JUDGMENT : The Hon. Mr Justice Ramsey : TCC. 14th March 2008

Introduction

1. These proceedings relate to the Public Private Partnership ("PPP") arrangements for the London Underground ("the Underground"). Under those arrangements, London Underground Limited ("LUL") transferred major parts of the infrastructure of the Underground to "Infraco" companies who entered into agreements with LUL to provide infrastructure services on parts of the Underground network.

2. Following a lengthy bidding process LUL sold the Infraco companies. Metronet Joint Venture purchased two of those Infraco companies which changed their names to Metronet Rail BCV Limited ("BCV") and Metronet Rail SSL Limited ("SSL"). I shall refer to the companies together as "Metronet". BCV became responsible for the group of Underground lines comprising the Bakerloo, Waterloo and City, Central and Victoria lines ("the BCV Network") and SSL became responsible for the sub-surface lines comprising the District, Circle, East London, Hammersmith & City and Metropolitan Lines ("the SSL Network").

3. The arrangements between LUL and BCV were contained in an agreement which was expressed to be amended and restated on 4 April 2003 ("the BCV Contract"). On the same date there was a similar contract between LUL and SSL which was identical in respects material to these proceedings ("the SSL Contract"). I shall therefore refer to those contracts together as "*the Service Contract*".

4. On 18 July 2007 both BCV and SSL entered into a form of administration known as PPP Administration. The Administrator thereafter consented to the continuation of these proceedings pursuant to paragraph 43(6) of Schedule B1 to the Insolvency Act 1986.

The current dispute

5. As part of the arrangements under the PPP scheme Metronet had to achieve upgrades, including station upgrades, by specified times. For the purposes of this dispute, it is accepted that BCV has failed to deliver certain defined station upgrades within the time limits specified by the BCV Contract. In response to the failures by Metronet, LUL served Corrective Action Notices ("CANs"). The CAN is a remedy provided for under the Service Contract but one which Metronet contends does not apply in the particular circumstances. The validity of the CANs is therefore in issue in these proceedings.

6. Under the dispute resolution procedures contained in the Amended and Restated Dispute Resolution Agreement, incorporated by Clause 49.1 of the Service Contract, the dispute was subject to a multi-tier dispute resolution process. The dispute is referred sequentially to Contract Managers, to the relevant PPP Board, to Senior Representatives, to an Adjudicator and then to the Courts. In relation to this dispute the Adjudicator in his decision found that LUL was not entitled to issue a CAN and granted the relief sought by Metronet. This is a rehearing but the argument has necessarily focussed on the correctness of the Adjudicator's decision.

Evidence relevant to the dispute

7. The issue which I have to determine relates, essentially, to the interpretation of paragraph 7 of Schedule 2.1 to the Service Contract. Whilst some evidence would be admissible by way of background or matrix, such evidence is necessarily limited.

8. LUL served witness statements from three witnesses: Mr Geoff Virrels, LUL's Deputy Chief Programmes Officer and PPP Contract Director for both the SSL Contract and the BCV Contract; Mr Walter Roux, LUL's Head of PPP Reviews Financial Analysis and Mr Sean Graham, a solicitor in LUL's legal department. Metronet has responded by serving a witness statement from Mr Terence Cleary, Deputy PPP Contract Manager.

9. Mr Virrels' witness statement deals with the background to the issue of the CANs and the questions whether BCV's failures can be described as "*persistent*" and whether the issue of a CAN was "*proportionate*". These matters are not issues which fall for consideration on the dispute as formulated. Mr Roux in his witness statement provides a narrative of the BCV Contract setting out his views as to its meaning and operation. He was called to give evidence before me and was cross-examined by Mr Andrew Bartlett QC, on behalf of Metronet, as to the applicability of various provisions and on the financial effect of certain failures by BCV. In my judgment, his statement essentially contained matters of submission. Indeed, essentially that is how Miss Finola O'Farrell QC, on behalf of LUL, dealt with that statement; she adopted it as part of her submissions.

10. Mr Cleary's witness statement briefly responded to the statements of Mr Virrels and Mr Roux. It dealt with causes of delay and the adequacy of the financial remedies under the Service Contract.

11. In the event, Mr Virrels' evidence was not germane to the issue in dispute. It provided some background to the dispute which was of passing interest. The evidence of Mr Roux and the response of Mr Cleary were generally matters of submission and I have treated them as such. In truth, there is little by way of admissible factual background which either party relies upon.

12. Mr Graham's statement deals with the costs of the adjudication, which forms a separate issue in these proceedings. The parties have agreed the following figures, exclusive of VAT, and therefore Mr Graham was not called:
    (1) Metronet's costs of the adjudication proceedings which were paid by LUL on 29 December 2006: £10,867.06.
    (2) The costs of the Adjudicator which were paid by LUL on 29 December 2006: £10,050.
    (3) LUL's costs of the adjudication proceedings: £27,447.60. This is agreed as a figure but with a reservation by Metronet as to the reasonableness of those costs.

Submissions on law

13. Metronet contends that the Adjudicator was right for the reasons which he gave and for additional reasons. LUL submits that the Adjudicator accepted the interpretation for which it contends but rejected it as being incorrect because, in his view, it would be unreasonable and legally absurd. LUL contends that the Adjudicator was wrong to reject that meaning.

14. The issue depends on the interpretation of the particular provisions of Clause 22 and paragraph 7 of Schedule 2.1 of the Service Contract. In order to understand the terms used in those clauses it is necessary to refer to other parts of the labyrinthine web of contractual provisions contained in over 900 pages of the Parts of, Schedules to and Appendices to the Schedules to the Service Contract, with associated Agreements and Codes.

15. Metronet submits that the proper legal approach to the interpretation of the Service Contract is set out in the Adjudicator's decision. In summary:

(1) The general approach to interpretation of a commercial contract should be guided by business common-sense, reflecting the legitimate expectations of the parties. It is not limited to the literal or semantic meaning of particular words. In support of this it cites:

(a) ***The Antaios*** [1985] AC 191 where Lord Diplock said at 201: "*…if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense*".

(b) ***Mannai Limited v. Eagle Star Life Assurance Co Ltd*** [1997] AC 749 where Lord Steyn said at 771: "*In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in a way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue influence on niceties of language*".

(c) ***ICS v. West Bromwich*** [1998] 1 WLR 896 where Lord Hoffman said at 913: "*The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.*"

(2) In giving expression to the reasonable expectations of the contracting parties, regard should be had to the commercial purpose for which the contract was concluded by the parties and the result it was designed to achieve. In ***Contract Law: Fulfilling the Expectations of Honest Men*** (1997) 119 LQR 433 Lord Steyn explained, extra-judicially, the change from a black-letter, literal approach to a purposive approach to construction and said:

"*the significance of the trend towards purposive construction must be considered. It does not mean that judges now arrogate themselves the power to rewrite contracts for the parties. It signifies an awareness that a dictionary is of little help in solving problems of construction. Often there is no obvious or ordinary meaning to the language under consideration. There are competing interpretations to be considered. In choosing between alternatives a court should primarily be guided by the contextual scene in which the stipulation in question appears. And, speaking generally, commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties.*"

(3) A contractual interpretation which produces an absurd or even unreasonable result is likely to be wrong. If commercial parties intend such an absurd or unreasonable result, it will ordinarily take clear and unambiguous language to achieve that result. In ***Wickman Machine Tools v. Schuler*** [1974] AC 235, Lord Reid said at 251: *"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.*"

16. LUL submits that in ascertaining the intention of the parties to the Service Contract I should bear in mind the following further passages from the speech of Lord Hoffmann in ***ICS v. West Bromwich Building Society*** [1998] 1 WLR 896 at 912:

"*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

…

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see ***Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd****. [1997] A.C. 749.*"

17. LUL also relies on the passage from the speech of Lord Hoffmann in the later case of ***BCCI v. Ali*** [2002] 1 AC 251 at para 39:

"…the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: "we do not easily accept that people have made linguistic mistakes, particularly in formal documents". I was certainly not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage."

18. LUL refers me to Chitty on Contracts (29th Ed) at para 12-063 and submits that in construing individual clauses, the contract is to be read as a whole and the words of each clause are to be interpreted so as to bring them into harmony with the other provisions of the contract.

19. In my judgment the issue in this case concerns the question whether a provision can mean what it says in the context of the other provisions. The relevant principles as they apply to this issue show that I should consider the *"natural and ordinary meaning"* of the words, construing them in the context of the Service Contract as a whole and against the background of matters known to both parties when they entered into that contract. If that meaning leads to a result that is unreasonable or absurd then that is to be taken into account in deciding whether that meaning was what the parties intended or whether something has gone wrong with the language. In determining what the parties intended I should be guided by the commercial purpose of the contract and by business commonsense because that is likely to represent the legitimate expectation of the parties.

The provisions as to remedies in the Service Contract

20. The material provisions of the Service Contract are as follows:

(1) Clause 22.1 of the Service Contract, within Part F "*Remedies for Poor Performance*", deals with "*Failure to Comply with Obligations*". It provides:

"If Infraco breaches any of its obligations under the Contract (including breach of Schedule 2.1 (Service Outputs), but subject to paragraph 7 (Limit of LUL Remedies) of Schedule 2.1 (Service Outputs) including the proviso thereto) …, LUL may additionally and at its option (but without prejudice to LUL's right to exercise any other remedy it may have pursuant to the Contract) do any one or more of the following which is reasonably proportionate to the default in question:

(a) impose Service Points pursuant to the Performance Measurement Code…;

(b) issue a Corrective Action Notice… provided that a Corrective Action Notice …shall not restrict or prevent LUL from serving any notice under clause 40 (Warning Notices and Default Notices) or from issuing a subsequent or other Corrective Action Notice; and

(c) commence regular monitoring….

(2) Clause 22.1A then provides:

"For the purposes of clause 22.1 and without prejudice to the ability of LUL to issue Corrective Action Notices as set out in paragraph 7 (Limit of LUL Remedies) of Schedule 2.1 (Service Outputs), it will be reasonably proportionate to the default in question to issue a Corrective Action Notice in respect of events also giving rise to a failure enumerated in paragraph 7 (Limit of LUL Remedies) of Schedule 2.1 (Service Outputs) if such events (taken together with any other failure):

(a) demonstrate that such failure is not an isolated event but rather represents a pattern of behaviour which has or is reasonably likely to give rise to a material breach of any Infraco Obligation; or

(b) represent a persistent failure of Infraco to meet any particular Infraco Obligation."

21. From those provisions it can be seen that Clause 22.1 is "*subject to paragraph 7 (Limit of LUL Remedies) of Schedule 2.1 (Service Outputs) including the proviso thereto)*" and Clause 22.1A is *"without prejudice to the ability of LUL to issue Corrective Action Notices as set out in paragraph 7 (Limit of LUL Remedies) of Schedule 2.1 (Service Outputs)"*. It is therefore necessary to see what effect paragraph 7 of Schedule 2.1 has upon the ability of LUL to issue a CAN under Clause 22.1.

22. Paragraph 7 of Schedule 2.1 is subdivided into eight subparagraphs, 7.1 to 7.8. It is convenient to take each of the subparagraphs in turn.

23. Sub-paragraph 7.1 provides:

"Except as otherwise provided in this clause 7, in the event of a failure by Infraco as set out hereafter in sub-paragraphs (a) to (g), the remedy available to LUL shall be limited to the payment adjustments (if any) pursuant to Schedule 4.1 (Performance Payment Mechanism):

(a) failure to make any of the Train Facilities or Station Facilities Available, the result of which is any of the Disruption types, as more particularly described in Table 1 of Part A of Schedule 5 of the Performance Measurement Code; or

(b) failure to ensure that those Train Facilities set out in sub-paragraphs (a) to (h) of paragraph 1.3 above and set out in Appendix 4 (Train Staff and Train Service Facilities) are Available during the period from the time of Train Delivery to the time of Train Return and are Available to LUL Staff at all other times, subject to any rights of access having been granted in accordance with the Access Code; or

(c) failure to ensure that, in relation to each Station, or, where Appendix 13C applies, each Non-BCV Station, those Station Facilities set out in paragraph 2.2 and set out in Appendix 13 (Station Facilities) are Available during the

applicable Station Opening Hours and are Available for LUL Staff at all other times, subject to any rights of access having been granted in accordance with the Access Code; or

(d) failure to meet the Ambience requirements in relation to Train Facilities during the period from the time of Train Delivery to the time of Train Return as set out in paragraph 1.4, or to meet the Ambience requirements in relation to Station Facilities during the applicable Station Hours, as set out in paragraph 2.3; or

(e) failure to meet the requirements in relation to the minimum Train Ambience scores for each Line as set out in paragraph 1.4A or the minimum Station Ambience scores for each Station as set out in paragraph 2.4; or

(f) failure to meet the requirements in relation to Capability as described or referred to in paragraphs 1.1, 2.1 and 3.1 of Section Two of the Performance Measurement Code; or

(g) failure to meet the requirements in relation to Specific Projects as set out in Appendices 5A, 7, 8, 14, 15, 16, 17 and 18."

24. It is common ground that the failures by Metronet which are material to this dispute are failures referred to in sub-paragraph (g). The effect of paragraph 7.1 is therefore to exclude the remedy of issuing a CAN in the case of such a failure, subject to the provision in paragraph 7.1 that it applies "*except as otherwise provided in this clause 7*". This is evidently a reference to sub-paragraphs 7.2 to 7.8.

25. Although not material to the facts of this case, paragraph 7.2 states that "*Without prejudice to any rights or remedies LUL may have pursuant to paragraph 23.2 of the Service Contract, in the event of failure by Infraco as set out in paragraph 7.1 above, LUL shall be entitled to take remedies"* under Clause 22 or Clause 23 of the Service Contract or steps in accordance with the Safety Agreement, the LUL Safety Case or safety-related Standards *"to the extent that as a result of such failure or such failure taken together with any other failures, the safe operation of the Underground Network or the safety of LUL's Customers, LUL Staff or of any other persons is, or may be, materially affected."* It therefore preserves the right to issue a CAN where the paragraph 7.1 failure or failures may materially affect safety.

26. Paragraph 7.3 is central to the dispute between the parties. It provides:

"Without prejudice to any rights or remedies LUL may have pursuant to paragraph 23.2 of the Service Contract, in the event of a failure by Infraco as set out in sub-paragraphs (a) through (g) of paragraph 7.1 above, LUL shall, subject to paragraph 7.6, not be restricted from taking remedies pursuant to clause 22 of the Service Contract (Failure to Comply with Obligations), (subject to the limitations set out therein and in clause 22.1A), or not be restricted from taking remedies pursuant to clause 23 of the Service Contract (LUL Step-In Rights) provided that:

(a) in the case of a failure set out in sub-paragraph (a) or (d) of paragraph 7, such failure taken together with any other failures results in Infraco's level of Availability or Ambience performance being worse than Unacceptable, as determined in accordance with clause 4 (Availability) and clause 5 (Ambience) of Section Two of the Performance Measurement Code, as measured against the parameters defined in accordance with paragraphs 3 (Availability) and 4 (Ambience) of Schedule 4.1 (Payment);

(b) in the case of a failure set out in sub-paragraph (e) of paragraph 7.1, Infraco fails to meet the required minimum Train Ambience score as set out in Appendix 6A or the required minimum Station Ambience score as set out in Appendix 6B, and as measured against the aggregate BCV Ambience performance levels defined in accordance with paragraph 4 (Ambience) and Appendix 2 (Payment Parameters) of Schedule 4.1 (Payment); and

(c) in the case of a failure set out in sub-paragraph (f) of paragraph 7.1, such failure taken together with any other failures results in Infraco's level of Capability in any Payment Period:

(i) being worse than Unacceptable, as set out in Appendix 2 (Payment Parameters) of Schedule 4.1, and Infraco fails to demonstrate to LUL an increase in the corresponding measure such that the level of performance is better than Unacceptable prior to the completion of the succeeding three (3) Payment Periods; or

(ii) being worse than Benchmark, as set out in Appendix 2 (Payment Parameters) of Schedule 4.1, and Infraco fails to demonstrate to LUL an increase in the corresponding measure such that the level of performance is better than Benchmark prior to the completion of the succeeding ten (10) Payment Periods.

in each case, and as measured against the parameters defined in accordance with paragraph 2 (Capability) of Schedule 4.1 (Performance Payment Mechanism)."

27. It is evident that the provisions of the paragraph are "*Without prejudice to any rights or remedies LUL may have pursuant to paragraph 23.2 of the Service Contract*" and are "*subject to paragraph 7.6*". Otherwise the paragraph provides that, in the event of failures under paragraphs 7.1(a) to (g), LUL is not to be restricted from taking remedies pursuant to Clause 22 of the Service Contract (subject to the limitations set out therein and in clause 22.1A) or pursuant to Clause 23 of the Service Contract. It is the meaning of the phrase "provided that" and its effect on what goes before which gives rise to the issue between the parties.

28. What follows the phrase "*provided that*" in paragraph 7.3 is a reference to particular failures within sub-paragraphs (a), (d), (e) and (f) of paragraph 7.1. There is no reference to sub-paragraphs (b), (c) or, material to this case, (g). The question is whether, as Metronet contends, paragraph 7.3 provides that LUL is not restricted from issuing a CAN but only in relation to the particular failures within sub-paragraphs (a), (d), (e) and (f) of paragraph 7.1 or whether, as LUL contends, paragraph 7.3 provides that LUL is not restricted from issuing a CAN not only in relation to the particular failures within sub-paragraphs (a), (d), (e) and (f) of paragraph 7.1 but also in relation to failures within sub-paragraphs (b), (c) and (g).

29. Paragraph 7.4 provides that "Except as hereafter provided, in the case of a failure classified as a Facilities Fault or a Fault Rectification Fault, LUL shall be limited to the payment adjustments (if any) pursuant to Schedule 4.1 (*Performance Payment Mechanism*)." It does not expressly refer to failures in paragraph 7.1 but I accept LUL's submission that Facilities Faults and Fault Rectification Faults are, in fact, a category of failures within paragraph 7.1(b) and (c). As the Master Definitions Agreement and paragraph 3 of Schedule 2.1 to the Service Contract make clear, Facilities Faults and Fault Rectification Faults arise when there are Defects in or Failures of Station Facilities or Train Facilities. The definition of "Defect", "Failure" and "Available" in the Master Definitions Agreement also means that when there is a Defect in or Failure of those Facilities, the Facilities are not Available. Thus where there are Facilities Faults and Fault Rectification Faults to which paragraph 7.4 applies, the relevant Station Facilities or Train Facilities are not Available under paragraphs 7.1(b) and (c). Paragraph 7.1 then applies particular provisions to Facilities Faults and Fault Rectification Faults. These are defined in paragraphs 3.9 and 3.10 of Schedule 2.1 as faults which LUL staff report to Infraco and which must be rectified either "within the most practicable time possible" for Facilities Faults or within Standard Clearance Times for Fault Rectification Faults. Paragraph 7.4 provides that if such faults are not Closed-out within specified times then the remedies in Clauses 22 and 23 of the Service Contract will apply.

30. Paragraph 7.5 provides that:
"Without prejudice to any rights or remedies LUL may have pursuant to paragraph 23.2 of the Service Contract, in the event of a failure by Infraco as set out in sub-paragraphs (a) or (d) of paragraph 7.1 above, LUL shall, subject to paragraph 7.6, not be restricted from issuing a Corrective Action Notice and taking any other remedies available to it pursuant to clause 22 of the Service Contract (Failure to Comply with Obligations) but not any remedies pursuant to clause 23 of the Service Contract (LUL Step In Rights) to the extent that such failure taken together with any other failures results in Infraco's level of Availability or Ambience performance being worse than Benchmark, as determined in accordance with…"

31. It is to be noted that this commences with the same phraseology as paragraph 7.3 but limits its application to sub-paragraphs (a) or (d) of paragraph 7.1 when the failure or failures results in Availability or Ambience performance being worse than defined Benchmarks. It also limits LUL in such case to being able to issue a CAN or any other remedy under Clause 22. It does not give a further right under Clause 23.

32. Paragraph 7.6 is of relevance as providing a limitation on the operation of paragraphs 7.3 and 7.5. It provides:
"For the purposes of paragraphs 7.3, and 7.5, the performance of Infraco will be attributable to the inherent variability of a measure, and so LUL will not be entitled to exercise the remedies otherwise available to it in accordance with those paragraphs, to the extent that it is agreed or determined that the failures giving rise to the level of performance being better than or worse than the relevant indicator (as the case may be) occurred as a result of the inherent variability of the performance of the Assets as reflected under and in accordance with the Performance Measurement Code and not as a result of any failure of Infraco to perform any Infraco Obligation in an efficient and economic manner and in accordance with Good Industry Practice, having regard (amongst other things) to…"

33. This provision therefore prevents LUL from being able to issue a CAN (or the other remedies in paragraphs 7.3 or 7.5) where the failures identified in those paragraphs occurred as a result of the inherent variability of the performance of the Assets and not as a result of any failure of Infraco to perform in the specified manner. It is to be noted that it refers to the relevant failures being "*failures giving rise to the level of performance being better than or worse than the relevant indicator (as the case may be)*".

34. Paragraph 7.7 provides that "Notwithstanding anything else in this clause 7, LUL shall not be restricted from taking any remedy available to it in respect of events giving rise to a failure enumerated in clause 7.1 above, to the extent that such events were caused by a breach of Infraco Obligations (other than breaches of Infraco Obligations as set out in clause 7.1)." That reinforces the fact that paragraph 7 does not apply to failures by Infraco other than those set out in paragraph 7.1.

35. Finally, paragraph 7.8 provides: *"For the purposes of paragraphs 7.3, 7.4 and 7.5, any Corrective Action Notice issued in accordance with LUL's entitlement as set out in such paragraphs shall specify a time period within which the breach is to be remedied which, notwithstanding the provisions of clause 22.1(b), shall not expire prior to the first anniversary of the Transfer Date."* It provides a particular limitation on the time to remedy a failure for a CAN issued under paragraphs 7.3, 7.4 and 7.5.

Submissions by LUL

36. LUL submits that paragraphs 7.1 and 7.3 cannot be construed in isolation but that these paragraphs and the other parts of paragraph 7 when read together define the circumstances in which LUL is entitled to exercise additional remedies.

37. LUL contends that the words used in paragraph 7.3 are clear and unambiguous and entitle LUL to exercise its Clause 22 and 23 remedies for a failure under paragraph 7.1(g). It submits that the introductory part of paragraph 7.3 states that it applies *"in the event of a failure by Infraco as set out in sub-paragraphs (a) through (g) of paragraph 7.1 above"*. That shows, LUL submits, that paragraph 7.3 is not limited in its application to the failures in paragraphs 7.1(a), (d), (e) and (f), which are the subject of additional provisos in paragraph 7.3, but applies also to the failures in paragraphs 7.1 (b), (c) and (g).

38. LUL submits that it is not unreasonable for it to be able to exercise its Clause 22 and 23 remedies, in addition to financial remedies for a failure by Metronet to complete Station Modernisations, Enhanced Station Refurbishments

and Station Refurbishments to which Appendix 15 to Schedule 2.1 applies, as set out in paragraph 7.1(g). LUL submits that it is not properly compensated by financial remedies if stations are handed over unmodernised and unmaintained.

39. LUL does not accept that there is anything absurd about its construction of paragraph 7.3. It submits that the Adjudicator was in error in assuming that the remedies which had been removed from LUL in paragraphs 7.1(b), (c) and (g) were then handed back in paragraph 7.3. LUL points to the fact that Paragraph 7.3 is "*subject to paragraph 7.6*" which, it submits, introduces a significant qualification.

40. Further, LUL submits that the Adjudicator was in error in assuming that the paragraphs which follow paragraph 7.1 all contain exceptions to a general rule in paragraph 7.1. It points to paragraph 7.4 being a free-standing exception which does not depend on paragraph 7.1. As a result, LUL submits that the Adjudicator placed too much emphasis on paragraph 7.1 rather than reading it in the context of the whole of paragraph 7.

41. LUL submits that failures falling within paragraphs 7.1 (b), (c) and (g) are generally more serious than those falling within the other provisions and that they are capable of more objective assessment and therefore should attract a wider remedy.

42. LUL also submits that by consideration of the whole of paragraph 7 of Schedule 2.1 the following conclusion can be reached as to failures referred to in paragraph 7.1:

(1) Paragraphs 7.1(a) and (d): Remedies under Clause 22, including the issue of a CAN, may be applied if performance is worse than Unacceptable (paragraph 7.3(a)) or worse than Benchmark (paragraph 7.5) but Clause 23 step-in may only be applied if performance is worce than Unacceptable (paragraph 7.3(a)) but not if performance is only worse than Benchmark (paragraph 7.5).

(2) Paragraph 7.1(b) and (c): Remedies under Clauses 22 and 23 may be applied (paragraph 7.3) but in the case of Facilities Faults and Fault Rectification Faults, Clause 22 and Clause 23 may only be applied where individual faults are not Closed-out within the specified periods (paragraph 7.4).

(3) Paragraph 7.1(e): Remedies under Clauses 22 and 23 may be applied when performance fails to meet the required minimum score (paragraph 7.3(b)).

(4) Paragraph 7.1(f): Remedies under Clauses 22 and 23 may be applied when the level of Capability is either worse then Unacceptable for a particular period or worse than Benchmark for a longer period.

(5) Paragraph 7.1(g): Remedies under Clauses 22 and 23 may be applied generally.

Submissions by Metronet

43. Metronet submits that the effect of LUL's interpretation of paragraph 7.3 is that the combined effect of paragraphs 7.1 and 7.3 is merely to impose a requirement to satisfy paragraph 7.6 before a CAN may be issued in respect of a sub-paragraph (g) breach. It contends that such a reading of paragraph 7 as a whole would give an extraordinary result: paragraph 7.1 would remove the remedy of issuing a CAN; paragraph 7.3 would cancel the effect of paragraph 7.1 and would instead impose a restriction with limited effect, the obligation to comply with paragraph 7.6. Metronet poses the question of what purpose is served by paragraph 7.1 in such circumstances as paragraph 7.3 deals with all limitations. Metronet contends that LUL fails to read paragraph 7.3 as a whole.

44. Metronet accepts that the words before the phrase "*provided that*", read alone, could be construed as removing the limitation on LUL's remedies imposed by paragraph 7.1 and imposing an alternative limitation under paragraph 7.6. However, it submits that when paragraph 7.3 is read as a whole, the limitation imposed by paragraph 7.1 on remedies for the failures in sub-paragraphs 7.1 (a) to (g) is reduced or modified by the phrase "*provided that*". That phrase, it submits, should be construed to mean "*if* " or "*when*" or "*in circumstances where*" or "*only where*" or "*if and only if* " so that it is only in the particular circumstances identified in the sub-paragraphs of 7.3 that the limitation on remedies in paragraph 7.1 is reduced or modified. Metronet concludes that, as none of the sub-paragraphs of 7.3 relate to sub-paragraph (g) failures, paragraph 7.3 is not relevant to sub-paragraph (g) failures.

45. In this way, Metronet contends that the words in paragraph 7.3 up to "*provided that*" are modified by the words after "provided that" which state the circumstances in which paragraph 7.1 is to be modified and that those circumstances are limited to sub-paragraph (a), (d), (e) and (f) failures.

46. Metronet points out that the removal of LUL's remedies for failures to deliver station upgrades in accordance with the contractual timings as provided under sub-paragraph 7.1 (g) does not mean that LUL is left without serious remedy. It notes that a financial penalty ranging from £50,000 to £200,000 per 4 weeks for each station is set out in Table 4 of Appendix 3 to Schedule 4.1. On the basis of the evidence put in by Mr Virrels in paragraph 24 of his witness statement, Metronet submits that the total penalties for the late stations would amount to £2,125,000 per 4 week period or an annual sum of £27,625,000 plus any other abatement which the failures may trigger relating to ambience, availability and service points. When abatements to Metronet's infrastructure service charge caused by the failures are also taken into account, Metronet submits that the remedies available to LUL are significant and refutes any suggestion that the limitation of remedies to financial payments removes any incentive for Metronet to comply with the Service Contract.

47. Metronet also submits that, on LUL's construction, paragraph 7.3 would give more limited remedies for failures to make Available Train Facilities or Station Facilities which caused Disruption (paragraph 7.1(a)) than failures to

make Available Train Facilities (paragraph 7.1(b)) or Station Facilities (paragraph 7.1(c)) which do not involve Disruption. Paragraph 7.3(a) would apply a limitation on cases where CANs could be issued in the case of paragraph 7.1(a) failures but would apply no such limitation to failures in paragraphs 7.1(b) and (c).

48. Further, Metronet does not accept LUL's submission that sub-paragraph 7.1(b), (c) and (g) failures are capable of more objective assessment and so should attract a wider remedy. It submits that each of the failures in sub-paragraphs 7.1(a) to (g) is closely defined and capable of accurate objective assessment.

49. Metronet does not accept LUL's submission that sub-paragraph 7.1(b), (c) and (g) failures are '*generally more serious*' and so attract a wider remedy. It submits that the seriousness of the failures under each sub-paragraph can vary depending on the particular facts of the failure. However, Metronet contends that, for the reasons set out above sub-paragraph 7.1(b) and (c) failures are less serious than sub-paragraph 7.1(a) failures. Also, it contends that sub-paragraph 7.1(g) failures are unlikely to prevent LUL from operating the Underground and would not give rise to risks to the health and safety standards or security of the Underground necessary for the next stage of remedies after the issue of a CAN.

50. Metronet submits that paragraph 7 should be construed in a commonsense and commercial manner: paragraph 7.1 removes Clause 22 and Clause 23 remedies in the case of the failures in paragraph 7.1(a) to (g); paragraphs 7.2 to 7.5 are all exceptional cases where LUL are allowed Clause 22 and/or Clause 23 remedies despite the ban in paragraph 7.1; paragraph 7.6 applies a limit on paragraphs 7.3 and 7.5 and paragraph 7.7 provides that certain failures are outside paragraph 7.1. Metronet submits that, contrary to this approach, LUL construes paragraph 7.3 as a general provision which contradicts paragraph 7.1.

51. Metronet submits that so far as failures identified in paragraph 7.1(g) failures are concerned, the effect of LUL's construction would be that the limitation in paragraph 7.1 has no practical effect. Whilst paragraph 7.6 applies, Metronet submits, referring to the answers given by Mr Roux in cross-examination that paragraph may have, at most, only slight significance in relation to failures covered by paragraph 7.1(g) and certainly that would not be sufficient to justify LUL's construction of paragraph 7.

Decision

52. In my judgment, the plain and ordinary meaning of paragraph 7.3 of Schedule 2.1 is that it applies to failures set out in all of paragraphs 7.1(a) to (g) and that, in the case of failures set out in paragraphs 7.1 (a), (d), (e) and (f), paragraph 7.3 only applies to certain defined failures.

53. The relevant part of paragraph 7.3 provides that:

"…in the event of a failure by Infraco as set out in sub-paragraphs (a) through (g) of paragraph 7.1 above, LUL shall…not be restricted from taking [defined remedies] provided that:

(a) in the case of a failure set out in sub-paragraph (a) or (d) of paragraph 7, such failure taken together with any other failures results in [performance being lower than certain levels];

(b) in the case of a failure set out in sub-paragraph (e) of paragraph 7.1, Infraco fails to meet [certain scores]; and

(c) in the case of a failure set out in sub-paragraph (f) of paragraph 7.1, such failure taken together with any other failures results in [performance being lower than certain levels]."

54. I consider that the construction for which Metronet contends would require the ambit of paragraph 7.3 to be limited to the failures identified in sub-paragraphs (a), (b) and (c) of paragraph 7.3. This would either require the reference to "sub-paragraphs (a) through (g) of paragraph 7.1" to be read down to sub-paragraphs (a), (d), (e) or (f) or it would require the phrase "provided that" to be read as limiting the terms of paragraph 7.3 to the failures set out in the part following that phrase. That, in my view, would require a re-writing of the provision in paragraph 7.3 which could only be legitimate if the result were unreasonable or absurd. I note that where paragraph 7 was intended to apply only to limited sub-paragraphs of paragraph 7.1 that was stated: see paragraph 7.5.

55. Is the plain and ordinary meaning one which is unreasonable or which leads to absurdity? Metronet submits that it is and adopts the reasoning of the Adjudicator. It points to the combined effect of paragraphs 7.1 and 7.3 as leading to an unreasonable and absurd result.

56. The Adjudicator held that LUL's construction would mean that "*what one contractual provision took away from LUL as remedies by paragraph 7.1 as the general rule is immediately handed back to LUL by another provision under paragraph 7.3 without any qualification or proviso; and, further that whereas LUL's remedies under Clause 22.1 are expressly qualified by reference to paragraph 7…that limitation is likewise illusory as regards issuing a CAN under Clause 22.1(b) in respect of any failure under these same three sub-paragraphs, including sub-paragraph (g).*" The Adjudicator continued "*In my view, this is manifestly a curious result (at least); it would be an odd way of drafting a formal commercial document; and the question arises whether the Parties can have intended that result.*" In rejecting LUL's submissions he held that "*LUL's case does not answer satisfactorily the question why the Parties should have formulated a general limitation in paragraph 7.1(g) only to nullify it so completely in the first part of paragraph 7.3. LUL's case necessarily attributes to the parties an irrational intention.*"

57. Clause 22 of the Service Contract provides wide remedies for breaches of Infraco's obligations, subject to paragraph 7 of Schedule 2.1. Paragraph 7.1 of Schedule 2.1 then limits the remedy for the failures (a) to (g) to payment pursuant to Schedule 4.1, except as otherwise provided in paragraph 7. It follows that the drafting starts by providing that all remedies are available under Clause 22; it then excludes remedies by paragraph

7.1, except where the remedies are restored elsewhere in paragraph 7. On any view, this is a somewhat tortuous and bizarre approach to identifying the remedies available for breach of Infraco's obligations. On any view, paragraph 7 restores the Clause 22 remedies for certain failures under paragraphs 7.1(a) to (f).

58. Further, as accepted by Metronet, paragraph 7.1 does not have the stark effect which the Adjudicator, dealing with the matter only on documents, held that it did. Paragraph 7.3 introduces the qualification "*subject to paragraph 7.6*". In addition it is evident that paragraph 7.8 provides another qualification to the remedies introduced by paragraph 7.3. It is not therefore correct that what is removed by paragraph 7.1 is then handed back "*without any qualification or proviso*" by paragraph 7.3 or that the effect of paragraph 7.3 is to "*nullify [paragraph 7.1(g)] so completely*". This, I consider, substantially weakens the contention that paragraph 7.3 is unreasonable or absurd. It provides a basis for the scheme, particularly given the tortuous and bizarre approach to drafting. Is there, though, any other reason why the plain and ordinary meaning is unreasonable and absurd?

59. Necessarily in cases such as this it is natural to look for an explanation for the scheme of remedies left in place by paragraph 7 of Schedule 2.1. However, as Metronet submits, considerable caution is required in relying on submissions or argument based on the extent of remedies that the parties would have wished to have or need to have in the Service Contract. Inevitably, as Metronet submits, LUL would wish to have the widest range of remedies available for any failures and Metronet would wish to have the narrowest range of remedies. The final negotiated contract is therefore unlikely to reflect what either party might have ideally wished for but will be the subject of compromises. Experience shows that it can be difficult to detect, in hindsight, a completely logical thread. This is particularly so in the complex and convoluted set of arrangements contained in the Service Contract.

60. One approach is to consider the purpose of providing LUL with wider remedies than just payment adjustments under Schedule 4.1. Under Clause 22.1 the additional remedies are to allow the imposition of Service Points, to issue a CAN or to commence regular monitoring of Infraco's performance. In the case of a CAN, Clause 23.1 provides that, if Infraco fails to comply with a CAN within the periods set out in the CAN then LUL may issue a Step-in Notice allowing LUL to take steps itself or through another Infraco to remedy the matters set out in the CAN. However, in principle, I can see why LUL might wish to have remedies under Clauses 22 and 23 under all of paragraphs 7.1(a) to (g).

61. LUL submitted that the failures under paragraphs 7.1(b), (c) and (g) were more serious. In relation to the matters listed in paragraph 7.1(a) to (g) the following may be noticed:

(1) Paragraph 7.1(a): The Disruption to the Availability for Train Facilities and Station Facilities varies from cases where there is a two minute delay to trains or a two minute platform closure to cases where there are 15 minute Full Line Suspensions or two minute full station closures.

(2) Paragraph 7.1(b): The lack of Availability varies from cases where one staff toilet at one station is not Available to where Trains are not Available.

(3) Paragraph 7.1(c): The lack of Availability varies from cases where a Ticket Office clock is not Available to where emergency equipment is not Available.

(4) Paragraph 7.1(d): The Ambience requirements vary from keeping seats free from tears to provisions as to noise and ride quality for Customers on Trains.

(5) Paragraph 7.1(e): The Ambience scores must reach certain levels in respect of cleanliness, litter and graffiti on Stations and certain levels onfnoise, ride quality, lights and temperature on Trains.

(6) Paragraph 7.1(f): For any Line Grouping, the Journey Time Capability, Service Consistency and Service Control calculated by particular formulae shall reach certain requirements.

(7) Paragraph 7.1(g): This covers a failure to achieve Journey Time Capability for a Specified Line Upgrade or failure to carry out a Station Modernisation, Enhanced Station Refurbishment or a Station Refurbishment as required.

62. It is evident that the purpose of paragraph 7.3 is to raise the level of seriousness in relation to the failures in paragraphs 7.1(a), (d), (e) and (f), so that the Clauses 22 and 23 remedies only apply to the failures above a particular threshold. However, this does not, in my judgment, assist in answering the question of whether paragraph 7.3 was intended to apply to failures in paragraphs 7.1(b), (c) and (g), without limitation. I accept that failures in paragraphs 7.1(b) and (c) could consist of quite trivial failures and a failure to meet the requirements of a Station Refurbishment in paragraph 7.1(g) could, in principle, be a relatively minor failure. Thus I do not accept LUL's submission that these are more serious failures. But this does not mean that paragraph 7.3 might not apply to those failures because of the absence of a threshold in paragraph 7.3. It merely means that the parties have chosen thresholds for some not other failures.

63. Neither do I accept LUL's submission that the basis of assessment of the failures differs between the two categories of failure so as to explain why a standard of performance needs to be specified in paragraph 7.3 for failures in paragraphs 7.1(a), (d), (e) and (f) but not for paragraphs 7.1(b), (c) and (g). For instance, the failures in paragraphs 7.1(e) and (f) relate to particular performance values which are more objective, whilst the other paragraphs may all involve a greater degree of subjective assessment in determining whether there has been a failure. Whilst this does not form a valid ground for any distinction, it does not negate the plain and ordinary meaning, for the reasons set out above.

64. Rather, whilst I do not consider that there is any particular reason why the parties might impose particular limitations on remedies for failures under paragraphs 7.1(a), (d), (e) and (f) but not for failures under paragraphs 7.1(b), (c) and (g), that is a choice which negotiating parties could make and there is nothing unreasonable or absurd in doing so.

65. I consider that the way in which failures under paragraph 7.1(b) and (c) are dealt with is instructive. Paragraph 7.1 stipulates that LUL's remedy for such failures is limited to payment adjustments pursuant to Schedule 4.1. Paragraph 7.4 then states that a failure classified as a Facilities Fault or a Fault Rectification Fault, which is a category of failure under paragraph 7.1(b) and (c), shall be limited to payment adjustments pursuant to Schedule 4.1. Whilst that could be an unnecessary repetition, I consider that it is consistent with paragraph 7.3 restoring remedies for failures in paragraph 7.1(b) and (c) and this then requiring the limitation to be expressly stated in paragraph 7.4 in relation to a Facilities Fault or a Fault Rectification Fault, with remedies under Clauses 22 and 23 only applying to certain Facilities Faults or Fault Rectification Faults.

66. On that basis I have come to these conclusions:

(1) I consider the ordinary and natural meaning of paragraph 7.3 is that it provides for LUL to have a remedy under Clauses 22 and 23 for failures under all of paragraphs 7.1(a) to (g), provided that in the case of failures under paragraphs (a), (d), (e) and (f) certain thresholds are met.

(2) There is nothing unreasonable or absurd about those remedies being available for those failures, nor does it conflict with commonsense or the commercial purpose of the contract so as not to represent the legitimate expectation of the parties.

(3) The manner in which paragraph 7 applies is to commence by the blanket limitation of remedies for failures under paragraph 7.1(a) to (g). It then adds back, on any view the remedy for certain failures under paragraphs 7.1 (a) to (f) and imposes the limitation under paragraph 7.6 (and the provisions under paragraphs 7.7 and 7.8) to all of paragraphs (a) to (f). There is in principle no reason why all failures under paragraphs 7.1(g) should not be added back, subject to the limitations under paragraph 7.6 (and the provisions under paragraphs 7.7 and 7.8).

(4) Whilst the method by which paragraph 7 was drafted may be somewhat bizarre, that also applies to the drafting in relation to failures under paragraphs 7.1(a) to (f). Paragraph 7.1 is, of course, subject to the major exception "*Except as otherwise provided in this clause 7*" and, on the ordinary and natural meaning of paragraph 7.3, that exception applies.

(5) I therefore consider that LUL have a remedy under Clauses 22 and 23 for failures under paragraph 7.1(g).

67. Subject to further argument on the wording of the declarations, LUL is entitled to issue a Corrective Action Notice pursuant to Clause 22.1(b) and Paragraphs 7.1(g) and 7.3 of the Service Contract in respect of any failure by Metronet to meet the requirements in relation to Specific Projects.

Finola O'Farrell Q.C. (instructed by Bewin Leighton Paisner LLP) for the Claimant
Andrew Bartlett Q.C. and Alexander Antelme (instructed by CMS Cameron McKenna LLP) for the Defendants