Neutral citation [2017] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1258/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

5 July 2017

Before:

THE HON. MR JUSTICE ROTH
(President)
MARGOT DALY
DR CLIVE ELPHICK

Sitting as a Tribunal in England and Wales

BETWEEN:

UKRS TRAINING LIMITED

Claimant

- v -

NSAR LIMITED

Defendant

Heard at Victoria House on 6 and 7 October 2016

JUDGMENT

APPEARANCES

Mr Tristan Jones (instructed by Berkeley Square Solicitors) appeared on behalf of the Claimant.

Mr Gordon Wignall (instructed by Greenwoods Solicitors LLP) appeared on behalf of the Defendant.

A. INTRODUCTION

1. This case began before the Tribunal with an application by the claimant ("UKRS") for an interim injunction to prevent the implementation of the decision of the defendant ("NSAR") taken on 17 June 2016, following the hearing of its appeal, that UKRS should be suspended for three months from accreditation under the Rail Training Accreditation Scheme ("the RTAS"). UKRS alleges that this decision constituted an abuse of a dominant position contrary to the Chapter II prohibition under sect 18 of the Competition Act 1998 ("CA").

2. NSAR applied to strike out the claim form which was subsequently served, on the grounds that it is not an undertaking for the purpose of competition law and therefore not within the scope of the Chapter II prohibition.

3. By order made on 21 July 2016, the Tribunal directed the question whether NSAR was an undertaking for the purpose of sect 18 CA would be determined as a preliminary issue. On that basis and in return for the usual cross-undertaking in damages, NSAR undertook not to enforce the terms of UKRS' suspension pending the determination of the preliminary issue. This is the judgment of the Tribunal on that preliminary issue.

B. THE PARTIES

4. UKRS is engaged in the business of training, with a principal focus on training for the rail industry. It is a privately owned, family company, of which the directors are two brothers and the shares are held by them and their wives. The managing director, Mr Sion Bowen, is also the vice-chair of the Association of Railway Training Providers. The company was set up in 2010, and now has an annual turnover of about £1.2 million. It has three offices and employs 18 full-time staff.

5. The majority of UKRS' turnover is derived from training and assessment for the Sentinel Scheme run by Network Rail Infrastructure Ltd ("Network Rail"), which involves a range of topics including safety and engineering. Under that Scheme, an individual who successfully completes the required training is issued with a Sentinel smartcard. Every worker on the Network Rail infrastructure requires such a Sentinel card, which is then used to control access to the track. In order to provide training

under the Sentinel Scheme, a trainer has to be authorised under the RTAS. UKRS supplied courses under the precursor to the Sentinel Scheme, and received approval as a training provider under the RTAS. The courses are generally booked by contractors to Network Rail on behalf of their employees who require training. The contractors are therefore described as the "sponsors" of the individuals being trained. UKRS' "sponsor" clients include major construction companies, utility companies and signalling companies, such as Balfour Beatty, Carillion, Babcock and ISS. It is now one of the largest providers of training in the rail industry.

6. NSAR was launched in December 2010 and formally incorporated on 6 January 2011. It was originally called NSARE Ltd, standing for the National Skills Academy for Railway Engineering. Its name was changed to NSAR in about December 2015, standing for National Skills Academy for Rail, to reflect the expansion of its responsibilities beyond engineering, to include for example the train operating staff. It will be necessary to set out and consider the nature and functions carried out by NSAR in further detail below, but among them is accreditation and auditing of trainers for the purpose of the RTAS. It is the only body authorised by Network Rail to carry out that role. Accordingly, any training provider operating under the RTAS requires accreditation and auditing by NSAR.

C. THE TRIAL

7. UKRS served statements from two witnesses: Mr Sion Bowen and Mr William Alexander. Mr Bowen's statements had largely been directed to the application for interim relief and were only marginally relevant to the preliminary issue. Mr Alexander has had a long career in the railway industry, first with British Rail, then Railtrack PLC ("Railtrack") and finally Network Rail, where he was the national Training Manager (New Entrants). In April 2011, he was appointed Head of Training and Skills at NSAR, which he left in September 2013 to set up his own consultancy providing services to firms engaged in the delivery of railway safety training, including UKRS. Mr Alexander indeed provided consultancy services to NSAR until 31 March 2014. His evidence described the development of track safety training in the UK railway system, the creation and nature of the Sentinel Scheme, and in considerable detail the changes in the arrangements for quality assurance as regards training from 2001 to date, including the establishment and role of NSARE/NSAR.

There was no challenge to Mr Alexander's evidence, nor to that of Mr Bowen insofar as it concerned the preliminary issue, and neither was cross-examined.

8. NSAR called four witnesses, all of whom were cross-examined. Two came from NSAR: Mr Neil Robertson, the Chief Executive of NSAR since June 2015; and Ms Kim Millen-Stirling ("Ms Millen"), who joined NSAR in September 2014 and is now both Head of Training and Skills and the Chief Operating Officer. Mr Robertson's evidence concerned the overall nature of NSAR and its various functions. Ms Millen's evidence was directed more specifically to the accreditation and audit roles carried out by NSAR with regard to the RTAS, both in its arrangements with Network Rail and in its arrangements with training providers. Both were honest witnesses who gave helpful evidence, although in part this comprised their own opinions as to what could or could not be carried out properly by a commercial organisation.

9. The other two witnesses were from Network Rail. Mr Richard Smith is a solicitor with long experience working in the rail industry and is now Network Rail's General Counsel, Routes. His evidence was, as one would expect, entirely honest, but insofar as his statement contained comments on the nature and performance of the auditing of trainers he readily accepted that those comments were entirely derived from what he had been told by others and did not constitute direct evidence. Mr Guy Wilmshurst-Smith has been Head of Training at Network Rail since 2010. He gave evidence about the introduction and development of the relationship between Network Rail and NSAR regarding maintenance and improvement of training standards. He clearly valued that relationship from the perspective of Network Rail, but the criticisms he made in his written witness statement of the previous provider of training accreditation were considerably qualified in his oral evidence.

10. All the witnesses appended to their statements documents on which they relied, and the Tribunal ordered only very limited specific disclosure and the provision of further information directed at the preliminary issue.

D. THE CLAIM

11. Although not before the Tribunal on the preliminary issue, it is appropriate to summarise in brief outline the background to the claim.

12. As indicated above, UKRS had been accredited by NSAR as a training provider under the RTAS for the purpose of the Sentinel Scheme. Following a series of audit visits carried out by NSAR in late 2015 and early 2016, on 17 May 2016 NSAR wrote to Mr Bowen informing him that UKRS would be suspended from the RTAS for three months commencing on 23 May 2016. It appears, although not stated on the face of the letter, that this decision was taken following discussion with Network Rail.

13. UKRS immediately exercised its right to appeal against that decision, as a result of which the implementation of the decision was suspended. On 24 May, NSAR provided to UKRS' solicitors more details of the grounds for the suspension decision, in terms of breaches of various different rules said to cover the RTAS and Sentinel Scheme or schemes. On 26 May, UKRS presented a very full written appeal, accompanied by various witness statements. The appeal was heard by Mr Robertson on 8 June, and on 17 June he wrote to Mr Bowen announcing his decision to dismiss the appeal and that UKRS would be suspended for three months commencing 21 June 2016.

14. UKRS alleges that NSAR holds a dominant position in the market for accreditation services to Sentinel card training providers as it is the only body with power to grant the relevant accreditation. UKRS contends that there was procedural unfairness and/or erroneous findings as to breach of the various rules, which amount to discrimination by NSAR; and further that the decision to suspend constitutes a refusal to supply. On either or both bases, since its conduct was not objectively justified, NSAR was said to be in breach of the Chapter II prohibition.

E. THE FACTS

Background

15. Following the privatisation of British Rail in 1994, the provision of track safety training became the responsibility of Railtrack, a publicly listed company which took over ownership of the railway infrastructure. Railtrack allowed individual training providers to develop their own courses and would approve the courses designed by the various providers. Quality assurance was provided by an external consultant, who visited each training provider annually and made a report to Railtrack. As a result of criticism of the weakness in control of the certification which could be obtained under

that system, Railtrack introduced a comprehensive reform of the training and certification system, which became known as Project Sentinel. The overall aim was to improve the quality of training materials and implement an effective framework for quality assurance of training delivery.

16. Accordingly, in 2000 Railtrack entered into a contract with an independent private sector company, which from 2001 was called Rail Training Audit Services Ltd ("RTAS Ltd"). As part of that contractual relationship, Railtrack was entitled to nominate a director to the board of RTAS Ltd, a role fulfilled for a while by Mr Alexander. RTAS Ltd was run on commercial principles and derived its income from audit fees paid by training providers. The scope of the audits was gradually increased, based on an audit protocol agreed between Railtrack and RTAS Ltd.

17. In 2002, Railtrack went into administration and Network Rail took over as owner and operator of the railway infrastructure. RTAS Ltd continued to provide the accreditation and auditing service as before.

18. In December 2005, the contract with RTAS Ltd came to an end and Network Rail placed a new contract with Achilles Group Ltd ("Achilles"). Achilles is a large company which operates internationally providing supplier risk management and compliance management services across a range of industries. Achilles initially maintained the prior audit protocol used by RTAS Ltd and the regime of annual audits along with random audits of a proportion of trainers. The four auditors of trainers previously employed by RTAS Ltd transferred across to Achilles, and the regime continued to be known as the RTAS scheme.

19. The contract between Network Rail and Achilles was renewed in October 2009, December 2010 and then further extended in April 2011.

20. Mr Richard Smith attached to his evidence the contract between Network Rail and Achilles which governed with effect from 2010/2011 the services they provided.[1] It is a lengthy and detailed contract, in part following what seems to be a standard form for Network Rail contracts. However, Schedule 1 specifies the particular project and services involved in detail and summarises the services which Achilles is to supply as

[1] Only an unsigned version 2.12 was produced. Mr Smith said that this was the only copy that could be located.

"the assessment, accreditation, licensing and audit of the rail training and assessment organisations and their qualified employees." In that Schedule, clause 2.1 defined the scope of the services as follows:

> "The Supplier shall deliver the Services in accordance with the Sentinel Scheme Rules (issue NR/SP/OHS/050 issue 3 dated June 2005) and the audit protocol documentation; relevant Railway Group Standards & Legislation provided in Schedule 2; and the minutes of the Sentinel operations Meetings since October 2005.
>
> Network Rail may publish updated copies of these documents from time to time and these shall be provided to the Supplier by Network Rail's Representative."

21. Achilles was required to maintain full records and provide Network Rail with details of any issues arising from audits (cl 3.4). The contract prescribed the provision of monthly written reports, followed by review meetings between Network Rail's representative and Achilles' contract manager to discuss any problems relating to the audit process (cl 4.1-4.2); and Achilles was further required to:

> "Submit suggestions each month at the Sentinel Operations Meeting which identify opportunities to continually improve the effectiveness of the audit protocols and process."

22. At the same time, Achilles carried out a supplier accreditation scheme for the railway industry which was known as the Rail Industry Supplier Qualification Scheme ("RISQS"). As we understood it, the RISQS audits concentrate on generic health and safety requirements and are applied to a wider range of companies with whom Network Rail contracts. Apparently, one of the reasons for appointing Achilles in the first place was with a view to merging the RISQS audits (which Achilles was already carrying out) with the RTAS audits, but that was never achieved. Indeed, Achilles has continued to carry out RISQS audits for Network Rail even after the appointment of NSAR.

Network Rail

23. Network Rail became the owner and operator of the railway infrastructure in October 2002, in succession to Railtrack. It is a wholly owned subsidiary of Network Rail Ltd ("NRL"), a not-for-dividend company of which all profits are reinvested to improve the railway. As of 1 April 2014 a Network Licence was granted to Network Rail (as successor to Railtrack) by the Secretary of State for Transport under the Railways Act 1993. The Network Licence authorises Network Rail, among other things, to be the

operator of a network, and imposes on it various obligations, including the obligation to comply with various safety codes.

24. In 2014, NRL was reclassified as a public sector, arm's length body of the Department for Transport ("DFT"). The Secretary of State is its sole shareholder and its board is directly accountable to him or her. The relationship between NRL and the DFT is governed by a Framework Agreement which took effect from 1 September 2014. Mr Smith said that Network Rail is now controlled by DFT and the Treasury "in many number of ways", but he also explained that "Network Rail retained the commercial and operational freedom to manage the railway infrastructure within regulatory and control frameworks." The annual report of NRL for 2014/15 explains its position as follows:

> "We are a public sector company that operates as a regulated monopoly. Our income is a mix of direct grants from the UK and Scottish Governments, charges levied on train operators that use our network and income from commercial property."

25. The regulator there referred to is the Office of Rail and Road ("ORR"), previously called the Office of Rail Regulation, established by the Railway and Transport Safety Act 2003. It is one of the sectoral regulators with a range of statutory functions and duties, like Ofcom, Ofgem and so forth. Aside from its statutory powers, the regulation of Network Rail by the ORR is carried out pursuant to the terms of the Network Licence.

26. Maintenance of safety of the railway infrastructure is obviously of critical importance for Network Rail, both as a matter of legal obligation and company policy. Particular statutory obligations are imposed on Network Rail under the Health and Safety at Work etc Act 1974 ("HSW Act") and The Railways and Other Guided Transport Systems (Safety) Regulations 2006 ("ROGS"). The ORR has published Guidance on *Developing and Maintaining Staff Competence* (2nd edn, 2007) ("the Guidance"), to companies responsible for managing and assuring the competence of those working in the railway and other guided transport systems industry, reflecting the requirements of the HSW Act and the ROGS, as well as a separate guide to the ROGS (2014). Para 24 of the Guidance states:

> "There are two options for client companies employing contract and subcontract staff, agency staff and the self-employed. The options are either:

(i) Include such staff in a competence management system that uses the same or equivalent standards as the client company uses. The client company should be able to verify and audit the competence management system and keep copies of certification showing individuals have been assessed as competent; or

(ii) Regard these people as the client company's own staff and take them into the client company's own competence management system, with periodical reassessments, training and keeping suitable records."

27. Mr Richard Smith explained that there is a designated training department at Network Rail which designs the standards which must be adhered to, such as the RTAS. Among the various provisions and arrangements set out by Network Rail to which we were referred are:

(1) Network Rail's Competence Management System ("CMS"), which defines the mandatory requirements for managing the competence of individuals who undertake work on Network Rail controlled infrastructure. The CMS was updated in 2012.

(2) Network Rail Standard NR/L2/CTM/202 Quality Assurance in Training and Assessment (referred to as "Protocol 202"), with which, since June 2010, approved trainers and assessment providers are required to comply. This is part of the CMS and specifically requires that training organisations must use approved trainers and training materials and must have sufficient resources and appropriate processes in place to deliver Network Rail-approved training; and use approved assessors and have appropriate processes in place to undertake competence assessments of individuals. The current version of Protocol 202 dates from December 2011.

(3) Network Rail Standard NR/L2/CTM/021 Competence and Track Safety, which has formed part of the CMS since late 2006. This sets out the minimum requirements for training and assessment of individuals who undertake track safety activities on Network Rail's managed infrastructure.

(4) The Rail Training Accreditation Scheme (RTAS) Rules. The only document produced in evidence comprises the "interim" rules issued on 5 December 2013, which Mr Wilmshurst-Smith confirmed is the version still in force.

(5) The Sentinel cards and Sentinel Scheme Rules. Sentinel smartcards are issued to qualified individuals who have undergone appropriate training and assessment, and the information on them is stored on a central database and can be updated regularly. The Sentinel Scheme Rules have been periodically revised and updated. In March 2011, the Rules were revised to include not only additional safety and technical competences, but also to include the requirements comprised in the auditing of training and assessment organisations. Mr Smith stated that this was in order to make clear what was required of those audits and of those being audited. With effect from 6 January 2014, they were fundamentally re-drawn to separate the Scheme training and medical rules.

NSAR

28. As mentioned above, NSAR was formally incorporated under its original name NSARE, on 6 January 2011. It was established with Government support through the Skills Funding Agency as one of a series of national skills academies. At the outset, it was co-funded by the Government with a grant of £2.7 million over the first three years and contribution from private industry, with the understanding that it was to be self-funding by April 2013.

29. NSAR is a not-for-profit company limited by guarantee, owned by its members. It currently has some 370 members: they include major companies in the railway infrastructure and engineering sectors, such as Alstom, Bechtel, Carillion and Siemens, all the railway operating companies, Network Rail, HS2 and Transport for London ("TfL"). The Board of NSAR is made up of senior figures from companies in the rail industry, apart from Mr Robertson and one member (described as an "observer" but having voting rights) from the DFT. The current chair is the chief executive of the Rail Safety and Standards Board Ltd, itself a not-for-profit company owned by companies in the rail industry.

30. Network Rail, HS2 and TfL and some of the other larger members are so-called "sponsoring members" who assist NSAR with its expenditure by providing a significant part of its income and who are all represented on its Board. Thus Network Rail contributes about £600,000; TfL about £200,000; and the rail delivery companies

and rail-owning stock companies together contribute about £300,000. Many of the smaller members of NSAR are training providers, including UKRS. The current turnover of NSAR is about £2 million.

31. NSAR's Articles of Association state the company's objects as being:

> "the advancement of education and training primarily for the benefit of the members (without prejudice to the generality of the foregoing) in the railway sector by increasing the level of skill and training of its workforce."

32. Mr Robertson in his witness statement said that NSAR's "primary mission", consistent with its original remit is: "to research and forecast where skills need to be developed and where they may fall short of requirements within the railway industry." The NSAR website contains the following summary of its role and function, which Mr Robertson confirmed was accurate:

> "*Developed by the Industry, for the Industry*
>
> NSAR has been established by the industry employers to meet the growing demand, both in terms of quality and quantity, for railway engineering skills across the UK.
>
> NSAR is the epitome of collaboration; it has been developed by the industry for the industry to fulfil the strategic role of developing and implementing the skills strategy, which supports the industry's vision to create an engineering workforce with the necessary skills to support the maintenance, development and expansion of a first-class, cost effective 21st Century railway.
>
> NSAR supports all type of employers large and small – from the infrastructure client organisations and their contractors to traction and rolling stock companies and their supply chains…"

33. NSAR also provides private consultancy services in relation to skills on a commercial basis: e.g., if an operator intended to make use of a certain quantity of rolling stock on a length of track, NSAR could be asked to forecast the availability of the necessary skilled workforce. This currently accounts for less than 10% of its revenue.

34. In addition, NSAR was engaged by Network Rail to manage the auditing and accreditation of training providers under the RTAS and the Sentinel system. In its Defence, NSAR expresses this unequivocally as a distinct function from "its main skills functions." Mr Robertson, its chief executive, adopted the same approach in his evidence: he described the auditing by NSAR of the training/assessment process by private providers as a "standalone" function, and "an additional distinct function". However, in his oral argument on behalf of NSAR, Mr Wignall submitted that apart

from the consultancy services, which are segregable, all the functions have to be considered together and cannot be divided up. He referred to NSAR's unique role as a skills academy and said that "to do the auditing assurance role properly you really have to have the wider set of functions."

35. In his oral evidence, Mr Robertson confirmed that he regarded the auditing as a separate and distinct function of NSAR. He explained that they refer within the company to keeping a 'Chinese wall' between the four individuals who carry out the auditing role to indicate that at an operational level they are kept separate so far as possible within a small organisation. We accordingly accept that evidence. This does not mean, of course, that there may not be some benefit for the auditors in getting up-to-date information on developments in the rail industry from the main role of NSAR, as mentioned by Ms Millen.

Relationship between Network Rail and NSAR

36. Network Rail adopted the first of the two alternative models set out in the Guidance (para 26 above) for ensuring the competence of outside contractors' staff. It has required all contractors to ensure that their workers who need access to the infrastructure are trained to the Sentinel standards, and has therefore enabled or encouraged a market in training services under the Sentinel Scheme. As Mr Robertson put it in his evidence:

> "… Network Rail is prepared to allow private providers of training, such as [UKRS], both to provide safety training and also to assess the competency of those who have received its training, but only on the basis that there is an independent assessment of both the training and the competence-assessment standards adopted by the private providers on its behalf."

37. Thus the current version of the RTAS Rules, at para 2.1, defines the role of the Accreditation Organisation as follows:

> "The role of the Accreditation Organisation is to deliver Rail Training Accreditation Scheme (RTAS) on behalf of Network Rail. They are responsible for ensuring, that Training Providers and Individual Trainers/Assessors accredited under RTAS Rules meet the specific requirements of Network Rail."

38. NSAR took over the RTAS auditing role under a contract with Network Rail in 2011/12. Mr Wilmshurst-Smith said that Network Rail approached NSAR to take over this role from Achilles, since their position as the industry skills body made them ideally suited for this task. There was produced in evidence an unsigned contract

between Network Rail and NSAR entitled "Network Rail Conditions of Contract for the Purchase of Services, Rail Training and Assessment Accreditation Service" which stated that the agreement was made on 1 September 2011, with inspections by NSAR to commence on 1 January 2012. Somewhat surprisingly, neither NSAR nor Network Rail were able to locate a signed copy, but the Defence and evidence proceeded on the basis that this document sets out the terms of the concluded agreement. Mr Richard Smith described it as a "concession agreement".

39. Clause 3 of the agreement provides:

> "In consideration of the payments to be made by Network Rail to the Supplier [NSAR] as hereinafter mentioned the Supplier hereby covenants with Network Rail to provide services in conformity in all respects with the provisions of the Agreement."

And condition 2.1 states:

> "The Supplier warrants that it has exercised and will continue to exercise in the performance of the Services all the reasonable skill care and diligence as may be expected of a properly qualified and competent member of the Supplier's profession experienced in carrying out services in relation to a project (if any) of a similar size scope and complexity to the Services."

40. The "Services" are set out in considerable detail in schedule 1. Schedule 1B specifies a full inspection framework of the training providers, setting out a grading structure and so forth: that was referred to as the NSARE Quality Assurance Framework.

41. In fact, the contract does not provide for any payment by Network Rail to NSAR but by schedule 4 specifies the fees which NSAR should charge training providers as the annual subscription under the accreditation scheme. Those fees vary between £2,000 for a provider with 1-4 trainers up to £4,800 for a provider with 10 or more trainers. But schedule 4 also sets out what the fees cover and therefore what approved providers should receive from NSAR, as follows:

- "Attendance at briefing sessions
- Support and guidance on completion of Self-Assessment Report
- Support and guidance on completion of Quality Improvement Plan
- Completion of baseline inspection
- Completion of further inspections at frequency determined by performance
- Guidance from Inspectors during inspection
- Business Improvement advice and guidance
- Publication of inspection results and grading on the National Skills Academy for Railway Engineering website
- Access to National Skills Academy for Railway Engineering website

- Ability to use National Skills Academy for Railway Engineering logo for company promotion (subject to licensing obligations)
- Support and guidance from NSARE Ltd
- Initial visit, guidance and support from Principal Inspector for new providers
- Follow up inspections if required will be charged at cost
- Additional inspections if requested will be charged at cost"

42. Accordingly, Network Rail requires its contractors to have all their workers who need access to the railway infrastructure to have a Sentinel smartcard. Those contractors have to sponsor them to have training to the standards prescribed by Network Rail at an accredited training provider. The sponsoring contractors pay the training provider for the necessary training courses, and the training provider pays a subscription and other fees to NSAR which has been appointed by Network Rail to provide the accreditation and follow-up auditing. As well as the accreditation and audits, the training providers receive supportive assistance from NSAR.

43. By letter agreement of 11 August 2014, the contract between Network Rail and NSAR was extended to 31 December 2015, with a varied schedule 1 describing the scope of the services required. The new schedule 1 specified that NSAR "will work in partnership with Network Rail to ascertain a 'fit for purpose' RTAS framework".

44. Towards the end of 2015, Network Rail, after discussion with NSAR, decided to introduce a more robust standard for auditing for both new and existing training providers, called the NSAR Quality Assurance Participation Scheme, to come into effect on 1 January 2016. On 17 November 2015, Mr Wilmshurst-Smith wrote to Mr Robertson notifying him of this decision. His letter stated:

> **"<u>Rail Training Accreditation Scheme (RTAS)</u>**
>
> Network Rail has recently reviewed the Rail Training Accreditation Scheme (RTAS) with the purpose of identifying a way to continue to raise the minimum standards of skills training delivery across the training provider network.
>
> After consideration, the NSARE Quality Assurance Participation scheme has been identified as the current minimum standard that will enable the industry to benchmark its performance whilst being effectively aligned to RTAS and Sentinel Scheme rules via a risk-based assurance framework."

45. Mr Wilmshurst-Smith also sent a circular letter on behalf of Network Rail to all training providers on 16 December 2015 to inform them of the change. It is worth quoting part of his letter:

"**Rail Training Assurance Scheme (RTAS)**[2]

A review of the Rail Training Assurance Scheme (RTAS) has recently been conducted and Network Rail has concluded that a more rigorous rail training inspection regime is required in order to raise the minimum standards within the training provider network.

After consideration, a new NSARE Quality Assurance Participation Scheme has been selected and this letter informs you that the current scheme will cease on the 31 December 2015 and the new Scheme will start on 1 January 2016.

The new Scheme is appropriately aligned to RTAS and Sentinel Rules and will deliver a significant improvement in the depth and detail of the inspection. The Scheme has the ability to increase training standards across the rail industry and takes a more critical view of the standard of training as well as training provider infrastructure; collectively this will improve training standards across the industry. The details of the Quality Assurance Participation Scheme will be distributed shortly but the key changes are:

a) Delivery of assurance will be brought in house (to NSARE) and utilise assessors with rail knowledge and skills.
b) Ad hoc visits will be introduced outside any scheduled plan.
c) Evaluation will be risk based and aligned to methodology used in the Skills Assessment Scheme.
d) The ethos of continuous improvement features throughout the Scheme proposal.
e) Overall the Scheme is much more in depth and demands a greater level of supportive evidence."

He concluded by stating that the pricing structure would be largely unchanged.

46. The new Quality Assurance Participation Scheme was set out in a 32 page document called the "NSAR – Quality Assurance Framework" ("the Framework"), sent out in January 2016. It includes detailed guidance for auditors and a comprehensive grading structure. Prior to its distribution, NSAR held presentations explaining the Framework to training providers, such as UKRS.

47. Also in December 2015, Network Rail and NSAR concluded a Memorandum of Understanding ("MoU"). In part, this provides for an arrangement for Network Rail to use income from the Sentinel Scheme to part fund NSAR's operating costs. Network Rail imposed a charge for each Sentinel card, and by the MoU it agreed to provide £7 out of this levy to NSAR. It was estimated that this would generate £600,000 p.a. However, that was intended to go towards the funding of NSAR generally and not to cover the cost of the RTAS; NSAR's specific accreditation and auditing function was supposed to be self-financing.

[2] It is unclear why RTAS is here expressed as the Rail Training *Assurance* Scheme whereas in the previous letter it was the Rail Training *Accreditation* Scheme. The two terms appear to be used interchangeably.

48. NSAR also agreed to establish what is there called a "management reporting system" to the NSAR board, as set out in Annex 1 to the MoU. Annex 1 is headed: "NSAR Management Reporting Headlines for Industry Sponsored Activity". In fact, it sets out a summary of the various and wide-ranging roles which NSAR is expected to carry out, including industry workforce planning; development of a rail industry academy; and acting as a contact with the education sector to promote the rail industry as a career. It is only under the third heading, "Policy & Governance", that two of the six items are relevant to this case:

> "c. **Rail Training Assurance Standards.** Support the development of the Rail Training and Assurance Scheme (RTAS) standards.
>
> d. **Delivery of a rail training assurance scheme.** Develop and deliver a rail training assurance scheme that drives up the quality of the training and the trainers."

49. The references to Annex 1 in the MoU are expressly stated not to be legally binding, but Network Rail regards it, as stated by Mr Richard Smith, as superseding the previous concession agreement (as varied and extended in 2014). Both Network Rail and NSAR consider that the MoU now governs the relationship between them, under which NSAR apply the new Framework summarised in Mr Wilmshurst-Smith's letter. Mr Wilmshurst-Smith in his evidence referred to it as having transformed the relationship, and said that the lack of detailed specification of what NSAR has to provide is significant:

> "It enables NSAR to take steps and help us to change both RTAS and the requirements for Sentinel as and when we both think necessary and as required according to new developments. We recognise that NSAR has the relevant expertise and we are prepared to be guided by NSAR."

Relationship between NSAR and training providers

50. When a training provider applies for accreditation under the RTAS, NSAR carries out an assessment and a visit to determine if the provider meets the necessary criteria. If NSAR concludes that the provider meets the criteria, then it recommends to Network Rail that accreditation is granted. There is an initial charge of £1,500 for that visit, and if the provider does not fulfil the criteria in certain respects NSAR will advise it on what further steps need to be taken.

51. Once accredited, the provider is subject to regular audits. The audits carried out under the RTAS were referred to as falling into two categories: rail audits and educational

audits. In very broad terms, the rail audit involves a detailed assessment that the Framework is being properly used and examination of course materials and registers; whereas the educational audit focuses more on the manner of delivery of the course. NSAR carries out the rail audits using its own team which now comprises four auditors. As far as the educational audits were concerned, until the end of 2015, those were sub-contracted to a private company, Tribal Ltd ("Tribal"). Hence, UKRS had an audit by Tribal in May 2015. Since the start of 2016, NSAR has used other outside consultants for the educational audits.

52. NSAR charges training providers an annual subscription fee, which varies on a scale according to the number of trainers and assessors registered with the provider. These have increased since 2012 and are now between £2,160 and £5,250.[3] There are various additional fees, including a fee (£330) per trainer/assessor employed by the provider; a fee for outside examinations and continuous professional development (CPD) taken by each trainer/assessor (£260 per head); and a fee for the annual use of NSAR's "Event Management System" (between £150 and £600 depending on the company's size). However, if a provider fails an audit, additional fees are charged for any consequent further audit, as happened with UKRS. The fees charged, as Ms Millen explained, are determined by Network Rail following discussion with NSAR. The intention is that the accreditation/auditing function should be self-funding.

53. While the primary benefit for training providers is the accreditation which they need to be able to train and assess individuals under the RTAS and the Framework for admission to the Sentinel Scheme (and resulting issue with a Sentinel card), NSAR offers them the following related but additional benefits:

    (1) organisation of the external exams which individual trainers have to take;

    (2) liaison with Network Rail and their IT providers to help process issue of Sentinel cards; and

[3] All charges are subject to VAT.

(3) regular two-monthly meetings or workshops with invited speakers on relevant industry issues or updates on the requirements of the relevant Network Rail rules and the Framework.

F. THE LAW

54. The Chapter II prohibition on abuse of a dominant position set out in sect 18 CA applies only to an "undertaking". Similarly, the Chapter I prohibition in sect 2 CA applies to agreements between "undertakings" and decisions by "associations of undertakings". As is well known, the Chapter I and Chapter II prohibitions follow what are now articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU").

55. Sect 60 CA sets out the so-called 'consistency principle', whereby the Chapter I and Chapter II prohibitions are to be interpreted consistently with the analogous provisions of EU law. Hence, sect 60(2) prescribes as follows:

> "At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law."

56. The meaning of "undertaking" is not defined in the CA or the TFEU but it has received extensive consideration in the jurisprudence.

57. In Case C-41/90 *Höfner and Elser v Macrotron* EU:C:1991:161, the European Court of Justice ("ECJ") stated at [21], in terms that have often been repeated:

> "… the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed…."

58. In that case, it was held that the public body which under German law had a monopoly on the provision of personnel recruitment in Germany was an undertaking. The body provided its services free of charge, and was financed by contributions

levied on employers and workers. The Court held that employment procurement of its nature is an economic activity, and stated at [22]:

> "The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities."

59. In Case C-180-184/98 *Pavlov and Others* EU:C:2000:428, holding that specialist medical doctors in private practice are undertakings, the ECJ repeated the *Höfner and Elser* formulation and added, at [75]:

> "It has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity [citing earlier authority]".

60. In Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* EU:C:2001:577, a reference to the ECJ in proceedings brought by a private company (Ambulanz Glöckner), one question was whether non-profit making medical aid organisations, such as the German Red Cross, providing a public ambulance service were undertakings. The organisations had been entrusted with that task by the relevant public authorities, and the services were financed partly by the State and partly by charges to users according to a tariff fixed by the State. In his Opinion, Jacobs AG said, at [67], that the 'basic test' was whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits. That approach was endorsed by the Court at [20]:

> "In the present case, the medical aid organisations provide services, for remuneration from users, on the market for emergency transport services and patient transport services. Such activities have not always been, and are not necessarily, carried on by such organisations or by public authorities. According to the documents before the Court, in the past Ambulanz Glöckner has itself provided both types of service. The provision of such services therefore constitutes an economic activity for the purposes of the application of the competition rules laid down by the Treaty."

61. In that regard, we think it is instructive to look at the approach of the Tribunal in *The Institute of Independent Insurance Brokers v DGFT* [2001] CAT 4 ("*GISC*"). The case concerned a rule adopted by the General Insurance Standards Council ("GISC"), a self-regulatory body of the insurance industry. The then UK competition authority had dismissed a complaint about the rule on the basis that GISC was not an undertaking. Although the Tribunal did not have to determine that question since it

held that the rule was in any event a decision of an association of undertakings, it nonetheless addressed the issue by reference to prior EU case-law:

> "254. Applying those principles to the present case, we note first that GISC is a private company that has been set up by the industry itself without any statutory basis. It exists solely by contract. GISC is not accountable to Parliament, nor to Ministers, nor indeed to anyone other than those in the industry who belong to GISC. As far as the constitution of GISC is concerned, GISC is run by a Board of Directors most of whom are, or have been, active in the industry….
>
> 255. On this basis GISC appears to us to have the features normally to be found in a private sector organisation or company accountable to its members, rather than a publicly constituted body exercising "public powers". We note also that, in the cases cited to us where the exercise of official or public authority was held to fall outside the competition rules, the activity in question had been exercised on some statutory basis of one kind or another. In the present case, GISC lacks any such statutory foundation.
>
> 256. We doubt whether, as a matter of Community law, the notion of the exercise of "official authority" or "public powers" can extend to cases where the legal basis of the activity in question is not to be found in the public law of the Member State but relies entirely on contract between private parties. Even if the Government is supportive of the principle of self regulation in the general insurance sector – which may not be quite the same thing as supporting a monopoly regulator for the whole sector, … - the Government is not, constitutionally speaking, the legislature….
>
> 257. Lastly, while it is true that the assumption of regulatory powers in respect of general insurance could properly be an activity of the State, … the setting up of a framework for promoting professional standards and consumer protection in general insurance is not an activity which, by reason of its intrinsic nature, can necessarily only be carried out by public authorities, as the case law appears to require.… "

62. Subsequently, in Case C-82/01P *Aéroports de Paris v Commission* EU:C:2002:617, the ECJ stressed that the fact that a body is carrying out a purely public function in respect of some of its activities does not preclude it from being an undertaking as regards another activity. The case concerned the public corporation ("ADP") under the authority of a government minister which managed the publicly owned facilities in the Paris airports. The ECJ upheld the approach of the Court of First Instance which distinguished between ADP's administrative and supervisory activities concerning air traffic control and the disembarkation and embarkation of passengers and cargo, and, on the other hand, its provision of airport facilities to airlines and various service providers in return for fees which it fixed on a commercial basis. As regards the latter, and thus its charges for licences to supply ground handling services, ADP was an undertaking.

63. The factual basis of those decisions may be contrasted with the two judgments of the ECJ concerning Eurocontrol, a regionally-oriented international organisation, established by the Convention on the Safety of Air Navigation. Under art. 1 of the Convention, its aim is to strengthen cooperation between the State parties and develop their joint activities in the field of air navigation. Under art. 2 of the Convention (as amended), its tasks are concerned, first, with research, planning and co-ordination of national policies and staff training; and secondly, with the collection of route charges imposed on users of air space for air navigation services (i.e. airlines). Further, at the request of some of the contracting States (Germany and the Benelux countries), Eurocontrol provided air navigation control services.

64. Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* EU:C:1994:7 (*Eurocontrol I")*, concerned a challenge by a commercial airline to the rate of charges which Eurocontrol sought to collect, which it was alleged constituted an abuse of a dominant position. On a reference from the Belgian court, the ECJ held that in this respect Eurocontrol's activities were not those of an undertaking. The charges were not fixed by Eurocontrol but by the contracting States, and Eurocontrol collected the charges on the States' behalf. And Eurocontrol's exercise of air navigation control was carried out only at the specific request of some of the contracting States. Accordingly, the Court held, first, that Eurocontrol's collection of route charges cannot be separated from the organisation's other activities. Secondly, the Court stated, at [30]:

> "Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules on competition."

65. Case C-113/07P *SELEX Sistemi Integrati v Commission* EU:C:2009:191 ("*Eurocontrol II")*, concerned a challenge to the rejection by the Commission of a complaint by a company engaged in the supply of air traffic management systems that Eurocontrol was abusing a dominant position in certain of its activities, in particular as regards the assistance which it gave on request to national administrations, its preparation and production of technical standards, and its acquisition of prototypes and related management of intellectual property rights. Following its earlier judgment, the ECJ held that offering assistance to national administrations in the planning and setting up of air traffic systems was one means whereby Eurocontrol

pursued its main objective of technical harmonisation and integration in the field of air traffic systems. So too were the preparation and production of technical standards, which could not be separated from the adoption of those standards, a task clearly entrusted by the contracting States to Eurocontrol under the Convention. And as for the granting of licences to prototypes, the Court noted that the fact that a body was non-profit-making was relevant but not decisive; in this case, the facts that licences were granted without remuneration and was also ancillary to the promotion of technical development, which was part of Eurocontrol's mission pursued purely in the interest of public service, meant that this activity was not economic in nature.

66. Finally, we should refer to Case C-343/95 *Diego Cali & Figli v SEPG* EU:C:1997:160 (the "*Port of Genoa* case"), in which a shipping company disputed payments levied on it by the independent company ("SEPG") granted exclusive rights by the public authority managing the oil port of Genoa to conduct anti-pollution surveillance operations. The payments due were calculated according to a tariff fixed by the port authority. Holding that SEPG was not for this purpose acting as an undertaking, the ECJ stated:

> "22. The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas.
>
> 23. Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition [citing *Eurocontrol I*]."

67. The following guidance and considerations can be derived from these authorities:

(1) A functional approach is appropriate: where a body carries out several activities it is necessary to consider whether the activity in question can properly be regarded as a discrete function: *Aéroports de Paris; Eurocontrol I and II.*

(2) Where the activity is of its nature a core function of the State, the body will not be an undertaking: *Port of Genoa; Eurocontrol I; cp Höfner and Elser*.

(3) The fact that the body does not operate for profit is relevant but by no means decisive: *Ambulanz Glöckner; Höfner and Elser; Eurocontrol II.*

(4) Where the activity in question has been (or is also) carried out by a private body on a commercial basis, that indicates that it is to be regarded as an economic activity such that the body carrying it out is an undertaking: *Hofner and Elser; Ambulanz Glöckner.*

(5) Where the charges levied by the body are determined not by it but by a public authority, that indicates that it is not an undertaking: *Port of Genoa; Eurocontrol I; cp Aéroports de Paris.*

(6) Where the power exercised by the body derives directly from legislation or is exercised on behalf of the State or a public authority, that indicates that it is not an undertaking: *Eurocontrol I and II; Port of Genoa;* and *cp GISC.*

G. DISCUSSION

68. NSAR carries out several varied functions. As explained above, we find that the accreditation and auditing under the RTAS and Sentinel Scheme is a distinct function which falls to be considered separately. Thus it is as regards the exercise of that function that we address the question of whether NSAR is an undertaking for the purpose of competition law.

69. It is clear that NSAR carries out this function on behalf of Network Rail. That is emphasised in the evidence of the witnesses from NSAR and from Network Rail. Indeed, both Mr Robertson and Mr Smith said that if NSAR did not carry out its role well, then Network Rail might have to carry out the function internally.

70. Accordingly, it is relevant and appropriate to consider the status of Network Rail. We have no doubt that Network Rail constitutes an undertaking. It owns and is responsible for the railway infrastructure, tasks previously carried out by Railtrack, a commercial enterprise. In 2007, the Information Tribunal upheld the appeal of NRL against the issue by the Information Commissioner of notices under the Environmental Information Regulations 2004, where the critical question was whether either NRL or Network Rail was a "public authority" within the terms of those Regulations: *Network Rail Ltd v Information Commissioner* (2007) UKIT EA 2006/0061 & 0062. In its judgment, the Tribunal stated:

"29. Whatever the position in 1947, running a railway is not seen nowadays in the United Kingdom as a function normally performed by a government authority. Indeed the [Railways Act 1993] reflected the view of the Conservative government of the day that ownership of and responsibility for running a rail network and providing train services belonged in the private sector. The present government shows no sign of wishing to return the railways to public ownership or control.

30. We are further impressed by the tenor of Council Directive 91/440/EEC on the development of the Community's railways, which was implemented by the 1993 Act. Whilst it contemplates railway undertakings continuing to receive public funds or remain in public ownership, it sets out firmly in the third recital that, in the interests of competitiveness and efficiency,

> "Member States must guarantee that railway undertakings are afforded a status of independent operators behaving in a commercial manner and adapting to market needs"

31. Section 11 is headed "Management independence". Article 4 requires Member States to ensure that railway undertakings have independent status and management, administration, internal controls, budgets and accounts separate from the state. Article 5 requires measures to enable such undertakings to adapt to the market and run as commercial concerns.

32. To summarise, the Directive which gave birth in large measure to the 1993 Act adopts the principle that running railways is an activity for independent bodies, however created and funded, operating as competitive, commercial concerns according to the dictates of the market. Such an approach is the antithesis of the proposition that running railways is a function of governmental authorities."

71. Mr Richard Smith, who remembered this case well, did not suggest when asked about the decision that the result would be different since the reclassification of NRL in September 2014. Although Network Rail is now in the public sector, that is not relevant to the question of whether it is an undertaking. Indeed, while pointing out that Network Rail does not have competitors and so should be regarded as a State regulated monopoly, Mr Smith acknowledged that this had not changed since 2007. The introduction to the 2014 Framework Agreement (see para 24 above), makes clear that the key principle underlying it 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."

72. We do not see that the safety aspects of the railway infrastructure can possibly be regarded as a distinct function of Network Rail from its role in the operation of that infrastructure. It is inherent in the function of the maintenance and operation of the infrastructure that it should be kept safe and operated in a safe manner. That will

necessarily include ensuring that the staff engaged in these tasks are properly trained in the relevant safety standards.

73. Accordingly, if Network Rail were itself carrying out the accreditation and auditing of trainers, it would constitute an undertaking. The fact that Network Rail has in effect outsourced that function, or may be regarded as having delegated it to NSAR, does not make the exercise of that function any less that of an undertaking when it is carried out by NSAR. There may be advantages in having this function carried out by an independent body, which can be free of internal pressures from the operational side of Network Rail, but that does not affect this conclusion.

74. In some of the evidence and submissions, it was suggested on behalf of NSAR that NSAR was acting as a regulator. We do not think that is a correct characterisation. There is a regulator with jurisdiction over Network Rail, and that is the ORR, which is a statutory body established by legislation: see para 25 above. Indeed, the ORR has issued guidance as to how Network Rail should comply with its statutory safety obligations, and the role assigned to NSAR alongside the RTAS and Sentinel Schemes is in part fulfilling that regulatory guidance: see para 26 above. Moreover, even if NSAR were to be regarded, contrary to our view, as a regulator, a body established by industry as a form of self-regulation may nonetheless constitute an undertaking: see *GISC*.

75. Furthermore, although it is relevant that NSAR is a non-profit making body, it is a body run by and for the railway industry generally. As regards the accreditation and auditing for the RTAS and Sentinel Schemes, NSAR submits to Network Rail each year the fees which it proposes to charge training providers, and it is Network Rail which has the final say in determining those fees. This underlines the fact that NSAR is, in effect, acting on Network Rail's behalf; and as discussed above, Network Rail is not a public authority but itself an undertaking.

76. A significant theme in NSAR's case was that the role it carries out could not be done by a commercial profit-making organisation. As regards the formal accreditation and auditing function, that is clearly something which in general terms could be carried out by a commercial organisation since prior to NSAR it was the subject of the contract between Network Rail and Achilles, and before that, with RTAS Ltd. While

the written evidence of Network Rail suggested that there were serious deficiencies in the way Achilles performed those services, in his oral evidence, Mr Wilmshurst-Smith stressed that he was not critical of Achilles and said that he considered they were doing "a reasonable job" and that the fault lay in what they were being asked to do as part of the contract. Indeed, the contract requirements were very full and clear, including provision for feedback and advice from Achilles: see para 21 above. Although it seems that in practical terms the agreement was not actually operated that way, we see no reason why a competent commercial auditing organisation could not effectively provide that level of engagement and support. If it lacked appropriate railway experience, it could buy-in the necessary expertise: we note that NSAR itself employed Mr Alexander, who had previously been at Network Rail, to assist in implementing an effective service. And when Network Rail turned to NSAR in succession to Achilles, in the concession agreement the number of competences to be assessed was significantly increased over those specified to Achilles.

77. Ms Millen was evidently of the view that a company trading for profit would not be sufficiently thorough in the service it provided, since it would constantly be looking at the costs involved; and that in carrying out audits it would not be impartial and critical in highlighting difficulties because it would have an interest in continuing to be used by those who were paying it. However, the former depends on how the costs are dealt with in the contract: as Dr Elphick pointed out, and Ms Millen accepted, if it was on a cost-plus basis, this would not be an issue. And as regards the latter, since those payments come from the training providers, they do not have a choice in switching to another auditor since they need to get accredited and approved by Network Rail's appointed auditor.

78. The reality of the case being advanced, as we understood it, was that there was a fundamental change as a result of the MoU at the end of 2015. Thereafter, the relations between Network Rail and NSAR were not governed by a formal contract, but on the basis of a much looser and more flexible cooperative relationship. Mr Wilmshurst-Smith described it as a kind of partnership, and referred to Network Rail as being "on a journey" with NSAR, working together to improve the quality and performance of safety training. That kind of relationship, it was suggested, could not be sustained with a commercial supplier of accreditation and auditing services.

79. We recognise that the relations between Network Rail and NSAR have evolved over time, and that if Network Rail were again to appoint a commercial enterprise to carry out the accreditation and auditing function it would doubtless be necessary to enter into a formal contract and not rely on a non-binding MoU. But subject to that, we do not accept that there is such a sharp break between the relevant function carried out by NSAR before and after the entry into the MoU. Mr Smith said that Network Rail had moved beyond the black-and-white audit process and was expecting to take lessons from the audits and work with NSAR collaboratively to improve the training services. Mr Wilmshurst-Smith said that Network Rail had now "handed the thought leadership for assurance in the industry" to NSAR. However, the rules in the RTAS and Protocol 202 have not changed since the end of 2015. The 2016 Quality Assurance Framework, as is apparent also from the summary in Mr Wilmshurst-Smith's letter of 16 December 2015 (para 45 above), while no doubt more rigorous and intensive than the previous provisions, does not in our judgment comprise matters that could not be encompassed within a formal agreement. And in any event, close collaboration with outside specialist consultants in developing enhanced standards and procedures is not infrequent in industry. Relating that more fundamental role to the conduct of audits depends on what is asked for by the client and the skills and competence of the selected auditors. Insofar as those are matters within the overall responsibility of Network Rail, they concern its operations as an undertaking; and in assisting and cooperating in that endeavour, NSAR is not exercising "public powers" or carrying out a function of the State, but itself acting as an undertaking.

CONCLUSION

80. For the reasons set out above, we hold that for the purpose of the claim in the present proceedings NSAR constitutes an undertaking and we determine the preliminary issue accordingly.

The Hon. Mr Justice Roth President	Margot Daly	Dr. Clive Elphick

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 5 July 2017