressive acts by government officials and similar acts by companies or individuals. He considered that exemplary damages should not be available in the case of non-governmental oppression or bullying. Whatever may have been the position 40 years ago, I am respectfully inclined to doubt the soundness of this distinction today. National and international companies can exercise enormous power. So do some individuals. I am not sure it would be right to draw a hard-and-fast line which would always exclude such companies and persons from the reach of exemplary damages. Indeed, the validity of the dividing line drawn by Lord Devlin when formulating his first category is somewhat undermined by his second category, where the

> defendants are not confined to, and normally would not be, government officials or the like."

In the light of this I find that a company such as Network Rail falls squarely within the range of organisations constituting "servants of the government" contemplated by this category as redefined in *Kuddus*, particularly in exercising its public functions of which so much has been made. The remaining ingredient of the first category is therefore "oppressive, arbitrary or unconstitutional action". I have no difficulty in finding as a fact that Network Rail's pattern of behaviour in unauthorisedly disconnecting and removing the Loop from the Network, equivocating over whether or not it had actually done so, failing to reinstate it as specifically ordered by an ADA, equivocating again over whether, when and how it should eventually be reinstated, eventually agreeing to complete its reinstatement only some six years after it was first removed, and finally asserting its total immunity to any process calculated to compel performance of what it affects to have agreed, amounts to both oppressive and arbitrary action – as well as being manifestly contemptuous of the dispute resolution process to which it has contractually submitted.

5.19.14 The second of Lord Devlin's categories (Ms Dwyer's 'conduct calculated by the defendant to make a profit for himself' etc) is also described more fully, and relevantly, by Lord Devlin himself in *Rookes v Barnard*, and is then further expanded in *Kuddus*.

> Lord Devlin said: "Cases in the second category are those in which the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the Plaintiff... Where a Defendant with a cynical disregard for a Plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the Defendant is seeking to gain at the expense of the Plaintiff some object... which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay."
>
> Then in *Kuddus*, Lord Nicholls stated that he was not "wholly persuaded by Lord Devlin's formulation of his second category (wrongful conduct expected to yield a

benefit in excess of any compensatory award likely to be made). The law of unjust enrichment has developed apace in recent years. In so far as there may be a need to go further, the key here would seem to be the same as that already discussed: outrageous conduct on the part of the defendant." And he went on to note "that the essence of the conduct constituting the court's discretionary jurisdiction to award exemplary damages is conduct which was an outrageous disregard of the plaintiff's rights."

5.19.15 Thus the second category does not, as so explained, require conduct calculated to make a profit as such, but only a benefit of some sort, greater than the damages which would otherwise become payable. I do not assert for a moment that Network Rail has actually sought to make a profit for itself or has acted in the slightest way in bad faith in its handling of the Loop reinstatement or otherwise in its response to the ADA17 determination. However, I do recall Network Rail's evidence at the Hearing as to its acknowledged "errors, mistakes and misjudgements", regarding the relative insignificance and inconvenience of the objectives for the required Loop reinstatement in accordance with ADA17, when weighed against the 'best for industry' objectives of the MML line speed improvements and other enhancements. I recall also Network Rail's assertions, or at least assumptions, that the Claimants must have "managed" well enough without the Loop and therefore should not be anticipated to be seeking much by way of compensation. On that basis I find as a fact that Network Rail's pattern of behaviour, as so described, though nowhere approaching "moneymaking in the strict sense" nevertheless can be regarded as an example of "seeking to gain at the expense of the Plaintiff some object... which either he could not obtain at all or not obtain except at a price greater than he wants to put down" as described by Lord Devlin.

5.19.16 It should be remembered also that Network Rail was of the view that its repeated assertions that "we are where we are" coupled with an apology would be enough to deflect any more serious consequences of its inaction than a further renewed but equally difficult (or, in the light of its post-hearing submissions, impossible) to enforce obligation to do what it should have done before. In this light I find that Network Rail, by constantly deferring the reinstatement indefinitely, may properly be considered also in effect to have been seeking or relying on a benefit in excess of any compensation it believed might become payable to the Claimants. As such, although the 'object' or 'benefit' sought by Network Rail may not have been monetary, but rather a de facto protection from real sanctions resulting in

the freedom to realise a particular purpose not otherwise properly authorised, I find in the end that its conduct may be viewed as amounting to an "outrageous disregard" of the Claimants' rights within the sense expressed in *Kuddus*.

5.19.17 The other submissions as to the lack of jurisdiction to make an exemplary award have in substance already been dealt with. Ms Dwyer had said it was not the role of the ADRR or Adjudication to issue "deterrents", because the ADRR were a means to resolve disputes between parties and, here, the parties had only sought orders to carry out a previous Determination. I have addressed that in paragraph 5.10 above and my summaries of the Claimants' submissions on this very issue at paragraphs 3.3 and 3.6. Clearly the Claimants have sought more than just orders to carry out the ADA17 determination in a new timescale; and the role of Adjudication is to exercise the jurisdiction spelt out Part G of the ADRR in accordance with the Principles in Part A, as I have described above.

5.19.18 Finally Ms Dwyer had maintained in her pre-Hearing legal submissions that to issue deterrent awards would trespass on the jurisdiction of ORR, which had the power as regulator (in appropriate circumstances) to issue penalties and fines. The jurisdiction to make any ADA determination in a dispute under an Access Contract is spelt out in Rule G47 as previously referred to, no more and no less. It does not in any way impinge on or overlap with ORR's jurisdiction to regulate involved parties in the railway industry and in that behalf to command fines and penalties as appropriate. In a separate issue, as it happens, both Claimants here have also raised in their submissions, as previously noted, claims that Network Rail's conduct in relation to the Loop amounts to a breach of its network licence. In the oral exchanges I clarified that, whilst I might incline to the opinion that there had been a breach of the licence I specifically declined to make any express finding in that regard or attach any particular consequence to it, let alone any remedy, as it was clearly a matter for ORR exclusively both to determine and to regulate any such breach and not within the prerogative or jurisdiction of an ADA to do so.

Summary of juridical bases for exemplary award

5.20 From the above analysis I conclude that an ADA has the power to make an exemplary award against Network Rail, by way of remedy for its failure to implement or comply with the determination of dispute ADA17. I propose to make such an award. It will be a single award but grounded on the following four different and alternative juridical bases

derived from the reasoning and conclusions in paragraphs 5.9 to 5.19 above. Each and all of these juridical bases will, I emphasise, be of equal and independent validity and will be sufficient in its own right to ground the remedy so awarded, should any or all of the others be found legally flawed:

5.20.1 First, I shall order the payment of an amount of money by Network Rail to each of the Claimants as a general exemplary award, expressly permitted as a matter of contract, pursuant to the general power granted to the Hearing Chair by the introductory provision in Rule G47 to "make such orders in his determination as he considers necessary to resolve the dispute including, without limitation, etc…". For the purposes of this basis of award I find that there are no express limitations on this general power and no implied limitations other than that it should not be exercised in a way or for a purpose which is contrary to public policy; and that there are no constraints of public policy applicable to such an award in this matter.

5.20.2 Secondly, I shall order the payment of an amount of money by Network Rail to each of the Claimants as exemplary damages for breach of contract, again expressly permitted as a matter of contract, pursuant to the specific power granted to the Hearing Chair by the provision in Rule G47 to "make such orders in his determination as he considers necessary to resolve the dispute including, without limitation, that (a) one Dispute Party shall pay an amount of money (including damages) to another Dispute Party, whether that amount is specified in the determination or calculated in accordance with such procedure as the Hearing Chair shall specify…". Likewise for the purposes of this basis of award I find that there are no express limitations on this specific power and no implied limitations other than that it should not be exercised in a way or for a purpose which is contrary to public policy; and that there are no constraints of public policy applicable to such an award in this matter.

5.20.3 Thirdly and fourthly, I shall order the payment of an amount of money by Network Rail to each of the Claimants again as exemplary damages for breach of contract, again expressly permitted as a matter of contract, and pursuant to the same specific power as cited in the previous paragraph, but on the basis that, should the case of *Rookes v Barnard* (or subsequent binding authority following it) be found to apply so as to limit the categories of circumstances for which an award of exemplary damages for breach of contract may be made, then the conduct in respect of which this award is made falls within one and/or alternatively the other of the first and second of Lord Devlin's categories of permitted cases in which exemplary damages

should be awarded. Likewise I find that otherwise there are no express limitations on this power and no implied limitations other than that it should not be exercised in a manner or for a purpose which is contrary to public policy; and that there are no constraints of public policy applicable to such an award in this matter.

Amount of exemplary award

5.21 It is naturally appropriate to give some consideration to the assessment of an exemplary award and the principles on which its calculation should be based. In its 1997 Report mentioned previously, the Law Commission enumerated a number of factors drawn from the then state of the law on exemplary damages, which might need to be taken into account. (I should acknowledge that the Law Commission also expressed its view that exemplary damages for breach of contract might in principle not normally be awarded because they failed the 'cause of action test' under the then state of the law as I have mentioned above; however the Commission also recommended that the cause of action test was an anomaly and should be abolished, as was duly achieved in 2001 by the *Kuddus* case also referred to above.) I consider three of the factors to be potentially relevant here:

5.21.1 First, the principle of moderation, on the basis that exemplary damages are an exceptional form of civil law remedy which includes a punishment factor not subject to the normal safeguards of the criminal process (and are often awarded by a jury which needs to be directed as to the danger of making an excessive award). As Lord Devlin said in *Rookes v Barnard*, the power to award a exemplary damages constitutes a weapon that should be "used with restraint".

5.21.2 Secondly, the relationship with any compensatory award, from Lord Devlin's statement in *Rookes v Barnard* that when exemplary damages are appropriate in principle under his categories test, they can be awarded so as to provide a larger sum where the amount awarded as compensation is inadequate to punish the defendant for his outrageous conduct, to mark the disapproval of such conduct and to deter him from repeating it. In other words the amount of exemplary damages awarded should supplement, not overlap with, the amount of any compensatory award (which includes the category of aggravated damages, of course not relevant here).

5.21.3 Thirdly, the financial position of the defendant. There is little guidance on what evidence might be required in order for this to be assessed in relation to most kinds of defendant. However, helpfully it has been quite recently discussed specifically with

reference to Network Rail, at least in the analogous context of fines levied in the criminal process for environmental and health and safety offences, in the joined cases *of R v Sellafield Ltd and R v Network Rail [2014] EWCA Crim 49*. In that matter the consequence of Network Rail's position as being effectively a public sector company was considered by the Court of Appeal, as to whether any fine levied on it should be mitigated on the ground that it would "in effect inflict no direct punishment on anyone; indeed it might be said to harm the public. That is because the company's profits are invested in the rail infrastructure for the public benefit; the profits make an addition to the state funds that are otherwise provided to meet the requirements of the provision of that infrastructure. It is likely that any shortfall in the requirements as a result of a fine will have to be met from public funds or in a reduction in the investment." All that notwithstanding, the Court of Appeal held that the fine on Network Rail still "must be such that it will bring home to Network Rail's directors and members" the relevant purposes of sentencing. It concluded that "the fine of £500,000 imposed on a company of the size of Network Rail can only be viewed as representing a very generous discount for the mitigation advanced; we would observe that if the judge had imposed a materially greater fine, there would have been no basis for criticism of that fine. Indeed, were it not for the matters to which we have referred, a fine of the size imposed would have been very significantly below that which should be imposed for an offence committed by a company of this size where the harm was relatively serious and the culpability at local operational management was serious and persistent." There is a clear analogy here between the purposes of sentencing in the criminal process and the purposes of an exemplary award in the civil process, namely, as stated by Lord Devlin in *Rookes v Barnard*, to punish and deter. Indeed Lord Devlin himself confirmed and explained the relationship between these civil and criminal purposes, in introducing his categories: "there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal."

5.22 Having due regard to these principles, then, I take as my benchmark for applying them in this case the estimated cost to Network Rail - that is to say, its own estimate – of doing what it now can, albeit imperfectly, to comply with ADA17, by reinstating the Loop in its preferred timescale and format: £10M. It might be thought that the extra cost of reinstatement caused by the failure to comply with ADA17 was only £8M, being the difference between the current estimate and the

estimate of a mere £2M as at the time of the ADA17 process in 2013. That, however, would be to ignore the point that the reinstatement of the Loop was necessitated by its unauthorised removal in the first place.

5.23 Applying the principle of moderation and restraint to that benchmark I propose to set the amount of the exemplary award at one per cent of the estimated cost to Network Rail of reinstatement: £100,000. This sum will be payable by Network Rail as to one half, £50,000, to each Claimant; Rule G47(a) expressly empowers an order of payment only by one Dispute Party to another, and although, as I have previously said, the terms of that sub-paragraph are not necessarily applicable so as to limit the general power granted by the introductory provision to Rule G47, I still consider it a proper restraint to apply here. Moreover, for the purposes of validating my third and fourth alternative juridical bases for the award by bringing it within one or other of the categories of *Rookes v Barnard*, I must recall that one of Lord Devlin's additional considerations to be "borne in mind when awards of exemplary damages are being considered" is that "the Plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour".

5.24 Mindful of the necessary relationship with any compensation payable I propose that the amount of the exemplary award payable to each Claimant shall be reduced proportionately by any amount agreed or assessed to be payable as compensation (except costs) pursuant to the compensatory award in favour of that Claimant. And lastly I conclude that, having regard to the considerations I have mentioned as to Network Rail's financial circumstances, including the putative consequences of its position as a public sector body, an amount of £100,000 is not reasonably to be considered in any way excessive as an exemplary award.

Enforceability of an ADA determination

5.25 Finally in this analysis of the legal issues arising out of the dispute, I revert to the first question I raised at the outset: where a party fails to comply with or simply ignores an ADA (or other ADRR Forum) determination, what legal sanctions are available to enforce that determination, either to a party directly affected by the failure or otherwise generally in order to maintain the authority of the ADRR dispute resolution process. Network Rail having for the time being at least consented to a practical resolution to address its previous failure with the Reinstatement Issue under ADA17, on the face of things a final decision on this matter of enforcement and sanctions is not strictly necessary to the resolution of the instant dispute. The issue of legal sanctions may however become necessary as soon as any other ADRR dispute determination is not complied with, not least if Network Rail

were to choose simply to disregard any or all of the decisions of this ADA. That possibility can only have been increased by Network Rail's latest submissions in its correspondence of December 2016 referred to above (particularly at paragraph 5.8.11), where Network Rail in effect challenged the enforceability as an injunction of a 'do something' award on the Reinstatement Issue, on the ground that it could never be wholly within Network Rail's power to do anything by a specific time. I have stated above that I reject those submissions, so they do not specifically affect the decisions below, but I imagine they may clearly affect Network Rail's thinking on how it intends to conduct itself if the matter comes to be enforced again. It is also a point of general significance to the railway industry on which any informed observations should be useful, as invited by Rule G48(j)(iii); and, in its letter to ADC noted in paragraph 2.2 above declining to be the appellate body for this ADA30, ORR stated that if as a result of this determination there were matters arising which related to systemic processes within the Network Code, including the Rules, it would consider these under its usual monitoring role, including if ADC thought that greater enforcement provisions were appropriate for it to attach to its ADA determination decisions.

5.26 Ms Dwyer's written legal submissions on this issue, as summarised at paragraphs 3.18.1 and 3.18.2 above, were substantially to the effect that the legal mechanisms and sanctions for enforcement of any ADRR forum determination were confined to those in the Rules and were as prescribed by law as remedies for breach of contract, so that the only relevant remedies available were the payment of compensation or an order to take action or an order to pay costs; and that, in the light of Rule G51's express prescription that failure to comply with an ADA determination "will be dealt with by way of a new dispute through the appropriate mechanism" there was no further jurisdiction for enforcement beyond what the parties had agreed in the ADRR.

5.27 We discussed these submissions at some length in the oral exchanges, when Ms Dwyer expanded her submissions to suggest that, despite the apparent circularity of Rule G51, there might be nevertheless a possible route to enforcement by bringing a "new dispute through the appropriate mechanism". By avoiding at the outset entering into a Procedure Agreement (thereby committing the dispute to another ADA and so perpetuating the circularity of non-enforceability) the initiating party could then take it to the allocation stage (envisaged by Chapter B of the Rules), where it might somehow be procured to be allocated to Court litigation as the new "appropriate mechanism", so benefiting from the Court's built-in enforcement procedures. Ms Dwyer acknowledged, however, that this was uncharted territory; and that on the face of it, Rule G51 did seem to present something of a closed loop in expressly requiring any failure to comply with a determination to be dealt with by a new ADRR dispute. From our ensuing discussion it emerged that, whilst it was possible that a Court might be persuaded of its own initiative to

break the circle, for example on an application for summary judgement based on an ADA award, this was by no means an outcome of which anyone could be certain, for example in knowing at which iteration of the dispute under Rule G51 the Court might eventually say that enough was enough. And in this case the Claimants had clearly been dissuaded by the application of Rule G51 from seeking to take their new dispute straight to Court to seek direct enforcement of ADA17, but had instead entered into a Procedure Agreement committing to a new ADA.

5.28 I suggest that this level of uncertainty as to the availability of any conclusive process or sanctions for enforcement is unsatisfactory. On reflection I believe that the problem with lack of effective enforceability under the Rules as they stand may lie not only with the circularity of Rule G51 but also with the allocation process itself. Under Chapter B of the Rules, with the limited exception of certain particular types of dispute, disputes may be required to be allocated to a particular Forum - including Court litigation - only if all the parties agree and sign a Procedure Agreement to that effect. Without such agreement, by Rule B14(j) the default procedure is final determination by arbitration subject to Chapter F as a one stage determination procedure with appeal only in accordance with the Arbitration Acts. That, it would seem, could be far too cumbersome and protracted as a mechanism for resolving a dispute concerned solely with enforcing a previous determination.

5.29 I should note that Ms Dwyer's written submissions included reference to the possibility of an application to the Court for interlocutory relief afforded by Rule G66. I do not agree with, or at least find very comforting, the argument that the absence of an express provision of any right to apply for similar final relief, to enforce a determination after the event, might be construed as implying such a right. Likewise it might be arguable that the provisions in Rules A16 and A17 for procedural default, which includes failure to comply with any direction of any ADRR Forum, could be of assistance in seeking enforcement in the form of an ADRR order that the defaulting party comply with its obligation. That, however, would seem to be ultimately as circular as Rule G51.

5.30 In conclusion, I suggest that the processes and sanctions for enforcement of a determination available under the Rules are not secure or effective. I believe that these provisions of the Rules are ripe for review by ADC and consideration by ORR as it has already envisaged. In particular I recommend that Rule G51 be considered for deletion in its entirety and that Rule B14(j) be considered for disapplication where the substance of a dispute is a claim that a previous ADRR Forum determination has not been complied with.

6. COSTS

6.1 Both Claimants in their respective Statements of Claim (see paragraphs 3.4.2 and 3.7.2 above) sought awards of their costs of the dispute, essentially on the basis that the only reason that the dispute had become necessary and had been brought was Network Rail's failure to comply with the determination in ADA17.

6.2 Network Rail in its Statement of Defence (see paragraph 3.10.2 above) claimed that no order for costs should be made, but without advancing any reason. At that time Network Rail also claimed that not even any determination of the dispute was necessary, on the ground that it had at least stated its agreement in principle to do something about reinstating the Loop. In its further pre-Hearing submissions, however (see paragraph 3.14 above), Network Rail stated that it was "prepared to pay the reasonable and properly vouched costs of each of the Claimants incurred in bringing this ADA30, to be assessed by the Hearing Chair summarily if not agreed", again without offering any reason for the concession nor for the complete change of position from that in its Statement of Defence.

6.3 The matter of costs is addressed primarily in Rules G53 to G55:

6.3.1 Rule G53 states: "The Hearing Chair shall have power to order one or more Dispute Party to meet part or all of the Costs or expenses of the ADA and of any other Dispute Party assessed by such means as the Hearing Chair shall determine. Any such order shall be made with due regard to the Principles and to the provisions of these Rules including in particular Rule A16(d)."

6.3.2 Rule G54 states: "An order for costs shall 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 reference was such as to justify an award of costs being made against it (or them)."

6.3.3 Rule G55 states: "The Hearing Chair may make such an order at any stage including following any interim or final award."

6.4 In addition the following provisions of the Rules are relevant:

6.4.1 In the Definitions section in the preamble to the Rules, "Costs" are defined as: "Professional and other costs and expenses

which would be recoverable following a judgement in Court proceedings in England".

6.4.2 Rule A16 states: "If a Dispute Party is in procedural default, the... Forum... may, whether or not upon the application of the the other Dispute Party, make one or more of the following orders: ...(d) that the Costs arising from or connected with the procedural default be paid by the defaulting party on an interim or final basis."

6.4.3 Rule A17 states: "For the purposes of Rule A16 procedural default shall include: ...(b) failure to comply with any direction of... any Forum; (c) failure to abide by the Principles."

6.4.4 The "Principles" in Chapter A include Rule A9: "Dispute Parties shall at all times:

(a) co-operate with any reasonable request of ... any Forum, the Secretary and each other;

(b) conduct themselves in good faith with the objective of resolving the dispute; and

(c) avoid antagonistic or unduly adversarial behaviour."

6.5 I propose to make an award of costs against Network Rail, in respect of both the Claimants' and the ADC's Costs and expenses of this ADA30. This decision was advised to the Dispute Parties at the close of the Hearing. I emphasise that I do so not on the basis, nor therefore subject to the terms, of Network Rail's specific concession as to costs but primarily because I am satisfied, as required by Rule G54, both that its case in this ADA30 has been so lacking in merit that the reference should not have been defended and that its conduct before and during the reference has been such as to justify an award of costs being made against it. In making this decision I confirm I am conscious that, as observed in previous ADA determinations (most notably ADA27, decided "on a fine balance" against an order for costs), these are quite hard tests to satisfy; so much so that, as far as I am aware, no award of costs has ever yet been made in an ADA. Nevertheless I find that Network Rail's case in this dispute has indeed been so lacking in merit and its conduct so reprehensible as to satisfy both tests: first and foremost (and sufficient in itself) in failing to comply with the binding ADA17 determination at all in the required timescale; then in initially defending the case on the premise that there was no reason for making any determination at all nor any award of costs; then in continually insisting on having regard to extraneous non-contractual considerations in its belated proposals for a practical remedy to the situation prior to, at and even after the Hearing and consequently failing to offer any

reasonable revised timescale for such remedy; and most recently in declining to co-operate with the ADA by confirming or providing the information to confirm the enforceability of an award on terms proposed by itself.

6.6 Though not essential to the decision, for completeness I should note that there is in this case another available basis under the Rules for an award of costs: that, by failing to comply with the ADA17 determination, Network Rail has failed to co-operate with a reasonable request of an ADRR Forum, thereby breaching the Principle in Rule A9(a) and constituting a Procedural Default under Rule A17. This in itself justifies an interim or final order for Costs under Rule A16(d), to which Rule G53 enjoins me to have particular regard.

6.7 At the end of the Hearing I directed that the Claimants might apply direct to Network Rail in respect of their Costs, in two stages: upon an interim basis, if wished, up to and including the day of the Hearing; and upon the basis of a final award up to and including the date of this determination. Network Rail proposed and I agreed that the final order should be for Costs to be summarily assessed if not agreed, and that if the Dispute Parties could not reach agreement within a reasonable time (to be specified in the order) after the Claimants' duly vouched application to Network Rail, the amount should be referred back to me for summary assessment. As at the date of this determination I do not know if any interim application for costs has been made by the Claimants to Network Rail, so I shall make the final order to include all the Claimants' unpaid Costs to the date of the determination. I understand no interim application for costs has yet been made by the ADC to Network Rail and I shall make a similar final order with regard to its Costs and expenses of the ADA pursuant to Rule G53.

6.8 In the discussion on Costs the definition in the Rules was called to mind. It was noted that, among other things, this was normally taken to exclude a Dispute Party's management staff salary costs for the time expended on the dispute. The personnel resource involved in delivering ADC's ADA activity is provided entirely through consultancy contracts and all of ADC's such expenses associated with this dispute will be covered by the order. I shall review and confirm accordingly the relevant information provided to me by the ADC's Secretary in assessing the amounts to be certified and claimed.

7. DECISIONS

Having carefully considered the submissions and evidence as set out in sections 2 to 4 and based on my analysis of the issues and submissions set out in sections 5 and 6, I determine as follows:

7.1 Subject to paragraph 7.2 below Network Rail is required to reinstate and reconnect to the Network the Clay Cross Loop at its former location, providing at least 649 metres usable length (as previously made known and confirmed by all the Dispute Parties at and after the Hearing), that is so as to provide 649 metres actual physical length from the clearance point to the signal but including any properly required stand-back distance from the exit signal, and in a form and layout (incorporating all associated signalling) at least equivalent to the physical form and layout in which it stood immediately prior to the Implementation Stageworks (as defined in the determination of ADC dispute ADA17). In the alternative (at its option), Network Rail is permitted and, if it chooses this option, required specifically pursuant to this decision to reinstate the Clay Cross Loop at such location and in such length as previously stated but in its modern equivalent form and layout (again incorporating all associated signalling) as at the time of reinstatement, in either case without being obliged to establish or implement a new Network Change solely in respect of such reinstatement and reconnection. Any such modern equivalent reinstatement shall include installation of the following Switches and Crossing units: NR60 S&C at the North end of the Loop and NR56v S&C at the South end of the Loop; shall allow for a minor move in the position of the starting points ("toes") of the Switches and Crossing units; shall not require any Electrification and Plant upgrades or land take; and may allow the Loop to retain its designated passenger and goods status or a goods only status.

7.2 Whichever option as described above is chosen, such reinstatement and reconnection of the Loop shall in any event be commenced and completed by 20 October 2018, and Network Rail shall observe all such procedures and take all such actions as are required of or permitted to it under the Network Code and any relevant Track Access Agreement in order reasonably to enable or facilitate such reinstatement and reconnection. For the avoidance of doubt, the obligation to complete such reinstatement and reconnection by 20 October 2018 is intended to be absolute and binding on Network Rail irrespective of any other event or circumstance occurring or failing to occur, including without limitation (a) the carrying out or completion of the commissioning works being undertaken by Network Rail in connection with the Derby Remodelling Scheme or any other project, or (b) any funding constraint imposed or sought to be imposed by any source within or external to Network Rail, but with the sole exception of an event or circumstance amounting legally to a frustration of its Track Access Contract for the time being

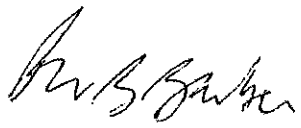
with either of the Claimants. Within 30 days from the date of publication of this determination Network Rail shall provide to each of the Claimants written confirmation endorsed by ORR that Network Rail has duly effected a change control to the Enhancement Delivery Plan for the Sheffield to St Pancras Line Speed Improvements Project (EM001A) so as to add 20 October 2018 as the date of reinstatement and reconnection of the Loop and has thereby constituted it as an ORR recognised regulatory milestone.

7.3 Network Rail shall pay to the Claimants compensatory damages in respect of its failure to comply with the determination in ADA17 that it should as a minimum reinstate the Clay Cross Loop in its prior physical form and layout by the date of commencement of the December 2014 Timetable. The heads of such damages may include (without limitation) compensation for the actual and anticipated losses of the opportunity to use the Loop for the period from the December 2014 Timetable Date to 20 October 2018. The amount of compensatory damages is to be assessed if not agreed between Network Rail and the Claimants severally. Each Claimant shall submit to Network Rail within 30 days from the date of publication of this determination either its itemised claim for compensatory damages or its written final confirmation that it makes no claim for such damages. Network Rail may request each Claimant to provide within a reasonable time but not less than 7 days, and each Claimant shall so provide, any reasonable further information or substantiation of its respective claim; and in any event within 30 days from the date of each such submission Network Rail shall confirm to the Secretary of the ADC that the amount of each respective claim is either agreed or required to be summarily assessed. If agreed, the amount of each claim shall be paid by Network Rail within 30 days of such confirmation; if required to be assessed, it shall be remitted to me for summary assessment including any necessary further direction as to the process and timing for assessment and payment.

7.4 Network Rail shall pay to each of GBRf and DBC severally the sum of £50,000 (fifty thousand pounds) as an exemplary award. This award is made on all or in the alternative any one or more of the four juridical bases described in paragraph 5.20 above. These respective sums shall be reduced proportionately by the amount of any compensatory damages agreed or assessed under paragraph 7.3 above with regard to each respective Claimant. The correct sums so payable as an exemplary award shall be paid by Network Rail to each Claimant within the same timescale following agreement or assessment of, and shall be paid at the same time as, any compensatory damages payable to that Claimant under paragraph 7.3 above or alternatively, as the case may be, shall be paid within 30 days of that Claimant's notification under paragraph 7.3 above that it makes no claim for compensatory damages.

7.5 I award costs in this matter against Network Rail, in amounts to be assessed summarily if not agreed between Network Rail and each of the Claimants and ADC severally. This award is made on either or both of the bases described in paragraphs 6.5 and 6.6 above. Network Rail shall pay to each of GBRf and DBC severally its respective Costs and expenses incurred in bringing this ADA and shall pay to the ADC its Costs and expenses incurred in constituting this ADA and arranging for it to be duly heard and determined. Network Rail shall pay each Claimant's respective such Costs and expenses in accordance with the same process and timescale for agreement or assessment as prescribed in respect of compensatory damages in paragraph 7.3. Network Rail shall pay the full amount of the ADC's such Costs and expenses within 30 days of receiving the Secretary's certification of and claim for the same following my assessment.

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



Peter Barber
Hearing Chair
19 January 2017

Appendix

Transcript of the Hearing