



Neutral citation [2021] CAT 1

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1298/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

4 January 2021

Before:

ANDREW LENON QC
(Chairman)
JANE BURGESS
MICHAEL CUTTING

Sitting as a Tribunal in England and Wales

BETWEEN:

ACHILLES INFORMATION LIMITED

Claimant

- v -

NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant

RULING (SPECIFIC DISLOSURE)

A. INTRODUCTION

1. The factual background to these proceedings is set out in the Tribunal's judgment given on 19 July 2019, [2019] CAT 20 ("the Judgment"). Abbreviations and defined terms in the Judgment are adopted in this ruling.
2. In the Judgment, the Tribunal found that that the requirement in Network Rail's Sentinel Scheme and OTPO Scheme that suppliers and persons seeking access to Network Rail's managed infrastructure ("NRMI") must obtain supplier assurance only through RISQS and not through alternative schemes infringes the Chapter I and Chapter II prohibitions of the 1998 Act. The Tribunal made an order on 12 September 2019 giving effect to the Judgment. On 5 March 2020 the Court of Appeal dismissed Network Rail's appeal against the Judgment.
3. By the Tribunal's order dated 26 May 2020 case management directions were made by consent ("the Case Management Order"). The issue of dominance was stayed and directions were given for the trial of damages.
4. Pursuant to the Case Management Order, Achilles served Further and Better Particulars of Loss and Damage on 26 June 2020 and Network Rail served a Defence on 31 July 2020. Achilles' case is, in summary, that the infringements by Network Rail have caused it loss and damage by excluding it from the provision of supplier assurance in respect of organisations requiring access to NRMI for their personnel and/or plant. Achilles contends that, but for the infringements, it would have successfully and profitably retained a high proportion of its buyer and supplier customers in the rail industry after 1 May 2018. It also contends that Network Rail, in combination with the RSSB engaged in a consistent strategy of communications to the rail industry in Great Britain indicating that Achilles was not authorised to provide supplier assurance services and that RISQS was the Network Rail approved scheme.
5. In its Defence, Network Rail denies that the infringements had the exclusionary effect alleged by Achilles. It contends, amongst other things, as follows:

- (1) With regard to the scope of the infringement, the Judgment recognised that Network Rail is entitled to require the use of RISQS by suppliers with whom it wishes to contract directly as a buyer and that Network Rail is entitled to require the use of RISQS as a pre-qualification system for suppliers wishing to provide services directly to Network Rail.
- (2) Having lost the RISQS concession, Achilles will have been excluded from the activity of assuring those organisations which were lawfully required by Network Rail to use RISQS and/or which will have chosen to use RISQS and not to “multi-home”. The overwhelming majority of suppliers on RISQS in March 2018 were suppliers seeking to tender to Network Rail. There will not likely be any or any sufficient interest from suppliers in Achilles’ alternative supplier assurance scheme so as to render it viable. There was therefore no or no material exclusion arising from the infringements.
- (3) TfL and other RISQS buyers that chose to sign the RISQS Charter were entitled to specify and did specify the use of RISQS in respect of their suppliers when carrying out rail infrastructure work, including suppliers which did not require to be on the Sentinel Scheme but did otherwise require a RISQS audit.
- (4) As a matter of timing, Achilles would not have been able to offer supplier assurance to buyers and suppliers in respect of services carried out on NRMI as of 1 May 2018. Achilles chose to withdraw from the RISQS tender in May 2017 but did not notify Network Rail until 21 March 2018 that it sought to offer to the rail industry its own supplier assurance service. Even if Network Rail had agreed to modify the RISQS-only rule at the end of March 2018 so as not to apply to those suppliers and buyers that do not seek to tender to Network Rail, Network Rail would not have been in a position to accept supplier assurance from more than one supplier assurance provider and Achilles’ IT systems would not have been able to interface with RISQS’s IT systems for at least a further 12 months. It will have taken Network Rail this long,

acting reasonably, diligently, and as quickly as practicable, to be ready to accept alternative supplier assurance providers.

6. The Case Management Order included directions for disclosure of documents by exchange of lists and for applications to be made to the Tribunal for specific disclosure of any further documents or narrow category of documents.
7. Achilles initially made four requests for specific disclosure of documents from Network Rail by its letter dated 7 October 2020. Network Rail responded on 13 October 2020 objecting to all four requests. By a letter dated 14 October 2020, Achilles proposed an amended form of Request 1 and separately confirmed that it did not pursue Request 2 and intended to pursue Requests 3 and 4 by way of an application to the Tribunal.
8. By letter dated 15 October 2020 Achilles made its application to the Tribunal (“the Application”). Network Rail responded to the Application by letter dated 19 October 2020. Achilles replied to Network Rail’s response by letter dated 22 October 2020.
9. The Application has been determined on the papers without an oral hearing. This is the Tribunal’s unanimous decision.

B. THE TRIBUNAL’S APPROACH TO DISCLOSURE

10. Under Rule 53 of the Competition Appeal Tribunal Rules 2015 (S.I. No.1648 of 2015), the Tribunal has a general case management power to give such directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost, including directions for the disclosure of documents or classes of documents. Rule 60 contains detailed provisions in relation to disclosure, including a provision that, in deciding what orders to make in relation to disclosure, the Tribunal shall have regard to the governing principles and the need to limit disclosure to that which is necessary to deal with the case justly. The governing principles are set out in Rule 4, the primary principle being that the Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.

C. ACHILLES' REQUESTS

(1) Request 1

11. Achilles originally requested from Network Rail, by reference to a document disclosed by Network Rail entitled "Spreadsheet of Network Rail Suppliers (*Oracle & BravoNR – Combined Supplier Details*)", which is referred to below as "the Network Rail Supplier List", any documents recording the following information in relation to each listed Network Rail supplier:

(1) The Network Rail RICCL codes supplied by each supplier during that period together with the corresponding auditable code(s) in RISQS (if any).

(2) Total Network Rail spend with each supplier in the last 12 months broken down by RICCL code(s).

12. The request was made on the basis that the Defence pleaded that Network Rail was entitled to and did impose the RISQS-only rule on suppliers seeking to tender to it; the overwhelming majority of suppliers on RISQS were suppliers seeking to tender to Network Rail and were required to register with and to be assured through RISQS; in consequence there was no market for Achilles' services in May 2018 and/or no exclusion. Achilles submitted that the Network Rail Supplier List appeared to have been generated for the purposes of the litigation rather than being a contemporaneous document, that it lists almost 25,000 suppliers and was clearly not limited to activities assured by RISQS. Achilles further submitted that the documents it sought were necessary in order to clarify the extent to which the suppliers named in the Network Rail Supplier List carried out activities assured by RISQS and to put the list in the context of Network Rail's use of the RISQS-only rule.

13. Network Rail objected to this request on the following grounds, amongst others:

(1) The information sought related to each of Network Rail's c.20k+ suppliers and was unnecessary and disproportionate.

- (2) Network Rail was not aware that it has any internal source which records the RICCL codes/auditable codes. It did not record its spend with each supplier by RICCL code and was therefore unable to provide the information as to total spend.
 - (3) In support of its assertion in the Defence that the overwhelming majority of suppliers on RISQS in March 2018 were suppliers seeking to tender to Network Rail, Network Rail relied on the list of RISQS members contained within a document entitled “*Achilles_Report_Sentinel RISQS 20180316*” cross-referenced with the Network Rail Supplier List. In support of its assertion in the Defence that the overwhelming majority of RISQS audit revenues is derived from suppliers and buyers that seek to tender to Network Rail, Network Rail relied on the list of RISQS members contained within a document entitled “*Audit calculator for duration 5 June*” cross-referenced with the Network Rail Supplier List.
14. In the light of these objections, Achilles proposed an amended Request 1 in the following terms:

“Documents recording the total Network Rail spend on direct contracts with each supplier listed on the disclosed documents “*Achilles_Report_Sentinel RISQS 20180316*” and “*Audit calculator for duration 5 June*” in the period 2015 – 2020, broken down by contract or activity in whatever form Network Rail keeps such information”.
15. Achilles submits that these documents should be disclosed on the following grounds:
 - (1) Information about Network Rail’s direct contracts with suppliers registered with RISQS is relevant for determining the issue of the size and value of the opportunities that Achilles would have had and would have in future to provide supplier assurance services to those suppliers in the market who were (and are) seeking to tender to Network Rail.
 - (2) The disclosure sought is needed to test Network Rail’s assertion in its Defence that the “overwhelming majority” of suppliers on RISQS in March 2018 were suppliers seeking to tender to Network Rail and that,

since Network Rail was entitled to require its own suppliers to utilise RISQS, such suppliers could not likely have provided or provide supplier assurance opportunities for Achilles.

- (3) The three documents so far produced by Network Rail in answer to the request, i.e. the Network Rail Supplier List, and the documents “*Achilles_Report_Sentinel RISQS 20180316*” and “*Audit calculator for duration 5 June*”, do not provide the information reasonably sought by Achilles. The Network Rail Supplier List does not show that the listed suppliers seek to contract directly with Network Rail currently or in the relevant period of the counterfactual for Achilles’ claim. Network Rail has evidenced no more than the fact that some of the listed suppliers also feature in the two other documents.
- (4) The disclosure sought will demonstrate whether the listed suppliers were indeed seeking to contract directly with Network Rail in the relevant period and for what contract. This is relevant to the question of whether those suppliers are in fact direct contractors at all and consequently relevant for determining the size and value of the opportunities those suppliers might create for Achilles.
- (5) Further, and in any event, to the extent that any of the listed suppliers were in fact current suppliers “seeking to contract with Network Rail” in the relevant period, the value and nature of those direct contracts is relevant to determining the size and value of the market available to Achilles. In particular, the value, nature and frequency of the opportunities to contract directly with Network Rail is relevant to the determination of whether suppliers were likely to “single home” to RISQS (as Network Rail alleges at paragraphs 6.1 to 6.4 of its Defence), “single home” with Achilles or “multi home”. Hence this is relevant to Achilles’ claim for loss and damage and consequently the implications for competitive opportunities available to Achilles in relation to those suppliers.

- (6) Production of the documents sought would not be disproportionate. The documents “*Achilles_Report_Sentinel RISQS 20180316*” and “*Audit calculator for duration 5 June*” list less than 2,000 suppliers with considerable duplication between the lists. Moreover, the extraction of supplier spend data is a routine task for business accounting software.

16. Network Rail objects to the request on the following grounds:

- (1) Information as to the suppliers’ spend with Network Rail and the type of contract or activity has no relevance to determining the size and value of the supplier assurance opportunities open to Achilles.
- (2) Once it is clear that a supplier seeks to contract directly with Network Rail for infrastructure, maintenance or construction services of a type covered by RISQS, Network Rail can require that supplier to use RISQS for procurement, pre-qualification and assurance purposes regardless of the level of the supplier’s spend with Network Rail and regardless of the contract type or activity with Network Rail.
- (3) The size and value of supplier assurance opportunities for Achilles relate to the supplier assurance spend for those suppliers but this is information that Achilles itself possesses through having provided supplier assurance to suppliers when it was concessionaire for the RISQS scheme.
- (4) Equally, the nature of the contract or activity with Network Rail does not provide relevant information to determining the size and value of supplier assurance opportunities for Achilles. This is because, once suppliers’ activities fall within the types of activity covered by RISQS and where the suppliers seek to contract directly with Network Rail, it is simply the case that Network Rail can require those suppliers to use RISQS for procurement, pre-qualification and supplier assurance purposes, and those suppliers cannot provide any supplier assurance opportunity for Achilles.

- (5) It would be disproportionate to require Network Rail to obtain supplier spend for each of the 4,000+ suppliers for each year over a five-year period.

(2) The Tribunal’s decision on amended Request 1

17. If the only basis for seeking the documents was to test Network Rail’s assertion that the “overwhelming majority” of suppliers on RISQS in March 2018 were suppliers seeking to tender to Network Rail, the Tribunal would accept Network Rail’s submission that the amended Request 1 was not justified. It is not necessary to know the total spend of an organisation in order to determine whether that organisation was seeking to tender to Network Rail. The documents already disclosed enable cross-referencing to be made between the suppliers listed on the Network Rail Supplier List and the lists of audited RISQS members at March 2018 and June 2020. If these documents were not sufficient to determine the proportion of suppliers on RISQS who were seeking to tender to Network Rail, Achilles could ask for further information. It would not need to know the total spend.
18. The Tribunal considers, however, that, the documents requested are potentially relevant to the issue of whether, given a choice between providers of supplier assurance, suppliers would “multi-home” or “single-home” with RISQS (or Achilles), and hence is relevant to Achilles’ damages claim. There is, as Network Rail points out, no direct correlation between the size and value of supplier assurance opportunities for Achilles and the size and value of services provided by suppliers on the RISQS scheme direct to Network Rail. The Tribunal nevertheless considers that a supplier who contracts only infrequently or for low value with Network Rail may well be more likely to join a scheme other than RISQS than a supplier who contracts with Network Rail frequently and for high value. It does not follow from the fact that Network Rail can insist on its direct suppliers using RISQS that a given organisation would necessarily have chosen to “single-home” with RISQS. The Tribunal accepts Achilles’ submission that, in considering which platform to use, a supplier would take into account the extent to which any opportunities in which it was interested were available through one platform or the other.

19. In the Tribunal's view, it would not be unduly onerous for Network Rail to produce the documents sought.
20. The Tribunal is therefore satisfied that it would be just and proportionate to order the documents sought by Achilles in the amended Request 1.

(3) Request 3

21. Request 3 is for production of the following:

“Any documents recording communications between:

- a) individuals at the Defendant; or
- b) the Defendant and the RSSB / RISQS; or
- c) the Defendant and rail industry buyers including Amey, Clancy Docwra, Babcock and Volker or
- d) the Defendant and the ORR

concerning the RSSB / RISQS' “RISQS Charter” in the period 19 July 2019 to date.”

22. Achilles submits that these documents should be disclosed for the following reasons:

- (1) The Defence pleads that key RISQS buyers chose to sign the RISQS Charter (including those buyers named in the request) and that any such buyers could not likely have provided supplier assurance opportunities for Achilles.
- (2) The most recent version of the RISQS Charter was launched on or about 2 December 2019, following the Tribunal's Judgment but before the dismissal of the appeal, i.e. when the RISQS-only rule remained in place and RISQS was the only effective provider of supplier assurance to the rail industry. The documents requested will demonstrate the circumstances in which the RISQS Charter was launched and signed and test the proposition in the Defence that RISQS Charter buyers would not likely have produced supplier assurance opportunities for Achilles.

23. Network Rail submits that the disclosure sought is not relevant. It points out that it is not alleged in these proceedings that Network Rail took any steps to force parties to sign the RISQS Charter in 2019 and that, as a result, this request is not relevant to the pleaded issues. In any event, Network Rail has no reason to believe any material falling into the scope of Request 3 is in existence and therefore it would be disproportionate to search for the same.

(4) The Tribunal's decision on Request 3

24. The Tribunal agrees with Achilles' submission that, having pleaded in its Defence that major contractors chose to sign the RISQS Charter and that such contractors "could not likely have provided (or provide) supplier assurance opportunities for Achilles", documents casting light on the circumstances in which the RISQS Charter was signed are relevant to an understanding of what factors influenced their signing of the Charter and therefore relevant to the question of whether they would have signed it in the absence of the RISQS-only rule. The relevance of these documents does not depend on Achilles having pleaded that the contractors were forced to sign the RISQS Charter.
25. If, as Network Rail suggests, there are no documents falling within the request, it will not be unduly onerous to search for them.
26. For these reasons, the Tribunal considers that it would be just and proportionate to direct disclosure of the documents sought by Achilles by Request 3 insofar as such documents exist.

(5) Request 4

27. Request 4 is for:

"Any documents (including documents recording communications internally at Network Rail and/or with third parties) recording the steps taken by Network Rail to implement the findings of the Judgment in the period 19 July 2019 to 1 April 2020.

In particular in that time period:

a) documents recording Network Rail's engagement with RSSB and ORR regarding the development of the new Network Rail Standard NR/L2/SCO/302.

b) documents recording Network Rail's engagement with its key direct suppliers including Amey, Clancy Docwra, Babcock and Volker Rail.

c) any documents recording (including notes and/or meeting minutes) the meetings held by:

i) Network Rail's internal working group(s) established to consider and implement the effect of the Judgment; and

ii) Network Rail and Altius (as the provider of the IT system for RISQS and the provider of the proposed 'aggregator' system to be implemented by Network Rail in response to the Judgment); and

iii) Network Rail and any third parties (including representatives of the RISQS Scheme and/or any RISQS working group)."

28. Achilles submits that these documents should be disclosed on the following grounds:

(1) The Defence pleads that Achilles' ability to compete after 1 May 2018 would (absent the infringement) have taken at least a further 12 months, including to establish an interface with RISQS's IT systems, on the basis of Network Rail acting reasonably, diligently and as quickly as practicable. The period of 12 months is put forward on the basis that this is the amount of time from the date of the Tribunal's Order following the Judgment that it will have taken Network Rail to implement the Judgment.

(2) An issue for the Tribunal is therefore whether the period of implementation pleaded in the Defence is in fact an accurate and relevant consideration for the counterfactual. This is a matter that can and should be tested by evidence. It is (obviously) not sufficient for Network Rail to rely on the bare fact that implementation in the factual (including the six months when the Judgment was under appeal) has so far taken 13 months.

- (3) The fact that some disclosure has been given in relation to this issue underlines its relevance but does not excuse the need for further disclosure.
- (4) The documents sought will evidence the actions actually taken within that period in order that the Tribunal can consider (a) whether they would have been taken in the counterfactual and, if so, (b) the time period. The correspondence entered into between Achilles and Network Rail referred to by Network Rail in response only commenced in February 2020 and was limited to questions surrounding Achilles' access to the market. Network Rail's case that the request is disproportionate presupposes that there is a substantial volume of relevant documentation that has not yet been disclosed.
- (5) The request is not disproportionate. The period covered by the request is at most nine months and likely nearer to six months in terms of actual activity. Furthermore, the activity subject to the request is all recent in time and so should be readily to hand. There are likely to be a limited number of custodians relevant to the request. The correspondence between Achilles and Network Rail shows the process has been run by Mr Blackley, who himself is likely to hold most if not all the relevant documents. To the extent necessary, Achilles will obviously co-operate with Network Rail to agree a proportionate and reasonable number of custodians for the purposes of answering the request. The request particularises the specific documents, which Achilles believes exist and which are responsive to the request, to assist Network Rail in targeting their disclosure.

29. Network Rail resists the request on the following grounds:

- (1) Evidence on the steps taken to implement the Judgment was put before the Tribunal in the liability hearing and before the Court of Appeal in Network Rail's application to continue the stay on the Tribunal's Order following the Judgment. Evidence on this point is also before the Tribunal in the damages action as a result of Achilles' inclusion in its

disclosed documents of the chain of correspondence between the parties extensively recording the steps Network Rail has taken, and the timeline involved, to design a new system to facilitate multiple supplier assurance providers operating in the rail sector.

- (2) Achilles has not made any attempt to enforce the Tribunal's Order following the Judgment on the basis of a delay in implementation.
- (3) The work Network Rail has put into the implementation of the Tribunal's Order following the Judgment has been considerable, involving a large number of meetings and consultations with working groups, stakeholder groups and third parties with documentation being provided to a sizeable number of individuals. Network Rail has also addressed the significant number of points raised by Achilles regarding the design of the multi-party environment. It would be unnecessary and unduly burdensome for Network Rail to be required to collate all documentation recording the steps taken by Network Rail to implement the Tribunal's Judgment.
- (4) A request for all documentation recording the steps taken by Network Rail to implement the Tribunal's Judgment is not a request for a specific or narrow category of documents.

(6) The Tribunal's decision on Request 4

30. In the Tribunal's view, some further disclosure is appropriate in order to test Network Rail's contention that Achilles could not have competed for a period of 12 months because of the time needed to establish an interface with RISQS's IT system. Request 4 is, however, too broad. The Tribunal is not persuaded that it would be appropriate, for the purpose of determining the date by which Achilles' alternative service could have been up and running, to embark on a detailed investigation of the steps taken by Network Rail to implement the Judgment. Moreover, the Tribunal accepts that production of all documents relating to the implementation of the Judgment would be a burdensome

exercise. This is not a “narrow category of documents” as envisaged by the provision for specific disclosure in the Case Management Order.

31. Balancing these competing considerations, and taking into account the way in which Network Rail puts its case as to the minimum time needed to accept supplier assurance from more than one provider, the Tribunal concludes that disclosure in relation to Request 4 should be limited to production of documents held by Network Rail relating to the steps taken to establish an interface between Achilles’ IT systems and RISQS’s IT systems in the period 19 July 2019 to 1 April 2020.

Andrew Lenon QC
Chairman

Jane Burgess

Michael Cutting

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

Date: 4 January 2021