TTP2736

A Note on preliminary views of the legal entitlements of the Dispute Parties in this TTP, pursuant to an amendment to the Access Dispute Resolution Rules under Rule H20

1. TTP2736 was commenced by GB Railfreight ('GBRf') issuing a Notice of Dispute on 20 November 2025. The Notice referred to the rejection of a Train Operator Variation Request ('TOVR') by Network Rail ('NR'). While the Notice was not specific, it became clear that the Dispute arose from the rejection by NR of a TOVR for 4L19, Masborough to London Gateway, for inclusion in the May 2025 Working Timetable ('WTT').

2. The TTP was listed for a hearing on 17 December 2025. GBRf withdrew the Dispute on 10 December 2025, by which time GBRf had served its Sole Reference Document ('SRD') and had responded to Directions issued on 05 December 2025.

3. Normally withdrawal by a Claimant would bring a Dispute to an end. In this instance, however, questions as to the legal entitlements of the Dispute Parties have arisen which do not appear to have been addressed in any previous TTP. They are potentially relevant to other operators who serve London Gateway, as well as any potential Access Beneficiaries, and to Network Rail. This Note has therefore been prepared to assist any Access Beneficiary and NR in considering the extent to which the HEO (or other external legal issues) should be taken into account when NR reaches any Access Decision. I am using my powers under ADRR Rule H20 to vary procedure (while continuing to observe the Principles of the ADRR, outlined in Chapter A) to do so.

4. As in any Dispute listed for a hearing, the Hearing Chair will be considering the legal entitlements of the Parties as the Dispute unfolds. Following this practice, therefore, I was doing so in this Dispute. Quite obviously, any preliminary conclusions reached by a Hearing Chair prior to a hearing will be just that – preliminary – and may well be changed once the Parties have made submissions. Even without the benefit of that input, however, I suggest that these preliminary conclusions may assist all involved.

5. When the TTP was listed for a hearing, I directed the Parties to produce SRDs. GBRf served its SRD on 05 December 2025. It raised three heads: whether the TOVR was deemed to have been accepted under D3.3.8 of the Network Code; that the *London Gateway Port Harbour Empowerment Order* 2008 SI 2008 No 1261 ('the HEO') was being used 'outside the Rules'; and that the Decision Criteria in Part D had been misapplied.

6. This Note only deals with the second head, whether in considering the provisions of the HEO in reaching its Decision NR had acted 'outside the Rules', or more broadly, whether NR was entitled – or required – to consider the HEO when reaching its Decision.

7. In rejecting the TOVR, NR stated that the principal reason was that the proposed arrival time at London Gateway, at 1702, did not comply with a provision in the HEO. Article 17(3) of Schedule 6 of the HEO states that, *'In any event, no trains servicing the authorised works may be scheduled to arrive at or depart from the port premises between the hours of 0700 and 1000, or between the hours of 1600 and 1900'*.

8. The words used in NR's rejection were:

   '*PELE25SSB000143 is being rejected as 4L19HG is planned to enter London Gateway during the London Gateway Harbour Empowerment Order 2008 restricted times. The restricted times are 0700 to 1000, and 1600 to 1900. 4L19HG is planned to arrive at 17:02'*.

9. Attached to the rejection was an e-mail from London Gateway to NR dated 23 May 2025 which included the statement that London Gateway, '*…wouldn't accept any service where the timings are within the HEO restriction*'.

10. GBRf stated in its SRD that,

    [Within 5.2] '*There are no rules concerning time restrictions at London Gateway contained within the Anglia TPRs, and under D4.3.1(b[ii]), Network Rail must respond to operator TOVRs conducting itself within the Rules.*

    5.3 There is a clearly distinguishable difference in Network Rail's obligations to observe the specific, codified 'Rules' that constrain TOVR decisions under Part D and other information that Network Rail chooses to incorporate into its decision-making process. If Network Rail believes that the Harbour Empowerment Order requires restrictions, there is a formalised code-compliant process (including the consultation of timetable participants) to update the TPRs. Until any such rule is incorporated, TOVRs must be determined by reference to the existing Rules only.'

11. In dealing with the question of NR using any factor outside the Rules, GBRf referred to TTP2591, which I also chaired, suggesting that TTP2591 was relevant to TTP2736. My response to GBRf, explaining why I did not think that TTP2591 was relevant is attached as Appendix 1. NR responded to this by saying that it agreed with my analysis.

12. 'The Rules' within Part D of the Network Code are defined as 'the Timetable Planning Rules and the Engineering Access Statement'. (The Engineering Access Statement is not relevant in this context). I have read the Anglia Timetable Planning Rules ('TPRs') 2025 Version 2 and can find no reference to the HEO or any other restrictions at London Gateway.

13. At first sight, therefore, it could be assumed that GBRf's contention that NR should have paid no attention to the HEO might seem to be correct, but this requires a more detailed analysis of any other provisions in Part D which may be relevant.

14. D1.1.9 states that:

    '*In addition to compliance with the processes described in this Part D, Timetable Participants may be separately required to consult with … other infrastructure managers and any other parties with the right so to be consulted, regarding proposals for development of Services*'.

15. This requires GBRf (but not NR) to consult London Gateway, both as an infrastructure manager and as 'any other party with a right to be consulted'. Further, but I suggest linked with this provision, Clause 6.4.1 of GBRf's Track Access Contract ('TAC') requires GBRf to ensure that suitable access has been granted by a party controlling a '*...relevant facility connected to the Network*' to ensure that railway vehicles are promptly accepted off the Network or presented on to it.

16. This clearly gives London Gateway the power to determine the permitted arrival and departure times of trains at its premises, whether of its own volition or to meet any externally imposed requirement, in this case the HEO.

17. While this power is not included within the Rules, by virtue of D1.1.9 it is a power included within Part D. But can it be brought within the Rules? There is clear legal authority that a term can be implied into a contract for reasons of 'business efficacy' (*Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* UKSC 2014/0158. (The circumstances in which this is permissible are set out in a note at Appendix 2). In this instance the requirements are, in my view, less demanding, because there is no need to imply a completely fresh term into the Network Code, it is only necessary to expand the interpretation of 'the Rules' to include any other relevant provision under Part D.

18. The draftsman of Part D did not foresee these particular circumstances, which appear to have arisen for the first time in this Dispute. Part D was intended to be a self-contained code, but in order to reach my preliminary conclusions I am not having to introduce into 'the Rules' a term from outside Part D, but merely to imply into the definition of 'the Rules' the provision in D1.1.9, which is a requirement within Part D.

19. The question of bringing any requirement of the general law into Part D is a separate issue, which it is not necessary to decide in the circumstances of this Dispute.

20. As the requirements of Part D discussed above bind GBRf, and not NR, it could be said that GBRf was at risk of breaching its TAC by submitting a TOVR including an arrival time within the restricted hours. Given that NR was aware of London Gateway's stance on this issue, as set out in the e-mail of 23 May 2025, then NR should not be criticised for planning the STP on the basis that a restriction which was known to NR, and which was binding on GBRf, would not allow trains to be accepted into London Gateway within the restricted hours. In my judgment this is a reasonable and rational line for NR's train planners to have taken.

21. As a matter of legal entitlement, therefore, my preliminary conclusion is that NR was not required to consider the HEO in reaching its Decision on the TOVR, but that in the light of London Gateway's e-mail of 23 May 2025 it was eminently sensible of it to do so, to avoid including a path in the WTT which would be unworkable if London Gateway exercised its rights under Part D and GBRf's TAC, to refuse to accept the train into London Gateway.

22. The HEO is effectively planning permission for the construction of London Gateway. As is common in such grants of a major planning permission, there are various restrictions within it, including the restricted hours for the acceptance and despatch of trains. The HEO is binding on London Gateway, but its enforcement is a matter of planning law. It is not criminal law, so any breach would not expose GBRf or NR to possible penalties as accessories to a criminal offence.

23. Compliance with the HEO is a matter for London Gateway. If it chooses not to comply with any provisions within the HEO, then that is its prerogative and its responsibility. GBRf would be able to submit bids which contravened the HEO if London Gateway was prepared to accept or despatch those trains; neither NR nor GBRf would be under any liability in this event. If NR was advised that such arrival times were acceptable to London Gateway, then NR would no doubt cease to regard the HEO as a constraint on timetable planning.

24. In this context, I note from information provided by GBRf that on several occasions the running of 4L19 under STP arrangements prior to withdrawal of the Dispute involved booked arrival times at London Gateway at 1610. My own examination of data from Real Time Trains showed a booked arrival time of 4L19 (from Tinsley) at 1644 on 15 December 2025. This suggests that London Gateway has changed its position since 23 May 2025, but as explained above, this is entirely a matter for London Gateway. GBRf is entitled to submit a TOVR for any arrival (or departure) time which London Gateway will accept.

25. Having decided as a preliminary legal conclusion that 'the Rules' should incorporate any relevant requirements arising under Part D, as mentioned above, it is a separate question as to whether NR should reflect entirely external legal issues in planning the WTT, as these do not fall within 'the Rules'. One possible example would be if Greater Anglia had demanded the right to stop trains at Beaulieu Park before that station was authorised to open by the Office of Rail and Road. I do not need to decide how issues such as this might be brought within the Rules because of the position reached on the issues in Dispute, but had I needed to write a full Determination I would have commented within Observations and Guidance that any company operating in the railway industry should expect to obey the general law, whether or not it fits within a narrow definition in the Network Code.

26. In this TTP, however, my preliminary conclusion is that business efficacy required the phrase ‘the Rules’ in Part D to embrace the considerations in D1.1.9, without considering any provisions in the general law which impinge on the planning of any particular service.

27. As further Observations and Guidance I would have strongly recommended that the restrictions in the HEO, to the extent that London Gateway wishes to observe them, or any other similar restrictions elsewhere should be incorporated into the relevant TPRs to put their status beyond doubt.

28. I remind the Parties that this Note records the preliminary conclusions reached on the legal entitlement of the Parties, which would have been open to revision had I heard submissions on the issues. Nonetheless, I hope that these comments might be useful.

Clive Fletcher-Wood
Hearing Chair TTP2736
17 December 2025

Appendix 1: Chair's response to GBRf re: TTP2591 (extract taken from First Directions dated 05 December 2025)

3. A further issue is whether the TOVR was deemed to have been accepted under D3.3.8.

4. Noting that GBRf relies in part on its interpretation of TTP2591, which I chaired, it might assist both Parties if I point out that the interpretation which GBRf seeks to place on this TTP does not reflect my understanding. As GBRf will recollect, TTP2591 first decided whether or not the path in dispute was compliant with the TPRs in force at the time. The decision was that the path was compliant.

5. The hearing then turned to the objections that NR had raised on safety grounds. The Determination made it clear that NR was entitled – and indeed required – to consider safety issues, but did not uphold the conclusion that NR had reached relating to safety. But safety issues clearly fall within Part D, because the Objective (D4.6.1) specifically includes a reference to safety.

6. Nothing within TTP2591 examined the question at issue here, whether NR should take into account a legal provision which is not specifically mentioned in Part D. I await any further submissions from GBRf, but my initial view is that nothing within TTP2591 will assist in resolving this TTP.

Appendix 2: Explanatory note taken from an online publication by Reynolds Porter Chamberlain LLP on 09 December 2025

Supreme Court clarifies law on implied terms: "business efficacy" test remains

21 January 2016. Published by Chris Ross, Partner

The Supreme Court has clarified the law on implied terms: in order for a term to be implied it must be necessary for business efficacy or alternatively be so obvious as to go without saying. In practice, it will be a rare case where one of those conditions is satisfied but not the other.

The court confirmed, in the light of the widespread misinterpretation of Lord Hoffman's judgment in *Attorney General of Belize and others v Belize Telecom Ltd*, that that judgment did not dilute the traditional tests.

Although the facts relate to a property transaction, the case has wider implications across all commercial contracts.

Background

The appeal arose following the exercise of a break clause in a lease between Marks and Spencer (the tenant) and BNP Paribas (the landlord). The lease had been granted for a term expiring in February 2018 and the rent was payable in advance on the usual quarter days. The tenant exercised its right under the break clause to determine the lease in January 2012, after it had already paid the full quarter's rent in advance in December 2011.

The issue was whether the tenant could recover the apportioned rent in respect of the period from January to March 2012. This turned on the interpretation of the lease and required the court to consider the principles relating to when a term is to be implied into a contract.

At first instance, the court held that the tenant was entitled to a rebate of the future rent. The Court of Appeal reversed that decision. The question went up to the Supreme Court, which unanimously dismissed the appeal.

The judgment: discussion of relevant tests

There was no provision in the lease that expressly obliged the landlord to pay the apportioned sum to the tenant. The question was therefore whether such an obligation should be implied.

Lord Neuberger, giving the lead judgment, noted that two tests are commonly used when determining whether a term should be implied into a contract:

29. Under the "business efficacy" test the proposed term will be implied if it is necessary to give business efficacy to the contract (*The Moorcock* (1889) 14 PD 64).
30. Under the "officious bystander" test the proposed term will be implied if it is so obvious that, if an officious bystander suggested to the parties that they include it in the contract, 'they would testily suppress him with a common 'oh of course' " (*Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206). In other words, the proposed term must be so obvious that it goes without saying.

The modern authority is *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988. In that case Lord Hoffman suggested that the process of implying terms into a contact was simply part of the exercise of construing the contract, saying "*There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*"

The Supreme Court held that this formulation in *Belize* has been misinterpreted as suggesting that reasonableness is itself a sufficient ground for implying a term and suggested that the right course is for Lord Hoffmann's speech in *Belize* to be treated as a "characteristically inspired discussion rather than authoritative guidance on the law of implied terms." The court confirmed that Belize did not dilute the traditional business efficacy and officious bystander tests and to the extent subsequent judgments suggested that it had, that approach was mistaken.

Lord Neuberger confirmed that the pre-*Belize* authorities "*represented a clear, consistent and principled approach*". He referred in particular to *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20 and *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472.

In *BP Refinery* the court said that for a term to be implied, the following conditions (which may overlap) must be satisfied:

6 it must be reasonable and equitable;
7 it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
8 it must be so obvious that 'it goes without saying';
9 it must be capable of clear expression;
10 it must not contradict any express term of the contract.

In *Philips*, the conditions in *BP Refinery* were described as a summary whose simplicity could be misleading. The court stated it is difficult to infer with confidence what the parties to a lengthy and carefully drafted contract must have intended. An omission may be the result of the parties' oversight or their deliberate decision. It is tempting, but wrong, for a court, with the benefit of hindsight, to imply a term which reflects the merits of the situation as they then appear. The term to be implied must be either the only contractual solution or the one which would, without doubt, have been preferred.

In the present case, Lord Neuberger made the following comments in addition to the conditions set out above:

- If reference is made to the question of what the parties would have agreed, the question is not concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time they were contracting.
- A term should not be implied into a detailed commercial contract merely because it appears fair or one considers that the parties would have agreed it if it had been suggested to them: those are necessary but not sufficient grounds for implying a term.
- The "business necessity" and "obviousness" tests can be alternatives, but in practice it would be a rare case where one was made out but not the other.
- "Business necessity" involves a value judgment: it does not require absolute necessity. In Lord Sumption's words, a term should only be implied if, without the term, the contract would lack "*commercial or practical coherence*".

On the facts, the court found that the conditions for implying a term into the lease were not satisfied, in particular because the implied term would have sat uneasily with the fact that the parties had agreed a very comprehensive (70 page) lease and the fact that there was clear caselaw establishing that rent payable and paid in advance can be retained by the landlord. As such, very clear express words would have been needed in order to find in the tenant's favour.

The court also went on to consider whether it was correct that the processes of contractual interpretation and implication of terms are part of the same exercise. Lord Neuberger stated that they are separate and that therefore in most, and possibly all, disputes about whether a term should be implied, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered.

Comment

The case brings clarity to this area of the law after the uncertainty following the decision in Belize and confirms that the traditional "business efficacy" and "officious bystander" tests are alive and well.

The decision reinforces that the courts will be slow to imply terms into a professionally drafted commercial agreement even where, as in this case, the court acknowledged the "real force" in the tenant's argument that allowing the landlord to retain the entire rent payment would be unfairly prejudicial to the tenant and a windfall for the landlord.

The issue as to whether the implications of terms was part of or something separate from the proper interpretation of a contract was referred to by Lord Carnwath as "*an interesting debating point*", but of little practical significance. That may be the case, although following Lord Neuberger's approach the process of interpretation would take place before the question of implied terms is considered, which would suggest a clearer distinction does exist.

Extracted from

https://www.rpclegal.com/thinking/commercial-disputes/supreme-court-clarifies-law-on-implied-terms-business-efficacy-test-remains/