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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No: 1298/5/7/18

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Monday 11 October 2021

14  
15 Before:  
16 Andrew Lenon QC  
17 Jane Burgess  
18 Michael Cutting  
19 (Sitting as a Tribunal in England and Wales)

20  
21  
22 BETWEEN:

23  
24 Achilles Information Limited **Claimant**  
25 v  
26 Network Rail Infrastructure Limited **Defendant**

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28  
29  
30 **A P P E A R A N C E S**

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32 Phillip Woolfe (On behalf of Achilles)  
33 David Went (On behalf of Network Rail)

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37  
38 Digital Transcription by Epiq Europe Ltd  
39 Lower Ground 20 Furnival Street London EC4A 1JS  
40 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
41 Email: [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)

1 **Monday, 11th October 2021**

2 **(10.30 am)**

3  
4 **Opening submissions by MR WOOLFE**

5 **MR WOOLFE:** Sir, appear for the Claimant, Achilles Information and my learned  
6 friend, Mr Went, appears for the Defendant, Network Rail Infrastructure  
7 Limited. Before I move to my opening submissions I shall run through  
8 a certain amount of housekeeping to check we all have the right materials.  
9 You should have the following. Volumes A to E, each which is a single  
10 volume. A is the tribunal's judgment and pleadings and so forth. B is the  
11 Claimant's witness statements and C is the Claimant's exhibits. D is the  
12 Defendant's witness statements and E is the Defendant's exhibits. Then you  
13 have a volume F, which is in two files. I will refer to them as F1 and F2 but  
14 they are labelled on the side as F and F part 2, but I hope that's fairly clear.  
15 Then you have the contemporaneous documents volume G, which is in  
16 volumes G1 to G13. Can we all check we all have those available.

17 G4 is very full, so when you come to it, you may find you need an overflow file to  
18 move some of the papers out.

19 Then you should find you also have a miscellaneous documents file as well. I know  
20 that one, because it has two witness statements in it, one filed by Achilles and  
21 one filed by Network Rail. I think we need direction from the tribunal for  
22 permission for those to go in under rule 55(2). It is common ground between  
23 the parties that they should both go in, particularly with matters leading up to  
24 the judgment and where Achilles stands now. So we will ask for your  
25 direction on that matter.

26 **THE CHAIRMAN:** (Inaudible).

1 **MR WOOLFE:** We do have one document, I am afraid, to add to the miscellaneous  
2 documents at this stage, which is a copy of the contractual terms, Achilles  
3 standard terms to suppliers in its RISQS scheme prior to 1st May 2018. We  
4 sent this to the other side on Friday. The reason for including is at G2, tab 29,  
5 there are what we thought were the supply terms. They dealt with supplier  
6 audits and these are the supplier terms for access to the database, so to  
7 complete the picture on the contractual framework we should provide those  
8 for the tribunal. We have got them here to go in as tab 16 in the  
9 miscellaneous documents file. Can I hand them up at this stage, three copies  
10 of that.

11 Then in addition we have an inter partes bundle and you should have received  
12 skeleton arguments from both my learned friend and myself.

13 **THE CHAIRMAN:** Thank you very much for that.

14 **MR WOOLFE:** Can I inquire to what extent the tribunal has been able to pre-read  
15 the matters set out at the front of my skeleton argument? There is an agreed  
16 pre-reading list there and to the extent the time allowed, it would be helpful to  
17 know.

18 **THE CHAIRMAN:** We have done the pre-reading which you recommended.

19 **MR WOOLFE:** Then moving to submissions. By way of introduction I am going to  
20 make certain preliminary remarks on the overall test the tribunal is applying in  
21 assessing damages and on the key issues for the tribunal and then I will give  
22 you a road map for the remainder of my submissions where I will be  
23 addressing some of the underlying documents.

24 So beginning first of all with the test, we are seeking damages for breach of both  
25 sections 2 and 18 of the Competition Act. As set out in both of the skeleton  
26 arguments, and I think it is common ground, the starting point and the

1           fundament issue is but for causation.

2 Losses are to be identified by comparing the actual situation Achilles is in with the  
3           counterfactual situation that Achilles would have been in but for Network Rail's  
4           breach, and that's in my skeleton at paragraph 16 and Network Rail's skeleton  
5           at footnote 1 to paragraph 2.

6 In terms of the standard of proof it is also common ground that is not a matter of  
7           deciding a binary question on the balance of probabilities. Rather, the tribunal  
8           can adopt estimates and assumptions in order to quantify loss. Caution  
9           needs to be applied in using such estimates and assumptions but the court  
10          should try to avoid either over or under compensation. Again that's common  
11          ground. That's Achilles' skeleton at paragraph 17 and Network Rail's  
12          skeleton, footnote 97 to paragraph 21.

13 Now Achilles' actual situation is fairly clear. To a very great extent, therefore, this  
14          trial is concerned with identifying the counterfactual situation, the hypothetical  
15          question of what would have happened in May 2018 if Network Rail had not  
16          infringed Competition Law. Now nobody is pretending that those  
17          counterfactual questions are easy to answer, but they do have to be  
18          answered and have to be answered robustly.

19 We say the starting point should be to identify accurately the infringing conduct and  
20          how that conduct would have been different in the counterfactual, so what  
21          Network Rail would have done differently.

22 Then we need to look closely at the other key features of the factual matrix in the  
23          run-up to 1st May 2018 and ask what else would have changed in  
24          consequence of Network Rail adopting different conduct.

25 As you will see, there are certain instances in which Achilles and Network Rail and  
26          the RSSB's conduct would likely have been different in the counterfactual.

1 Then the tribunal, having considered all of that, will have to take a view on  
2 how competition would have played out.

3 So that's fundamentally the test as well as the dispute.

4 In terms of the issues you have my skeleton. I have tried there to breakdown the  
5 issues for the tribunal in order to assist you in grappling with the quite larger  
6 counterfactual material that we have.

7 At paragraph 14 I set out what seem to me to be the key factual and counterfactual  
8 issues for the tribunal. At paragraphs 22 to 31 I set out the nature of Achilles'  
9 case on each of those issues at a high level and try to point you to the key  
10 witness and expert evidence on this point.

11 Now I am not proposing in opening to address you on each of those issues, because  
12 you are going to hear that evidence tested in cross-examination and we will  
13 address you on that in closing, but the most important issue to get a handle  
14 on right at the outset we submit is the issue of continuity and delay in  
15 May 2018.

16 That is really important, because it affects the way all the other issues play out and it  
17 is the one where the divide between the parties is most stark.

18 It plays directly into the expert evidence. Mr Law assumes that Achilles would have  
19 been out of the market for almost a year. That's an assumption he adopts on  
20 instruction. So he treats the counterfactual as being concerned with Achilles  
21 re-entry after a gap of almost a year and therefore he takes the evidence we  
22 have of Achilles' actual re-entry in 2021 and that casts it or moves that  
23 backwards to assume that is what would have happened in 2019.

24 So that assumes discontinuity.

25 Mr Park, on the other hand, assumes that Achilles would have been continuously  
26 competing in the market so takes his point of comparison, the JQS scheme,

1 which is a scheme in a different market, the Nordic oil and gas sector. Now  
2 the key feature of that comparator is that Achilles compete is continuously in  
3 that market and faced the entry of a new competitor scheme sponsored by the  
4 largest buyers in the industry.

5 Just so you know, those two counterfactuals are set out in my skeleton respectively  
6 at paragraphs 10.2 and 12.2. So this issue of continuity has a number of  
7 aspects. It involves whether or not Achilles would have been continuously  
8 present on the market and it also involves to what extent there is continuity  
9 between what I may call the old RISQ scheme run by Achilles and the new  
10 RISQ scheme run by RSSB and it plays into the issue of incumbency. So on  
11 that issue of continuity I am going to mainly focus in my opening submissions.

12 Now that takes me to the road map for looking at the documents. Divided into six  
13 parts. First, I was going to set out the two parties' competing counterfactuals  
14 in a little more detail so you can understand exactly how they work so you  
15 have the competing candidates in your mind. Then I was going to look closely  
16 at the infringement found by the tribunal, so Network Rail's actual conduct.  
17 Third, I was going to turn to what Network Rail's non-infringing conduct would  
18 have been and show you the new standard that Network Rail has  
19 implemented.

20 Fourth, I will take you to the contractual matrix under which Achilles and its buyers  
21 and suppliers were operating before 1st May 2018, and that goes very much  
22 to the issue of continuity. Then, fifthly, I am going to look at certain key  
23 documents between really September 2017 and May 2018, interactions  
24 between the parties as to whether or not Achilles was going to carry on. So  
25 that's five parts. I said six. That should be five.

26 So beginning with the first one, the competing counterfactuals, Achilles' case is that

1 Network Rail could not have the RISQ rule in place and needed to have in  
2 place a scheme that allowed for competition between competing supplier  
3 assurance providers in time for that competition to start on 1st May 2018.

4 Specifically we say that Network Rail would have had something like the NR302  
5 standard in place in time for supplier assurance providers to be authorised to  
6 start operating on 1st May 2018. Now it may not have been precisely the  
7 same standard in every single respect but something that allowed that  
8 competition to happen from 1st May, and that also we say would have  
9 required Network Rail to have in place the API specification. You may have  
10 seen reference to this in the papers. That's the standard which allows for  
11 approval of supplier assurance providers and an API specification which sets  
12 out how these competing providers are to provide the relevant information to  
13 Network Rail.

14 Now Network Rail's counterfactual set out in their skeleton I think at 14 is that  
15 re-entry would not have occurred until about a year later. To support this  
16 what they point to in particular is that Achilles only sent a formal written  
17 request to Network Rail asking to be authorised they say on 21st March 2018.  
18 That's Network Rail's skeleton, paragraph 15. That's the first point they make.

19 The second point they make in their skeleton at paragraph 17, they say even if the  
20 RISQS-only rule in its original form had not existed there would not have been  
21 any interoperability system in place, and by that we understand the API  
22 specification perhaps or perhaps more widely the API itself and the underlying  
23 computer systems.

24 Now the implication of that seems to be that Network Rail wasn't obliged to take any  
25 steps to start putting in place an alternative set of standards or an  
26 interoperability system until 21st March 2018.

1 Now there are several problems with this. The first is it is unclear how in this world  
2 how the RISQ scheme itself could have been authorised after 1st May 2018 if  
3 Network Rail's standard didn't specify the RISQS was the desired scheme  
4 and it didn't have in place everything necessary for alternative schemes to be  
5 recognised. It is not clear how RISQS would have been authorised.

6 The second big problem with it is that it bakes in an exclusionary effect by only  
7 starting the process of amending its standards in March or round about March  
8 to May 2012 Network Rail's counterfactual effectively assumes that Network  
9 Rail would have been operating rules which did exclude Achilles from the  
10 market for a period of time.

11 Now as a matter of law the tribunal has to construct a counterfactual by identifying  
12 lawful behaviour on the part of the Defendant and it can't construct a  
13 counterfactual that bakes into some alternative infringing behaviour. I shall  
14 give you a reference but I needn't take you to the case, because it is stated  
15 very clearly. That's the Enron case, which is in the authorities bundle, tab 2,  
16 and it is paragraphs 88 to 90 where that's set out in terms.

17 So we say it can't be right to assume that Network Rail would have operated its  
18 Sentinel and OTP schemes for a period of many months after 1st May 2018 in  
19 a form which excluded Achilles from the market.

20 Thirdly, our third problem with this is that it doesn't match up with paragraphs 149 to  
21 150 and 153 of the liability judgment. Now we are going to look at those  
22 a moment, so I won't explain that further at this point.

23 **THE CHAIRMAN:** Can you repeat the first of those three points? I don't understand  
24 the point.

25 **MR WOOLFE:** What Network Rail has to grapple with is how it would have  
26 authorised the RISQ scheme itself, the RSSB RISQ scheme, to provide

1 supplier assurance from 1st May 2018, because I think it is common ground  
2 that, of course, the RISQS only rule itself, a rule specifying everybody who  
3 wants to come onto Network Rail's infrastructure must be assured through  
4 RISQS could not have been in place, because that was found to be unlawful.  
5 So you have to remove that from the standard.

6 The question is then under what -- how Network Rail would have made that work if it  
7 didn't have a standard in place. If it had -- didn't write the rule down but in  
8 practice excluded everybody from its property who was not RISQS assured,  
9 that's a RISQ only rule by another name. If it doesn't operate that rule, it must  
10 operate something that says what sort of assurance it does accept. It must at  
11 the very least have something which authorises RISQS and what would that  
12 standard have looked like in the counterfactual. So we say Network Rail's  
13 world is not world you can really imagine actually working in practice.

14 Now those are the two counterfactuals. If I can turn to the infringement specifically  
15 as found by the liability judgment, the tribunal's judgment is in Bundle A, tab 1.  
16 Can I ask you to take that up, because we are going to look at some  
17 paragraphs of it.

18 At paragraph 316, so right at the end of the judgment, the tribunal identified the  
19 infringement. It's hardly surprising. It is paragraph 316, which is on page 104  
20 of the bundle and it is identified as:

21 "The requirement in the Sentinel scheme and OTPO scheme that suppliers and  
22 persons seeking access to Network Rail's managing infrastructure must attain  
23 supplier assurance only through RISQS and not through alternative  
24 schemes."

25 That's the infringement that is identified. The rules and the engagement are set out  
26 in paragraphs 26.1 and 26.2 of the judgment identify the rules in question.

1 The important point, though, why I am taking you to the judgment is, if you recall, you  
2 rejected the case that I was advancing that it was an infringement by object  
3 but found it was an infringement by effect. So we should look at the restrictive  
4 effect, which is inherent to the infringement. So if you go to paragraphs 149  
5 and 150 on pages 45 to 55. Paragraph 149 starts on page 52. This is a point  
6 where the tribunal was reciting certain factors which raised a concern that the  
7 market opportunity may be limited, and then 150 is where the tribunal says:

8 "Notwithstanding that, they still think -- you still think there is a restriction of  
9 competition."

10 Now I think 149 is instructive in that if you look at it as a whole, and I am not going to  
11 read it all out to you, it is a concern that the market would in effect tip in the  
12 short-term to RISQS since the tribunal is directly concerned with short-term  
13 effects on competition, but 150 you found that Achilles would compete with  
14 the RISQS at least for a time and at 153, second sentence:

15 "If Achilles had been allowed to compete with the RISQS for business from buyers  
16 and suppliers using the Sentinel scheme and OTPO scheme from  
17 1st May 2018 onwards, it might have been at less of a competitive  
18 disadvantage now."

19 So the liability judgment itself assumes there would have been competition from  
20 May 2018.

21 Now I was going to enlarge on the point I gave the tribunal a moment ago. What  
22 does the world without the RISQS-only rule look like? We say there are two  
23 options, either you just delete the words from the Sentinel and OTPO  
24 schemes and don't do anything else, in which case Achilles can compete. It  
25 can provide that assurance or you take the view that Network Rail is entitled  
26 to impose conditions, which the tribunal did, in which case you have to

1 assume those conditions are in place.

2 If I take the tribunal to paragraph 254, which is on page 85 and this is where you are  
3 considering the objective justification case announced by Network Rail and  
4 the reason for imposing some other conditions other than simply deleting the  
5 rule, and you reach the conclusion that, in the second half of that paragraph:

6 "These safety purposes could be achieved by alternative providers of supplier  
7 assurance services working to the same standards as RISQS and subject to  
8 effective monitoring with their IT platforms linked to RISQS and/or", the "or" is  
9 important there, "data freely accessible to Network Rail, and with the RISQS  
10 forum open to participation by other providers of supplier assurance."

11 So essentially the tribunal found that in so far as Network Rail considered it  
12 necessary to have standards, it could impose them, and we say that that  
13 therefore has to be assumed -- those standards have to be assumed to exist  
14 in the counterfactual and it is not coherent for Network Rail to envisage a third  
15 possibility where there's no RISQS-only rule but no standards in place.

16 Moving to my third major topic, the standard and API specification. You can put file  
17 A away now and I was going to take you to bundle G12, which contains in it  
18 the new NR302 standard. Tab 628, bundle G12. I am going to call your  
19 attention to various features of it, essentially to show you it works  
20 substantively but also there is a very clear application procedure in it, as you  
21 would expect, for supplier assurance providers who want to be authorised.

22 If you look at page 5856, which is seven pages into the document, you can see the  
23 scope of the standard is specified and it applies at point (c) to supplier  
24 assurance providers seeking to assure suppliers who fall into certain  
25 categories, those requiring an audit, Sentinel sponsors and certain suppliers  
26 prioritised by Network Rail and so forth.

1 It is just worth noting the table on the facing page. This sets out the structure of the  
2 standard. There are a series of individual modules which set out substantive  
3 requirement applicable to people wanting to do work on infrastructure in  
4 various respects, but different categories of work. You can see there are core  
5 requirements for everybody. CDM requirement, which I think are construction  
6 and design requirements, Sentinel scheme, the safe work planning  
7 requirements and plant operation scheme, and you needn't go through it, but  
8 in the succeeding tabs there are the substantive standards applicable to each  
9 of those. I don't think we need to go to those. They are not germane for the  
10 moment.

11 Now it is just worth noting over the page, 5.8, the definition of supplier assurance  
12 provider is someone approved by Network Rail for that purpose. Then  
13 section 5.1:

14 "Network Rail shall use RISQS for the purposes of supply qualification for principal  
15 contractors", which you may recall have a particular meaning. That's  
16 contractors who I think are as defined in a certain set of regulations who have  
17 control of construction sites:

18 "And all suppliers with whom Network Rail contracted directly for the purpose of the  
19 direct contract with Network Rail who fall within the scope of the standard."

20 So for those people for those contracts:

21 "For its procurement Network Rail will use RISQS", but then in the note:

22 "Nothing in the standard requires suppliers with whom Network Rail contract directly  
23 to impose a requirement to use RISQS on their sub-contractors."

24 So although suppliers to Network Rail must be registered on RISQS, they need not  
25 be registered on RISQS as buyers. They can register on a different supplier  
26 assurance system as a buyer and apply a different supplier assurance system

1 to their own supply chain.

2 Then there is provision for the transfer of assurance information to Network Rail  
3 through the nominated supplier assurance platform, point three, but actually  
4 you will see something slightly different happened in that respect in the end.

5 Then over the page, section 6 sets out the requirements for supplier assurance  
6 providers. 6.1 sets out the requirement for Network Rail approval and  
7 specifically requires that supplier assurance records are to be transferred to  
8 Network Rail via an application programme interface. So the standard itself  
9 specifically refers to and assumes the existence of the API specification. It  
10 tells you a point about clarity, that a copy of the API may be obtained from the  
11 root services procurement operations director, so there's a clear named  
12 individual who can provide that straight into the box.

13 6.2 provides for an application, again a clear process to request approval. 6.3 sets  
14 out the clear standards which a supplier assurance provider must meet, which  
15 is the ISO 17021 standard. You may recall this was referred to in the liability  
16 trial. That is the ISO standard which sets out principles and requirements for  
17 bodies providing audit and certification of management standards. That's why  
18 that is named.

19 There are various requirements about managing conflicts of interest and so forth,  
20 nothing very surprising there. 6.6 over the page on 5062 I would ask you to  
21 note certain information which supplier assurance providers are to provide to  
22 Network Rail:

23 6.7, again there's provision for an application to Network Rail and the payment of  
24 a fee. So again a clear process.

25 6.7.2 I think on the facing page, 5863, under the lettered subparagraphs:

26 "After Network Rail has reviewed the application it shall respond to the application

1 within 28 days and where accepted arrange to complete the capability  
2 assessment within a maximum of 12 weeks."

3 So there's a clear timeline for the application process as well. I think that's -- the  
4 only other point I should -- I just flag two points for the moment because they  
5 are going to be more significant later. In 6.9 -- 6.9.1(e), a requirement that the  
6 supplier shall obtain a unique ID from the Network Rail nominated supplier  
7 assurance platform, that being RISQS, and provide that unique ID to their  
8 chosen supplier assurance provider to allow the transfer of information via API  
9 to Network Rail.

10 Now I flag that, because it became a point of dispute between Achilles and Network  
11 Rail, and you will see this in the evidence in due course, but Achilles thought it  
12 was unfair that all suppliers should have to go to RISQS, register with RISQS,  
13 and get an ID number in order to then use Achilles. In fact, the API that was  
14 implemented didn't require that in the end but I simply flag that for you as  
15 being a point to note.

16 I also note at this point 6.9.4 audit failure, essentially when a supplier fails an audit,  
17 until they solve the problem they can't switch supplier assurance providers.  
18 Again I will not make any more submissions about that now, but that is a point  
19 which may come up in evidence as well.

20 To sum up, really there are two points that you can take from that. First of all, the  
21 standards set out a very clear process. If this had existed, anybody would  
22 have known exactly what to do. You contact the root services. The name of  
23 the individual named in section 6. The root services procurement operations  
24 director to obtain a copy of the API, make an application. You would pay  
25 a fee and there's a timeline. There's no misunderstanding about that.

26 Secondly, I have already said it assumes the existence of the API. So you can't

1 imagine the standard really without the API specification being in existence.

2 Now the API specification is in volume G13 at tab 672. If we just look quickly at the  
3 version history, because this is the technical sort of software design  
4 specification. They keep version histories. You will see on page 6702, that it  
5 is a first creation date. I presume it is when the first draft was finished of 30th  
6 November 2020 and released on 1st December 2020.

7 If you just look at 6704, in the end it doesn't jump off the page from the document but  
8 this is common ground, the original API that was envisaged would have  
9 alternative supplier assurance providers feeding them information directly into  
10 RISQS and then Network Rail -- RISQS would pass the information to  
11 Sentinel and Network Rail could view it there.

12 In the event the API aggregator that is created, as you can see, from the first two  
13 paragraphs, is one which sucks in information from RISQS and Achilles and  
14 then passes it on to Sentinel. So instead of information going from Achilles to  
15 RISQS information from Achilles goes into this API aggregator and is then  
16 passed to Sentinel. That's essentially what the first two paragraphs say, albeit  
17 not in the clearest terms.

18 If you flick through, you can see on pages 6706 and following, you can see what sort  
19 of the API specification does. It sets out essentially the various fields I think is  
20 how I would understand it this aggregator has. The information has to be  
21 passed forward and how they are to be specified in terms of software code. It  
22 is not a terribly long and complicated document. It is six or seven pages. The  
23 tables detail is a technical level, the parameters of those fields.

24 I will just call your attention to 6709 to summary of requirements/required fields  
25 summarised in more plain language. The first one is a Sentinel aggregator ID  
26 number and essentially the aggregator provides a unique ID for each supplier

1 and at a separate point about halfway down that list:

2 "Approved supplier assurance provider's ID."

3 That's each approved assurance provider will have an ID relating to that supplier, but  
4 that is different from the ID number used by the Sentinel aggregator. So as  
5 eventually implemented, the API did not require every supplier to register with  
6 RISQS. Now suppliers are sent the unique identifier assigned to them in the  
7 API aggregator. That's the technical implementation.

8 We say in the counterfactual you should assume that the standard was something  
9 broadly like NR302 and that an API solution existed broadly like the one that  
10 has, in fact, been implemented. There may have been alternative acceptable  
11 APIs but you see the nature of the API type documents, API specification  
12 document, which needed to be in place.

13 Now having covered that and moving to my fourth point, which the contractual  
14 framework under which Achilles was operating prior to May 2018, there are  
15 three elements to this. The first is the concession contract signed in 2014  
16 between Achilles and the RSSB. The second is the contracts held with  
17 Achilles that Achilles held with buyers at the time it was operating the RISQS  
18 brand and the third are the contracts that Achilles held with suppliers at the  
19 time it was operating the RISQS brand.

20 Now just so you know the concession contract is not confidential and the supplier  
21 contracts in standard form are not confidential. The example of the buyer  
22 contract we have I am afraid it is stated in the contract itself that it must be  
23 confidential for a period of time. So at that point we are going to need to --  
24 I am afraid on that I am going to need to make submissions. I think it would  
25 be quite hard to do simply by pointing at the page. Therefore we may need to  
26 exclude people who are outside the confidentiality ring from the room at that

1 point.

2 The concession contract is in volume G2 at tab 30. The title of the document on the  
3 front page is "An agreement for the supply of services in connection with the  
4 RISQS scheme". Over the page, the top of page 1099 you can see the  
5 parties. Achilles is defined as the service provider. So where that term  
6 appears in the contract that is Achilles.

7 Clause 1 is an agreement to provide the services and you will see from point 3.15:

8 "The services means the services described in schedule 1."

9 I will take you to that in a moment but in order to understand what the services really  
10 are it is helpful to look at certain provisions of the main body of the contract  
11 first. To ask you to note some of the definitions, the RISQS scheme is  
12 defined at 3.1 as the:

13 "Overall scheme to manage the prior information and audit reports within the rail  
14 industry as detailed in the RISQS scheme document."

15 So that's defined by reference to an external document, not simply a document  
16 between the parties. Then there is a reference to the RISQS board, which is  
17 the representative body that governs the RISQS scheme.

18 Then there is the portal, which is defined as the internet facility owned and  
19 maintained by the service provider -- I stress the word "owned" -- whereby  
20 organisations can view supplier information.

21 I then turn to clause 4 where there is some more material about the services. There  
22 is an agreement to provide the services as described in schedule 1, which is  
23 broadly speaking matters relating to the scheme. 4.2:

24 "The service provider will provide the RISQ scheme manager with access to the  
25 portal."

26 The RISQ scheme manager is going to be an appointed representative of the RISQS

1 board. That's defined at 3.14. I understand it was Mr Richard Sharp for quite  
2 a long period of time. So Achilles to provide the RISQ team manager with  
3 access.

4 4.3 is a very important provision and my main reason for taking you to this contract:

5 "The service provider", so that's Achilles, "shall have the right to charge fees for the  
6 period of this agreement to suppliers and buyer organisations for participating  
7 in the RISQS scheme."

8 So Achilles itself is charging suppliers and buyers, not the RSSB charging them. It  
9 goes on:

10 "And shall hold direct contracts between itself and the participating supplier and  
11 buyer organisations governing their participation in the RISQ scheme."

12 So Achilles will not just gather the money in as agent or factor or something but is  
13 actually contracting directly with suppliers and buyers.

14 For the avoidance of doubt the service provider", Achilles, "will continue to manage  
15 those relationships independently and shall have the right to offer and  
16 contract for additional services to supplier and buyer organisations outside the  
17 scope of services contemplated by this agreement."

18 So essentially most likely other supplier assurance schemes.

19 "Provided that.

20 (a) supplier and buyer organisations are entitled at all times to have the benefit of the  
21 services".

22 So when you see the service in schedule 1, it is essentially a minimum offer that  
23 Achilles is contracting with RSSB to offer to supplier and buyers.

24 "(b), the service provider shall, if so requested by supplier or buyer organisation  
25 agree to such amendments to the direct contracts as are required to give  
26 effect to clause A."

1 As I say it, it is a minimum offer that Achilles is promising to RSSB that it will provide  
2 to suppliers and buyers."

3 Underneath that:

4 "Nothing in this agreement is otherwise intended to have the effect of amending or  
5 altering the direct contracts between the service provider and the supplier or  
6 buyer organisations."

7 So in summary Achilles is to charge buyers and suppliers. It is Achilles who is being  
8 paid. RSSB is not being paid. The RSSB is not being paid by buyers and  
9 suppliers and Achilles is not being paid by the RSSB to provide the scheme to  
10 do it.

11 Second point. It is completely clear that it is Achilles that is holding direct contracts  
12 with buyers and suppliers. Thirdly, it manages its own relationship with buyers  
13 and suppliers and nothing amends supplier and buyer contracts.

14 Now having made those points, if we then jump forward to schedule 1, which  
15 appears on page 1113 of the bundle, this sets out a description of the  
16 services. Now the reason for having taken you to clause 4.3 first is if you  
17 don't read 4.3 first, it could be rather confusing. You can read these  
18 pages thinking that it looks like this was the new RISQS scheme under which  
19 Altius and Capita provide at a wholesale level, agreed to provide audit and IT  
20 services to RSSB which then RSSB contracted to provide onwards. But  
21 actually what this does, when you look at it, is set out what Achilles has  
22 promised to RSSB that it will provide to suppliers and buyers.

23 So you can see it is divided into section A, a website and portal operation, the portal  
24 being something that belongs to Achilles. Then bottom of the page:

25 "Audit provision" and so forth.

26 I simply note over the page on 115 other Achilles services, again for the avoidance

1 of doubt Achilles can offer other services to buyers and suppliers.

2 Again if I can take you back to the main body of the contracts again so you can see  
3 basically what it does, paragraph 4.4 on page 1101, Achilles is to fix the fees  
4 for participating in the scheme subject to provision for review.

5 5 point 2 I would call your attention to on page 1102:

6 "The service provider shall operate the portal", so its website, "and provide the  
7 services" -- we have seen them -- "to enable supplier and buyer organisations  
8 to participate in the RISQS scheme in a fair, reasonable and  
9 non-discriminatory manner."

10 That's what it is promising to do. 6.1 you can see what is called the scheme  
11 management contribution fee. Essentially it is the form of concession fee that  
12 is payable by Achilles, which is to support the management to the RISQS  
13 scheme and the work of the RISQS board. It doesn't actually say who that is  
14 payable to, but I think it is RSSB.

15 Then move to clause 8, which is of quite some importance as well. This deals with  
16 ownership rights both for the portal but also for the data in it. So clause 8.1,  
17 what you can see is the IP in the portal remains with Achilles. It will remain  
18 vested in and the absolute property of the service provider and its licensors.

19 8.2 is more complicated but it is provision for Achilles to grant the scheme manager  
20 individual access to the information in the portal.

21 8.3 and 8.5 we can deal with together. The property in the supplier information  
22 remains with each supplier and property in the buyer information remains the  
23 property of each buyer essentially. So the individual information provided by  
24 those under this contract ownership in that data vests with those people.

25 8.4 the content and IP rights comprised in the audit reports shall remain the property  
26 of the service providers, again that's Achilles, for the purposes of operating

1 a shared audit model.

2 Then there is an important provision I think the -- the second sentence of that  
3 clause 8.4 about four lines down:

4 "The service provider shall grant RSSB and the RISQS board a limited,  
5 non-exclusive royalty free right to use the supplier information and the audit  
6 reports for the purpose of operating the RISQ scheme."

7 You can have a copy of it for running the RISQS scheme:

8 "And shall provide copies of all current reports in pdf format."

9 You need to read that along with clause 14.4. I am going to come to it in a moment.

10 Then 8.6 and 8.7 deal with property in development to this service that are made  
11 over time. So developments made -- 8.6: Developments made by Achilles,  
12 ownership of those rests with Achilles and intellectual property, 8.7 comprising  
13 in any joint developments between RSSB and the service provider shall be  
14 jointly owned. So there is some joint ownership there.

15 8.9, limits on the use of the link-up name during the currency of the agreement.  
16 There is no restriction on the use of that name after the period of the  
17 agreement.

18 Now we can look to clause 14, which deals with termination. I am going to go  
19 through what is here in a moment but it is important to note what is not in this  
20 termination provision. There is no provision in this termination clause for the  
21 transfer of any contracts that Achilles hold with buyers and suppliers to the  
22 RSSB. That's not something you see here. There's no non-compete  
23 provision here either preventing Achilles from offering a competing scheme in  
24 the rail industry for a period of years post termination. Again that's not  
25 something you see here.

26 There is nothing here requiring Achilles to cease operating the portal which it owns,

1 nor is there anything here requiring it to cease using the information that it has  
2 acquired in the course of the scheme. On the contrary, we have seen Achilles  
3 remains the owner of the portal and remains the owner of the audit reports.  
4 So it's quite important to know what is in them.

5 Now 14.1, 14 .2 and so forth are just regular termination rights.

6 14.4 is important. This provides for the transfer of -- not transfer of -- the provision of  
7 information on termination:

8 "Subject to the service provider's confidentiality obligations to supplier and buyer  
9 organisations", which we are going to see in a little bit:

10 "The service provider, Achilles, shall upon notice" and so forth.

11 Top of the next page, 1108:

12 "Shall send to the scheme manager a copy in the most appropriate and commonly  
13 usable format such as Excel or pdf of all the records concerning the suppliers,  
14 including audit reports, which the scheme manager would have been able to  
15 access on the last day."

16 So essentially all the stuff that you could see when you were scheme manager in our  
17 portal, we send you a copy of all of that:

18 "And it shall grant the RSSB a perpetual royalty fee licence to use such information  
19 for the purpose of the operational RISQ scheme which for the purpose of this  
20 clause shall include any replacement or successors thereto", and so forth.

21 Now the reason for taking you to this in quite some length is Network Rail in this  
22 case is trying to say that RSSB RISQS was the incumbent scheme, that  
23 RISQS was the incumbent scheme and had been there, and they are trying to  
24 say there is an identity, or at the very least a continuity, between the RISQS  
25 scheme as operated by Achilles and the RISQS scheme as operated by the  
26 RSSB after 1st May 2018.

1 Now we say that's simply wrong. There are elements of continuity. There is the  
2 RISQS name and there is the RISQS board and outside -- there are the  
3 documents that establish sort of the RISQS structure with the RISQS board,  
4 but at a commercial level buyers and suppliers have not at this stage  
5 contracted with any entity called RISQS. They have not contracted with the  
6 RSSB. They have contracted with Achilles and those contracts are not  
7 transferred to the RSSB upon the termination of this contract.

8 At a technical level, technological level, the portal that buyers and suppliers have  
9 been logging into up until 30th April 2018, the one for which they have user  
10 names and passwords and so forth, is a portal is owned by Achilles and the  
11 remains owned by Achilles. That portal is not transferred to the RSSB.

12 As you can see, at the end of this term, although the RSSB does get a copy of the  
13 data, although, as we have seen, not absolutely everything, but a copy of the  
14 data in the database, Achilles retains a copy too. So there is no sort of  
15 transfer of that data that means that RSSB has it on RISQS and Achilles  
16 doesn't.

17 We say those are quite important points when considering the counterfactual in  
18 which Achilles could compete.

19 Now I am going to show you an example of a buyer contract that Achilles signed with  
20 a buyer before 2018. There's one at G2 tab 32. Now, as I say, the contract  
21 itself requires that it be kept confidential. As it happens I would be very  
22 surprised if the bits I am going to point you to are highly competitively  
23 sensitive, but because we are bound to treat it as confidential I can't simply  
24 say it is not.

25 I am not sure who here is within the confidentiality ring. Everyone on our side can  
26 see this, but I think the gentleman at the back can't and I am not sure who --

1 right. Could I ask those who aren't in the confidentiality ring leave the room  
2 for a few moments. It should be about five minutes. Is that okay with you,  
3 sir?

4 **CHAIRMAN:** Yes.

5 **[CONFIDENTIAL PORTION EXTRACTED AND AVAILABLE AS SEPARATE**  
6 **TRANSCRIPT]**

7 **MR WOOLFE:** Now that's the buyer contract. In terms of the supplier contract, I just  
8 give you some references for the moment. There is a contract governing  
9 suppliers' participation in the database and that is the document I handed up  
10 that is in the miscellaneous documents file at tab 16, and then there is  
11 a contract which relates to the delivery of audits and the use of audit  
12 information within the database and that is at G2, tab 29.

13 Can I just ask you to note one point to avoid any confusion? At G2, tab 28 in the  
14 bundle there is a copy of the RSSB RISQS supplier terms. In the  
15 bundle index the entry for tab 2 is actually misdated. The index says that that  
16 document is dated 18th August 2014 but actually if you look at G2, tab 28,  
17 that's an RSSB document, and if you look in the bottom left-hand corner, you  
18 can see the date of it. It is from 13th December 2017. So we understand the  
19 RSSB was preparing for the launch of the new RISQS. I don't think it is  
20 suggested that suppliers were signed up to these terms before the launch of  
21 the new RISQS scheme, or at least not back in 2014.

22 If then if I can take you to the miscellaneous documents file, tab 16, again we have  
23 a slightly -- the difference of definitions in this is they are both from the  
24 concessions contract and from the buyer contract. Now the RISQS scheme is  
25 not a defined term. The RISQS database is defined as the database of  
26 supplier and other information operated by Achilles on behalf of the RISQS

1 board, and the RISQS board here is defined in terms which does refer outside  
2 the contractual framework to the public RISQS documents. So the definition  
3 there is a bit more like a concession contract than the buyer contract.

4 The rail portal again you can see. It means the website operated by Achilles. So  
5 that is not defined by reference to RISQS or the RSSB.

6 Now in general terms clause 2 at the bottom of the page provision that Achilles will  
7 provide to subscribers the information provided by the supplier. So although  
8 you will see in a minute the supplier retains ownership of the data, it is  
9 understood this will be provided to subscribers. Subscribers is essentially  
10 buyers but also you can subscribe as supplier patron, but similar thing.

11 Then if I take you to clauses 8 and 9. 8 you will be familiar with the idea that  
12 Achilles, as we have seen elsewhere, retains ownerships in the systems,  
13 questionnaires, order reports and so forth.

14 Second half of that paragraph. The intellectual property rights in the information and  
15 other material entered by supplier onto the questionnaires shall at all times  
16 remain vested in the supplier and nothing transfers that. Confidentiality --  
17 there is provision for confidentiality of information provided, but, of course,  
18 that must be read subject to clause 2, which specifically allows Achilles to  
19 provide that information to subscribers to the portal.

20 If you will recall, in the concession contract Achilles' ability to provide the information  
21 to RSSB was subject to its confidential requirements that it entered into with  
22 suppliers and buyers.

23 The inference we shall make here is there is no consent here for the information to  
24 be used in any system other than that operated by Achilles. There is no  
25 consent in these terms for that information to be used in a different portal,  
26 different system operated by the RSSB with whom the supplier is not at this

1 stage contracting.

2 **CHAIRMAN:** We just say that the RISQS database operated by Achilles on behalf  
3 of the RISQS board.

4 **MR WOOLFE:** Yes. It clearly acknowledges that the database that Achilles is  
5 operating with this data in is that operated on behalf of the RISQS board, and  
6 in a sense there are two different issues.

7 One is how Achilles would have carried on using the data post 1st May 2018 and in  
8 a sense if the consent is owned to use this data within a database operated  
9 on behalf of the RISQS board then it would look like Achilles would need to  
10 obtain fresh consent from the suppliers for the use of that information within  
11 the same portal, but for a database not operated on behalf of the RISQS  
12 board, but equally RISQS needed to obtain consent.

13 Although it has received a copy of the data that Achilles has provided to it, that copy  
14 of the data doesn't carry with it any right to use that data per se, because  
15 ownership of it still rests with the suppliers and buyers. As you will see, RSSB  
16 did, in fact, think, and we say correctly, they needed to obtain consent from  
17 suppliers and buyers to use that information within the new portal.

18 So again this goes to this point that there is not a sort of a RISQS scheme which is in  
19 existence pre-1st May 2018 that is simply handed over from Achilles to RSSB.

20 Now that completes my running through of the contractual framework.

21 The last topic I was going to try to run through certain key documents chronologically  
22 to give you an overview of the key period prior to 1st May 2018. I am going to  
23 pickup on certain key themes as I do so. I think there are five of them. You  
24 will see these themes -- sometimes two or three of these themes come out of  
25 the same document. If I state them all upfront, you get an idea of where we  
26 are going.

1 The first team, that Network Rail was aware that Achilles wanted to compete with  
2 RSSB RISQS from an early date, in any event by September 2017.

3 Second theme is Achilles trying to inform relevant people at Network Rail and in  
4 associated roles of their intent to provide a supplier assurance scheme to the  
5 market but in circumstances where it wasn't clear who should be told or what  
6 any process was for being authorised.

7 The third theme is Network Rail not responding clearly or promptly to those contacts  
8 on behalf of Achilles.

9 The fourth theme, which I have already touched upon in the contractual material, is  
10 that there were significant discontinuities, to put the matter at its lowest,  
11 between the old RISQS system and the new RISQS system and it wasn't  
12 a matter of simply handing over an existing system but the launch of a new  
13 one.

14 The fifth theme is that, given the existence of the RISQS-only rule, the RSSB and  
15 Network Rail were able to employ certain tactics to drive buyers and suppliers  
16 on to the new system and to register for the new system that we say they  
17 could not have used or could not have used as effectively in the  
18 counterfactual.

19 Now I am going to try to take this fairly swiftly. If you can take up bundle G3. At  
20 tab 63 -- there is 63 and 63A. It is 63 that you want. There is an e-mail from  
21 Mr J Katzen internally within Achilles reporting a call with Susan. As you  
22 will -- it is referred to in the witness statement -- Miss Ferrier will be here in  
23 due course -- this is Susan Cooklin, who is Network Rail. There is mention  
24 there -- we read it as she was having a conversation about continuing to  
25 provide supplier assurance. That's in May 2017. We don't place heavy  
26 reliance on it but it is there.

1 | Could I jump you forward to G3, tab 79, where we have in here and the succeeding  
2 | tabs, the bulk of that page is taken up with an e-mail from -- coming from J  
3 | Katzen to a Robert Traczyk -- I am not sure how to pronounce the surname --  
4 | dated 14th September 2017. You see from the first paragraph of that letter:

5 | "Achilles' partnership with the RSSB will cease from May. We are 100% committed  
6 | to ensuring continuity and from that date Achilles will continue to offer rail  
7 | assurance services through link-up, a brand many in the rail industry are  
8 | familiar with."

9 | This is a clear announcement to the market that Achilles is going to carry on.

10 | Mr Traczyk is at Network Rail for what it is worth. He forwards it to Miss Scott, who  
11 | by the time of trial was at the RSSB but at this stage was at Network Rail.  
12 | What you can see is a whole series of tabs. I am not going to read them all  
13 | out. 80 to 89, so all of those nine tabs, and tabs 92 to 105, you have a whole  
14 | series of e-mails within Network Rail that are being pinged about to different  
15 | people. There is no doubt they were well aware of this. It is not just one  
16 | individual.

17 | Just to go to G3, tab 89 just to pickup one of them, and if you look over the page to  
18 | page 1675, you'll see a version of that Achilles letter or e-mail that went to  
19 | somebody called Ian Mitchell. Again it is the same one, somebody else was  
20 | aware. It is forwarded at the top of that page, 1675, by Ms Scott to four  
21 | people, including Andrew Haines and Ken Blackley. Mr Blackley will give  
22 | evidence in this trial. It is also forwarded to Richard Sharp and so forth.  
23 | Mr Blackley has clearly seen it because he responds on page 1674. Just note  
24 | the terms in which he responds, second paragraph:

25 | "Achilles stating that 'between now and the launch of the new RSSB qualification  
26 | service' it is very misleading as the RISQS scheme exists now and shall

1 continue to exist albeit under a new provider."

2 So Network Rail are consistent in what they are saying. They thought at that time

3 they saw continuity between the old RISQS and new RISQS and that's still

4 what they are saying now. So that's just worth noting.

5 There can be no doubt that Network Rail knew. If you go to G3, tab 98, Mr Blackley

6 sends a message to a whole series of people within Network Rail. G3, tab 98,

7 page 1696. An e-mail to lots of people in Network Rail saying:

8 "You may be aware of the statement from Achilles published on 14th September."

9 It is the e-mail below -- that is the one we saw before -- "and I shall broadcast the

10 following message tomorrow to our supply chain."

11 You can see what is said:

12 "RISQS shall continue to operate although administered by a new supplier. RISQS

13 is a scheme by the rail industry for the rail industry and suppliers will not be

14 required to subscribe to any scheme other than RISQS."

15 So Network Rail knew about Achilles' intention and indeed was responding to it.

16 This is -- that's sent out 21st September. We have seen they were aware on

17 14th September.

18 Now it is true that Achilles did not at that stage come forward to Network Rail and

19 say "We would like to be authorised as a supplier assurance provider. Please

20 will you authorise us", but, of course, you have to understand that in the

21 context of there not being a standard in place like the NR302 standards that

22 now exists under which there is a provision for a process for being approved.

23 What you do see if I pass out of bundle G3 and into bundle G4, and in G4 it is

24 tab 168, page 2017, you have an e-mail from Estelle Whittaker, who was the

25 Chief Commercial Officer of Achilles, to and you see the e-mail address:

26 sentinel@mitie.com.

1 You may recall from the first trial -- I think it is in the judgment as well -- Mitie is  
2 a company which administers the Sentinel system I think at an IT level on  
3 behalf of Network Rail.

4 Miss Whittaker decides to notify them in the terms you see here. The second  
5 sentence in the first paragraph:

6 "We are 100% committed to ensuring continuity of supply, pre-qualification and  
7 assurance. Accordingly, we are writing to confirm that from 1st May 2018  
8 Achilles Information Limited will be issuing validation in accordance with ..."

9 Then a standard is identified. That's a very general standard about supplier  
10 assurance in rail issued by the RSSB.

11 "... as an equivalent scheme in relation to questionnaire and network audit modules",  
12 and so forth. You see the remainder of that.

13 Now clearly this is Achilles informing the people who run Sentinel that they are  
14 intending to issue validation against the Sentinel module. Now it may well be  
15 that, in fact, these were the wrong people to tell, and you can see under the  
16 NR302 standard that is later put in place in 2020 that Network Rail provided  
17 for applying for approval by Network Rail, but Achilles weren't to know this at  
18 this time, because there was no clear procedure in place, but this is what they  
19 tried to do.

20 Then if you look at G4 -- do I want to do this? No, I will miss that out.

21 G4, tab 180. So this is moving away from Achilles' efforts to contact people. We will  
22 come back to those, but chronologically speaking this is the next key  
23 document. This is a transition guide published by the RSSB, saying on the  
24 first page, 2075:

25 "Enhanced RISQS will go live on 1st May. The RSSB RISQS team are working hard  
26 to keep a smooth transition. The portal will be delivered by a new service

1 provider."

2 There is a series of a brief guide and frequently asked questions. I would ask you  
3 to -- some stuff about payments, who to pay when for what services on  
4 page 2076.

5 I call your attention in particular to page 2077 and data transfer, because we see  
6 provisions in the contract between the Achilles and RSSB about providing  
7 a copy of the data. You will see what it says under heading of "Data Transfer"  
8 on page 2077:

9 "This is seen as one of the biggest challenges that RISQS faces, and although they  
10 are trying to pre-populate the database, there are some data that the new  
11 suppliers will need to enter."

12 At the bottom of that section:

13 "The system is still being configured and tested, but there's early access to a beta  
14 version by suppliers."

15 So again this is another point about the discontinuity between the Achilles system  
16 and the new RISQS. RSSB is having to get a new system up and running  
17 and they're trying to get the information relating to suppliers across to the new  
18 system and is trying to get them to sign up and is offering access to a beta  
19 version of the new portal. This is not a simple, smooth handover of  
20 an existing scheme.

21 Now returning again to transactions between Achilles and Network Rail, if I can take  
22 you to G4, tab 193, a couple of e-mails on pages 2098 through to 2100.

23 If I can start on page 2099, you have an e-mail dated 26th February 2019. Tab 193.  
24 The second page of that tab, page 2099, there's an e-mail from Miss Katie  
25 Ferrier to a series of people in Achilles dated 26th February 2018. So this is  
26 some three months or so -- two or three months before the handover.

1 What this does is record a meeting between Colin, who is Colin Flack, from Achilles  
2 and Katie Ferrier and Gillian Scott, who is the Assurance Manager at Network  
3 Rail at this stage. Again you can read this perhaps at your leisure, but the key  
4 point is Network Rail was well aware that Achilles was wanting to offer  
5 a competing scheme at this point.

6 There's reference in the third paragraph to certain concerns about Capita's financial  
7 position at that stage.

8 Then in the fourth paragraph, so the last paragraph at the bottom of the page:

9 "We discussed the fact that Achilles had cross-sector buyers and are keen to offer a  
10 seamless service and have written to inform Sentinel that as of 1st May we  
11 intend to submit audit reports in accordance with our standards under the  
12 Achilles' names rather than RISQS. Gillian said that in order to talk with  
13 Network Rail it was her understanding that the supplier had to have a RISQS  
14 audit and therefore they had the option to have Achilles and RISQS but not  
15 Achilles or RISQS."

16 I think that's pretty clear:

17 "We queried the equivalent and she said she'll come back to us."

18 There is an interchange about whether or not, in fact, the applicable standards do  
19 allow Achilles to provide this assurance.

20 Then if you turn back to -- the preceding page in the bundle is a later e-mail, also  
21 from Miss Ferrier, of 12th March, so some two weeks or so later, referring to  
22 a discussion with Mr Blackley. You will see in the second paragraph he  
23 reiterated:

24 "Network Rail are very happy with the way Altius are integrating with Bravo", which is  
25 the Network Rail system. "If a supplier wants to work directly with Network  
26 Rail, they will have to register for the system."

1 "The word "directly" is key here.

2 "Ken was clear that if principal contractors or buyers want to use another scheme to  
3 manage their supply chain, then that is their choice and Network Rail do not  
4 want to inhibit this. I raised concerns that our assumption therefore that we  
5 are an 'equivalent scheme' is critical as it enables us to continue to offer our  
6 buyers surety ... He admitted that he hadn't really thought through these  
7 implications and would seek guidance from Graham Hopkins ..."

8 Now whether or not that's completely accurate or not, this sets out Achilles'  
9 understanding at the relevant time, and that's as of 12th March, but again  
10 there can be no doubt Network Rail had known from September and they still  
11 knew Achilles were going to come into the market -- were going to continue in  
12 the market.

13 Now in terms of the tactics that Network Rail -- RSSB is using at this point, still within  
14 bundle G4, tab 216 there is an RSSB announcement dated 15th March, so  
15 a few days after this -- that conversation between Miss Ferrier and Ken  
16 Blackley, Mr Blackley. You see from the headline of that news item on  
17 page 2368:

18 "'Act now or potentially use rail network access' warns Network Rail.  
19 An announcement from Ms Scott, Assurance Manager for Network Rail: "We  
20 have made clear to maintain Sentinel status suppliers will be need to be  
21 RISQS assured and that means signing into the RISQS portal now."

22 So using RISQS Sentinel status post 1st May 2018 to drive people to sign up now.

23 "For most suppliers signing and checking the data in the new portal is quick and  
24 simple, but if companies leave it to the end of April, they risk being invisible to  
25 buyers from 1st May."

26 So they are using Sentinel to drive take-up. As you will see in a few moments, this

1 does relate to the issue of data transfer.

2 Now if you go to bundle G5, at tab 223 there is a letter from Achilles to the RSSB  
3 dealing with the issue of data transfer, and what you can see from that letter is  
4 the data has been transferred in a series of tranches. Phase one you can see  
5 data is transferred to suppliers who have an active subscription as of 29th  
6 March 2018. So you can provide a snapshot now.

7 I just note under that first phase one:

8 "Where a supplier on RISQS is supplemented by third party information, none of the  
9 third party information will be provided as part of the supplier data transfer, as  
10 this information is provided by Achilles to buyers under agreements between  
11 Achilles and a third party provider."

12 So that doesn't fall within the scope of what Achilles has agreed to hand over to the  
13 RSSB on termination effectively.

14 You will see a second opening of the server in April, certain assurance health and  
15 safety certificates. Then a third phase, which essentially seems to be for  
16 material that arises after 29th March, because clearly what RSSB wanted was  
17 to have stuff that was current up to 30th April, but it wanted to get some of it  
18 early, but it couldn't get the current stuff as of 30th April on 29th March. So  
19 there's a third phase where the last month of other stuff is to go across. Again  
20 you can see it is not a completely smooth process of handing over a live  
21 database. It is radically different.

22 Then there's a chasing letter from Achilles to Sentinel -- to Mitie at G5, 225, having  
23 not received a response to the earlier e-mail. A specific request in the  
24 penultimate paragraph:

25 "Achilles hereby requests confirmation from Sentinel by 3rd April 2018 that with  
26 effect from 1st May 2018 suppliers registered on link-up TransQ will be

1 recognised by Sentinel as meeting those requirements."

2 Certain requirements there.

3 There's another chasing -- I pass from G5 into G6 now. Simply for your note, there  
4 is another chasing letter on 10th April at G6, tab 294, but we are going to look  
5 at Mitie's response at G6, tab 341, page 3282. Unusually for an e-mail chain  
6 this does not work from the bottom up. This actually goes from the top down.  
7 So the last e-mail in the chain is that from -- it goes on over the page on 3283  
8 -- Michele O'Neill, April 23rd at 10.18. So the answer doesn't go until about  
9 a week before the 1st May deadline:

10 "With reference to your correspondence dated 21st March 2018:

11 Sentinel.

12 Network Rail is the custodian of the Sentinel Scheme Rules ..."

13 Reference to a mandatory requirement to register with RISQS:

14 "RISQS is referenced throughout the document and does not give the option for  
15 an alternative."

16 So there is an answer there from Mitie and a similar response in respect of OTP and  
17 rail interface planning scheme and the principal contractor licensing scheme  
18 as well. So there is a clear answer sent back in terms from Mitie, as it  
19 happens.

20 I think I have just three more documents to show you all been this bundle all to do  
21 with this issue about data transfer and suppliers having access to the market.

22 There's an RSSB newsletter at G6, tab 300, so this is going back in the same body  
23 now. Sorry. False reference. It is tab 302. I apologise. At page 3135 we  
24 have a RISQS newsletter being sent out by e-mail dated 13th April 2018. You  
25 can see from the first point: Supplier pre-registration is open. Asking people  
26 to sign the RISQS Buyer Charter. The next item is a "pre-launch buyer

1 event". "Visit us at Infrafail" at the bottom of 3136.

2 "Log in now or face data loss, RISQS members warned.

3 Thousands of suppliers risk being wiped from the RISQS database if they do not log

4 in soon due to new data protection laws.

5 Some of the 4300 RISQS suppliers face being invisible to buyers in the GB rail

6 market as soon as May when the GDPR comes into effect.

7 On 1st May the enhanced RISQS system provided by RSSB goes live ... but GDPR

8 rules demand the members' profiles are wiped if they have not explicit

9 permission for their information to be held by logging in to the new RISQS

10 platform before 25th May."

11 Then there's saying you must log-in.

12 Now the point that I would stress that's slightly different about this in the action in the

13 counterfactual is the message RSSB is delivering is, "You will be invisible to

14 the rail market unless you log into the new portal". Now in the counterfactual

15 where Achilles could offer its own portal, to which suppliers already had log-in

16 details from 1st May, that wouldn't have been true. Those suppliers would

17 have been visible on the Achilles' portal. That's a simple point.

18 Now G4, tab 342 there is some correspondence between --

19 **MR CUTTING:** Did you say G4?

20 **MR WOOLFE:** Yes, G4. Sorry. I do apologise. G6, tab 342. I think I did say G4,

21 but it is G6. Again an e-mail chain and you can see -- we'll start with the

22 e-mail at the bottom dated 24th April at 6.58 in the morning. They get up

23 early. It is from a Mr Cox at the RSSB to a series of people, several of whom

24 are at the RSSB, but also including Ms Scott, Gillian Scott, who at that stage

25 was at Network Rail.

26 "All,

1 Despite considerable efforts to achieve an appropriate number of suppliers is logged  
2 on to the system ...", etc.

3 As I say, this is a week before the go live date:

4 "... I remain concerned that numbers will remain deficient at May 1st, go live.

5 I fully appreciate that not all of the circa 4500 suppliers are currently undertaking  
6 work on the infrastructure and for numerous other reasons remain  
7 static/non-active in the scheme. We have always worked on the fact that  
8 circa 3800 suppliers are generally live and active and available to our buyer  
9 members. It is also understood we do not require the entire 3800 number  
10 available as at 1st May. However, the fact remains that we have only circa  
11 2200 into the system to date despite our comms, considerable efforts by  
12 Network Rail, additional staff, etc, and are only seven days away from go live.  
13 We need to consider all current and additional methods to assist in  
14 transferring the suppliers across, especially those that are required to  
15 undertake work or be available to our buyers",

16 and a series of things as a matter of urgency.

17 Then there's a response from Ms Scott about "I'm not certain suppliers may be  
18 critical" and so forth and reviewing the status of Network Rail.

19 Just for the tribunal's note, 2200 suppliers out of 3800 is about 58%. So about 58%  
20 of the suppliers they considered to be active had logged into the system by  
21 this point.

22 Now what you can see is only about two hours later at tab 346 you have an e-mail  
23 that goes from Ms Scott. There is a very large blind copy list. It seems to go  
24 to a large number of people. You can see it is from Ms Scott, page 3299,  
25 (inaudible).

26 "Are any of the suppliers listed below part of your supply chain/approved supplier

1 list?"

2 We don't have the list, but there must have been a list attached:

3 "If they are, could you contact them as they have not updated their details on the  
4 new RISQS platform. Therefore:

5 From 1st May they will not be searchable to any buyers.

6 From 25th May any migrated data from the old platform will be deleted to ensure that  
7 RISQS remains compliant with the requirements of GDPR.

8 Any decision to rejoin RISQS beyond this date will require all details to be manually  
9 entered."

10 Now of her two bullet points, this first point about the data not being searchable  
11 unless they log in seems to us to be consistent with the point about data  
12 ownership that we have seen in the contractual framework between Achilles  
13 and suppliers and buyers. There is not consent to the use of the data unless  
14 they log in. We don't fully follow the GDPR point, but nonetheless this is what  
15 Network Rail was saying to all principal contractors. This is the largest  
16 construction firms in the industry.

17 You can see again there is this matter of using this threat of being invisible to the  
18 market as a way of driving uptake. We say that would not have been  
19 available to the RSSB in the counterfactual where Achilles continued in the  
20 market and, in fact, had a complete database of all suppliers and had buyer  
21 customers.

22 Now clearly there would have been some degree of competition and maybe  
23 suppliers would have wanted to switch or do both for some reason, but it  
24 wouldn't be possible simply to say, "You will be invisible to the market.  
25 Nobody will be able to see you and you won't be able to go on Network Rail's  
26 infrastructure without the RISQS-only rule", and even with the RISQS-only

1 rule you saw that only 58% of all suppliers had signed up to new RISQS  
2 a week before go live.

3 Now just some concluding remarks. Achilles is a leading provider of supplier  
4 assurance. It has been and continues to be highly successful in that business  
5 in other sectors and other regions. GB rail is not its only business.

6 Prior to the facts that gave rise to this claim, it had been an established provider in  
7 the rail sector for 20 years and its business was based on a healthy  
8 community of buyers and suppliers, and each side of that market had a strong  
9 interest in retaining access to that community and being visible to the other  
10 side, to see and to be seen. It had a stable revenue and high margin.

11 Now the facts are confidential, but you will see them in Miss Ferrier's fourth  
12 statement at paragraphs 25 to 28. You see the numbers of buyers and  
13 suppliers.

14 The key point now is this one. As an experienced provider, Achilles believed it could  
15 retain a significant proportion of its buyers and suppliers and could continue to  
16 operate a profitable community. It had experience in the construction sector,  
17 where there is sustainable competition between multiple competing  
18 communities, and it therefore wanted to stay in the market.

19 It similarly believed the same thing when competition emerged from the JQS market  
20 and there it has been proved right. It stayed in the market and still retains  
21 a large share of it. Not only did Achilles want to stay in the market; it was  
22 willing to pursue this litigation to ensure it was able to do so, and now it is  
23 willing to invest in the effort of seeking to re-enter the market even now,  
24 having been out of the market for three years, when it has to fight against the  
25 new RSSB RISQS scheme, which now does have the (inaudible) of  
26 incumbency.

1 At the risk of stating the obvious, an experienced and successful commercial  
2 provider, which operates profitably in a series of other competitive markets,  
3 would not invest all this time and effort if it did not believe that it is possible to  
4 earn significant profits from providing supplier assurance in the GB rail sector.

5 As the tribunal will hear over the course of the next few days, when you hear the  
6 evidence, there is good reason to think that when you look closely at what  
7 really happened in 2018 and the discontinuity between the old RISQS scheme  
8 and the new RISQS scheme, and Achilles' established relationships with  
9 suppliers and buyers, there is a real prospect that Achilles would have been  
10 highly successful in the market and retained a significant proportion of buyers  
11 and suppliers and would not have been out of the market for a prolonged  
12 period of time, as Network Rail assumes.

13 Sir, those are my opening submissions. I realise I have gone somewhat over the  
14 time we had envisaged, but we started slightly late. So it may be Mr Went  
15 may need to go on for a short time after lunch. I don't know.

16 **CHAIRMAN:** Thank you, Mr Woolfe. We will take a five-minute break then.

17 **(Short break)**

18  
19 **Opening submissions by MR WENT**

20 **MR WENT:** Good morning or good afternoon actually. I think I may be able to finish  
21 openings by lunch or maybe slightly eat into the time after 1 o'clock, but it  
22 should be fairly close I think.

23 We accept that Network Rail will be liable for some level of damages following on  
24 from the infringement. However, we dispute as grossly excessive the  
25 damages assessment advanced by the claimant. Achilles' damage  
26 assessment assumes that Achilles would have had glorious success in GB

1 rail when it started off in a competing supplier assurance offering in 2018.  
2 That glorious success would have seen Achilles have on its book 58% of  
3 buyers, OGB rail infrastructure services and over 80% or so of suppliers in the  
4 first year. There's no hedging of the position here on Achilles' part and no  
5 discount for the possibility of this having turned out very differently in the  
6 counterfactual. It is just assumed that it would have been an unmitigated  
7 success story for Achilles when the concession contract came to an end.

8 Now while we have around 90 pages of witness evidence from Miss Ferrier, Achilles'  
9 main factual witness, across her fourth, fifth and six statements, key parts of  
10 the evidence for the damages assessment are in the section of her fourth  
11 statement entitled "Achilles as the incumbent provider" -- that's at  
12 paragraphs 45 to 61 -- and then the section entitled "Incumbency in action",  
13 which is paragraphs 62 to 70.

14 In the first section Achilles is the incumbent provider. Miss Ferrier sets out what she  
15 believes shows that Achilles was the incumbent provider in GB rail based on  
16 a mix of general propositions about supplier assurance and specific points  
17 which she says apply to Achilles' offering in GB rail.

18 That section then sets out the next section, in which she describes incumbency in  
19 action, and the incumbency in action section describes Achilles' experience in  
20 the Northern European oil and gas industry, when apparently a competing  
21 supplier assurance provider entered the market.

22 Miss Ferrier tries to draw out what she considers the similarities between the  
23 situation in the Northern European oil and gas market and GB rail when the  
24 concession contract was coming to an end, and also throws in for good  
25 measure some more propositions which she wants us to believe apply  
26 generally to a supplier assurance.

1 So Achilles' proposition is quite a simple one. It's that Achilles was the incumbent  
2 supplier assurance provider in GP rail when RSSB entered with a new  
3 offering, in the same way that Achilles was the incumbent provider in the  
4 Northern European oil and gas market when EPIM JQS entered the market.  
5 Therefore, the situation in Northern Europe can reliably predict what would  
6 have happened in GB rail.

7 It may be a simple proposition, but we say it is no less astounding as a result. The  
8 shift of emphasis from the GB rail supplier assurance market to a comparator  
9 in a different market in Northern Europe is we say a clever attempt on  
10 Achilles' part to side-step the reality of the situation in GB rail. So crossing  
11 product markets and geographies also gives Achilles a chance to describe  
12 features of supplier assurance as if they are absolute truisms in the world of  
13 supplier assurance, regardless of the particular market in question and  
14 regardless of the particular facts of the case in hand.

15 It also means that Achilles can avoid needing to grapple with the nitty-gritty of the GB  
16 rail supplier assurance market and important facts for the case which are  
17 inconvenient to Achilles and would cast material doubt on supposed glorious  
18 success story.

19 So we have the alleged factual basis underpinning the proposed comparator from  
20 Miss Ferrier, and then Achilles' expert we will see has basically accepted  
21 hook, line and sinker what Miss Ferrier has presented in her witness  
22 statements. In doing so, though, he appears to have forgotten what he told  
23 the tribunal at the liability proceedings and hasn't, we say, taken proper  
24 account of what the tribunal found in its liability judgment.

25 Like Miss Ferrier, or perhaps indeed because of Miss Ferrier, he ignores the reality  
26 of the situation on the ground in GB rail. How can Achilles' expert have taken

1 the tribunal findings in the liability function and the facts pertaining to GB rail  
2 into account when the outcome of his damages calculation is purely -- it is  
3 purely based on the outcome of a supposed comparator which arose from the  
4 Northern European oil and gas industry.

5 Another important feature of Achilles' damages assessment is that it predicts  
6 a significant increase in the size of the GB rail assurance market. The  
7 increase which arises from the prediction of significant supplier multi-homing  
8 is potentially as much as 71% over the size of the market in 2018 or  
9 an increase of £4.6 million.

10 Now the tribunal will recall that an important part of Network Rail's attempted  
11 justification for the RISQS-only rule was that it would reduce the cost burden  
12 on the supply chain through ensuring that suppliers need only subscribe and  
13 be audited on one scheme in GB rail. The tribunal rejected efficiencies as a  
14 valid reason for justifying the RISQS-only rule, but that was not in the face of  
15 alleged evidence showing that the removal of the RISQS-only rule would give  
16 rise to a 70% increase in the size of the market, which would be felt primarily  
17 as a costs burden on the supply chain.

18 Right. With those introductory remarks I want to turn and have a further brief look at  
19 the judgment, if we may, partly just going over some of the paragraphs my  
20 learned friend has already taken you to, but I just want to highlight what I think  
21 are a few key points.

22 If we can start I think at paragraph 129. So that's looking at the counterfactual. If we  
23 look at paragraph 130, so this notes that Mr Parker's proposition was that the  
24 correct counterfactual was either there would be ongoing competition, or that  
25 there would be competition for at least a limited period of time before one of  
26 the schemes exited, or that multiple schemes would have entered. So that

1 was Mr Parker's view of the counterfactual.

2 Then paragraph 132. Just look at the last sentence I think. That shows Mr Parker's  
3 view that:

4 "Even if Achilles was unsuccessful in attracting buyers and suppliers, there would  
5 still be benefits from the competition."

6 Then going to paragraph 134, this sets out Network Rail's expert's view that buyers  
7 and suppliers would continue to single home to RISQS and they would be  
8 tipping towards to RISQS.

9 Then at paragraph 137 and following it notes that Mr Holt made alternative  
10 counterfactual that there would be a proliferation of schemes, and in  
11 paragraph 138 that this would give rise to a bottle-neck. Then those are the  
12 counterfactual that the tribunal analyses from paragraph 141 onwards.

13 So, first, just dealing quickly with paragraphs 141 to 148, in essence that is looking at  
14 the potential counterfactual of multiple entrants, and the tribunal explains why  
15 this is least likely to arise. If you look at paragraph 142, perhaps of note is  
16 that the size of the market for supplier assurance in GB rail would not sustain  
17 multiple entrants. So the size of the market was a key part of the tribunal's  
18 assessment, reasoning on this issue.

19 Having dismissed in those paragraphs the multiple entry counterfactual, the tribunal  
20 next says -- it is at paragraph 149.1, which we have already looked at:

21 "A number of factors suggest that the correct counterfactual might well be that  
22 suppliers and buyers would single home to RISQS and Achilles would not be  
23 able to compete to any material extent."

24 Now we say that the tribunal is identifying here features that existed in GB rail and  
25 nothing that follows negates that.

26 Then at paragraphs 150 to 154 the tribunal there provides what it believes is the

1 correct counterfactual, but it starts with:

2 "Notwithstanding those factors ...",

3 notwithstanding the factors that have just been looked at in 149, and given Achilles'  
4 experience of the market, given that it wishes to compete and believes it can  
5 do so, that this is the correct counterfactual.

6 Note, though, that paragraph 150 uses of language of the second counterfactual,  
7 namely that Achilles would compete with RISQS at least for a time and that its  
8 competition would lead to some benefits in the market.

9 I just want to highlight what's said in paragraph 154. So there it is said the scope of  
10 the price competition and product differentiation would be limited. So this is in  
11 the correct counterfactual.

12 Just keep the judgment open for one moment, because I may just return to  
13 something in a second.

14 We say that Achilles' expert now seeks to depart radically from these findings with  
15 his projected losses, which at the top end total just over £12 million. As  
16 already mentioned, the damages are based on Achilles retaining a significant  
17 proportion of buyers and an even larger portion of suppliers. We say that's  
18 a staggering proposition to adopt in the face of the factual position in GB rail,  
19 the contemporaneous documents which we will be reviewing during the  
20 course of this week and the tribunal's findings at the liability trial.

21 Matters very much hung in the balance, according to the tribunal in its liability  
22 judgment, and it wasn't certain that Achilles would make a go of it on  
23 a long-term basis. We will see during the course of evidence or exploring the  
24 evidence in more detail that the factual basis underpinning Mr Parker's  
25 damages assessment just simply is not sound and renders his analysis  
26 unreliable.

1 Just going back to the judgment for a moment, if we can turn to paragraphs 117 and  
2 118 just while we have it open, this is the section dealing with object  
3 infringement, which obviously the tribunal ultimately found there wasn't.

4 "117. In support of its case that Network Rail's intention is that there should only be  
5 one provider of supplier assurance, Achilles referred to Network Rail's  
6 signature of the RISQS Charter. Network Rail recognises, however, that the  
7 Charter in terms only referred to committing to use RISQS to provide  
8 assurance for 'suppliers for our rail work', ie direct contractors."

9 Then in paragraph 118:

10 "The Tribunal accepts that, by signing the RISQS Charter, Network Rail made public  
11 its commitment to RISQS in circumstances where one interpretation of its  
12 motivation was to pre-empt potential switching to Achilles. That commitment  
13 was, however, also consistent with its longstanding support for the Link-Up  
14 and RISQS schemes and its concern to manage apparent confusion in the  
15 market. We therefore make no finding of anti-competitive intent from those  
16 circumstances."

17 I would just suggest that we need to bear those paragraphs in mind when thinking  
18 about the communications that Network Rail put out between  
19 September 2017 and May 2018.

20 My learned friend sets out at paragraph 14 of his skeleton what Achilles considers  
21 are the key issues that the tribunal will need to assess. We agree that it's  
22 a helpful list. We would, though, want to add the following six points to the  
23 list, which we say are also key.

24 So, first, how much actual interest did buyers show in Achilles' competing scheme  
25 prior to 1st May 2018, and to the extent only limited interest was shown, was  
26 that due to the infringement or due to other reasons?

1 Second, my learned friend has already -- I will just put it in context for a moment --  
2 taken you to some of the key agreements in the concession contract. He was  
3 careful to point out that the concession contract didn't have any post-term  
4 non-compete. That's right, but we say it is absolutely key that there was  
5 a non-compete for the term of the concession contract. Just for your  
6 reference that's in clause 4.5(b) of the concession contract, which is at G2,  
7 tab 30 and I think the page number is 1101.

8 So that was just the context of the second point. So the second point is did the  
9 non-compete to which Achilles was subject in the concession contract, so for  
10 the period of concession, did that prevent Achilles from effectively marketing  
11 a competing product prior to 1st May 2018 and, if so, what impact would that  
12 have had on the likely success of TransQ in the counterfactual?

13 Third, was the RSSB entitled to put out all the communications it did in the actual  
14 and, if so, would it likely have done so in the counterfactual?

15 Fourth, was Network Rail entitled to put out all the communications it did in the  
16 actual and, if so, would it likely have done so in the counterfactual?

17 Fifth, to what extent was Achilles facing a normal subscription renewal process on  
18 1st May 2018? Again my learned friend has been at pains to suggest to you  
19 that this was just a normal rollover subscription period or process, but I think  
20 that's going to be certainly a key question.

21 Then, sixth, I'd like to expand a little on the points which will need to be considered  
22 under point 14.3 in my learned friend's skeleton, which is dealing with buyer  
23 multi-homing and single homing. I have four sub-points here.

24 So, first, to what extent do buyers take into account the cost and resource burden on  
25 their supply chain when considering which supplier assurance platform to  
26 use?

1 Second, to what extent are buyers likely to take into account the cost and resource  
2 burden on their suppliers by requiring them to be on a particular scheme  
3 where their suppliers are also required to be on another scheme by the  
4 buyers?

5 Third, to what extent are buyers when considering moving to a different supplier  
6 assurance scheme likely to take into account the extent to which buyers and  
7 suppliers in an industry are already committed to the first scheme?

8 Fourth, to what extent will buyers multi-homing on a free subscription basis on one  
9 supplier assurance platform in an industry drive supplier traffic to that free  
10 buyer subscription platform?

11 So those are additional points that I would ask the tribunal to be thinking about as we  
12 go through the evidence. In thinking about the case, we start from the  
13 proposition that buyers are key to deciding whether a supplier assurance  
14 scheme is going to be successful, and I don't think there's any disagreement  
15 between that on the parties. Suppliers tend to follow the lead of buyers.  
16 However, and this is really important, we are not examining in the abstract or  
17 out of context the question as to the extent to which buyers might multi-home  
18 cross-supply assurance schemes or the extent to which this might happen in  
19 other industries which have different supplier assurance histories, but rather  
20 whether in GB rail in the counterfactual at a point in time a second scheme  
21 had entered the market would buyers have decided to multi-home or switch to  
22 TransQ?

23 Accordingly, if Achilles had no or limited buyer interest in its TransQ offering when it  
24 was re-entering the GB rail market in 2018 or 2019, it would not have been  
25 successful. It's as simple as that. So it's vital to understand the extent to  
26 which buyers in the counterfactual would have been sufficiently interested in

1 Achilles' offering, and we say there are very important pointers from the actual  
2 as to what would have happened in the counterfactual.

3 This is not just about the extent to which buyers may have expressed interest in  
4 Achilles' TransQ offering, but important factors affecting the way in which  
5 Achilles could go about marketing its competing offering during the  
6 concession contract, important factors affecting Achilles' decisions around the  
7 new product offering, TransQ and Link-Up, and important factors affecting the  
8 extent to which this was a normal subscription renewal for Achilles or actually,  
9 what we say, something entirely different.

10 So, to be clear, it doesn't matter that a few suppliers might have strayed on to  
11 TransQ without fully appreciating the situation after 1st May 2018. It doesn't  
12 matter that a few buyers might have been willing to take Achilles up on the  
13 offer of a free subscription. Unless there were buyers on Achilles actively  
14 using TransQ for procurement purposes and mandating their suppliers be  
15 assured through Achilles, we say suppliers would not likely have made use of  
16 TransQ if those suppliers were also required to be on RISQS through the  
17 decisions of other buyers.

18 After all, why would suppliers choose to pay twice for supplier assurance  
19 subscriptions and audits and choose to expend the additional internal  
20 resources on maintaining two supplier assurance subscriptions and being  
21 audited twice if they could avoid it, and coupled with that why would buyers  
22 choose to move to a second new supplier assurance scheme and make their  
23 supply chains incur the cost of doing so?

24 We say that Achilles has not grappled at all with these vital points in its evidence, but  
25 merely glossed over them, and while Miss Ferrier's evidence is that supply  
26 multi-homing works effectively in supplier assurance and suppliers don't mind

1 it, that's far from what Achilles' internal documents say, as we will see.

2 So we will see in the evidence that Achilles did indeed have very limited buyer  
3 interest in the actual and didn't have great aspirations itself as to the number  
4 of buyers it would success in winning, and that's the case whether there was  
5 continuity, as my learned friend has called it, or not.

6 We will also see in the evidence that this wasn't due to the infringement but due to  
7 other factors that would equally have been applicable in the counterfactual,  
8 and just running through some of those, so I have already mentioned,  
9 although there wasn't a non-compete after the concession contract came to  
10 an end, a post-term non-compete, there certainly was a non-compete for the  
11 term of the concession. We say that hampered Achilles' ability to market any  
12 competing offering before 1st May 2018, and that would undoubtedly have  
13 happened in the counterfactual as well.

14 Second --

15 **CHAIRMAN:** What did it say in terms of hampering marketing?

16 **MR WENT:** Well, we can turn to the non-compete if you would like. There are  
17 a couple of provisions I think in the agreement. It is at 3230.

18 **THE CHAIRMAN:** Which bundle, Mr Went?

19 **MR WENT:** Sorry. It is in G2, tab 30. This is one of the relevant provisions at  
20 4.5(b):

21 "The service provider shall not undertake activities outside the scheme and cause  
22 a conflict of interest in relation to the services."

23 There's also provision -- we will come on to it -- that I think effectively says that  
24 Achilles can't use the Link-Up name during the concession contract without  
25 the approval of RSSB, without the approval of the RISQS.

26 8.9. I was struggling to find it. Thank you. Yes, at 8.9. So it's allowed to use

1 Link-Up name providing that any such usage does not conflict with the terms  
2 of the agreement or the communications policies detailed at schedule 5.

3 Those are the basic provisions. I think what's really important is how Achilles has  
4 interpreted those provisions during the course of the period we are going to  
5 look at. We will come on to that when we look at the evidence in more detail  
6 and during the cross-examination of Miss Ferrier, but that's just to set up the  
7 point.

8 I was going to say as a second point Achilles decided it couldn't use its TransQ  
9 Link-Up brand when it was thinking about the offering it was going to provide  
10 because of these provisions, but had to choose a brand that was unknown in  
11 GB rail. That would have happened in the counterfactual.

12 Third -- and again I have already touched on this -- my learned friend has very much  
13 been at to suggest that Achilles' buyer and supplier contracts could simply roll  
14 on at May 2018. We will see again as we go through the evidence that's just  
15 simply not the case.

16 Fourth, while Achilles was certainly neutral in its marketing, RSSB and other key GB  
17 rail stakeholders were busy making sure that the enhanced RISQS scheme  
18 would be an outright success. Of course RSSB that set up this industry  
19 scheme is going to do all it can to ensure its success and would have made  
20 the most of the fact that there was a non-compete in place. We say that  
21 would certainly have happened in the counterfactual.

22 Fifth, the market wanted to know Network Rail's position as the largest buyer in GB  
23 rail. Network Rail told the market that its direct suppliers must use RISQS for  
24 procurement and assurance purposes, and we know that Achilles believes  
25 that that was going to have, and I quote my learned friend in his submissions  
26 at the consequential hearing in September 2015, that that was going to have

1 a chilling effect on those suppliers. We have now got in evidence very  
2 detailed information on Network Rail's supply chain, which confirms that the  
3 majority of suppliers on RISQS indeed seek to supply direct to Network Rail.

4 Then, sixth, Transport for London had thrown its support in favour of RISQS,  
5 meaning that the two largest infrastructure owners in GB rail were committed  
6 to it and other large buyers on RISQS had also given their commitment to it  
7 through the RISQS Charter.

8 Now, as mentioned, Achilles in essence says that none of what was happening in  
9 GB rail at the time matters and it can't give the tribunal any good indication as  
10 to what would have happened in the counterfactual, and the reason for this is  
11 that Achilles has had a Damascene moment through its experience in the  
12 Northern European oil and gas market.

13 Now apparently that doesn't only point to the fact that Achilles is likely to retain  
14 a considerable number of buyers, but also that there would have been  
15 considerable multi-homing by suppliers in GB rail. It doesn't matter, Achilles  
16 needs to argue, that this comparator flies in the face of the facts in GB rail and  
17 key points found in the judgment. Achilles expects the tribunal, and we say  
18 on fairly flimsy witness and documentary evidence, to tear up key parts of the  
19 tribunal's judgment and find not only that there would have been ongoing  
20 competition from Achilles, but also that it would have been at such  
21 a spectacular level that the size of the GB rail supplier assurance market  
22 would have burgeoned beyond recognition.

23 While, of course, it's permissible in competition damages cases to look beyond the  
24 market in question for a comparator -- we accept that -- it is unusual to look  
25 beyond a product market in one country and instead look at a different product  
26 market which has a geographic scope extending over more than one country.

1 We say that there would have to be very compelling reasons for adopting  
2 such comparator, particularly in the face of reliable and detailed evidence  
3 from the market in question.

4 Moreover, we say it would have been incumbent on Achilles' expert economist to  
5 satisfy himself that the proposed comparator is indeed a reliable comparator  
6 and incumbent on him carefully to explore in some detail the potential  
7 differences between the two situations. To the extent this showed up any  
8 material differences it would not be a matter to determine whether the  
9 comparator remains a good comparator and, if so, whether it is necessary to  
10 adjust the results to reflect any differences. That exercise can't simply be left  
11 to trial and to the court. We say that the evidence demonstrably shows that  
12 the Northern European oil and gas industry cannot be used as any sort of  
13 reliable proxy for what would have happened in the counterfactual in GB rail.

14 We have already reviewed some important features of the GB rail supplier  
15 assurance market as found on the tribunal's judgment on liability, and there is  
16 no suggestion on Achilles' part that these features existed in the Northern  
17 European oil and gas market. Then there are a plethora of other  
18 distinguishing features. Some of the other differences we will explore during  
19 the evidence and they include the following.

20 So, first, the RSSB and the RISQS board establishing RISQS several years prior to  
21 when Achilles would have sought to re-enter the market in GB rail.

22 Second, the differences in incumbency between GB rail and the Northern European  
23 oil and gas sector.

24 Third, the non-compete constraint on Achilles during the RISQS concession. No  
25 suggestion of that in Northern Europe.

26 The contractual position between Achilles and its buyer and supplier customers in

1 GB rail. We say that that position is also very different between the two  
2 situations.

3 The RSSB moving the industry over to the enhanced RISQS scheme in advance of  
4 1st May 2018. We have already seen some evidence on that in the materials  
5 my learned friend has taken you to, but we will see more of that as we go  
6 through the evidence.

7 There was also Achilles' reputational issues in GB rail that are recorded in the  
8 judgment, and then last, but certainly not least, the product and geographic  
9 differences between GB rail supplier assurance and the supplier assurance in  
10 the Northern European oil and gas sector.

11 So we say that all of these differences mean that it's impossible to place any reliance  
12 on the supposed comparator advanced by Achilles.

13 Now while on the approach of the Achilles' expert, we also say it is not appropriate  
14 for Achilles simply to have instructed their expert to assume future loss over  
15 a five-year period. We say that's an arbitrary period and a matter that  
16 Achilles' expert should have considered himself based on the fact of the case.  
17 After all, every case is going to differ. Unless the facts are examined with  
18 a view to determining future loss it is not possible to predict what might have  
19 happened. My learned friend I know has cited some case law on this, but the  
20 case law makes abundantly clear that every case need to be examined and  
21 decided on its individual factual context. Mr Parker, though, has not given this  
22 point independent consideration but merely followed his instructions.

23 So that's Achilles' expert. By contrast we say that Network Rail's expert has  
24 grounded his assessment in the facts of the case and taken due note of the  
25 tribunal's findings in the liability judgment.

26 You have already been given summaries of Mr Law's expert evidence, so I don't

1 propose to take up time on that in openings.

2 One point I do just want to pick up briefly is a refinement of his approach in his  
3 supplemental report. So when considering in his first report how Achilles'  
4 performance might have changed after the first year of re-entering the market,  
5 for the first year Mr Law assumes it would have looked similar to the actual  
6 now. as it were, but when looking at subsequent years Mr Law examines the  
7 characteristics of buyers on RISQS and the extent to which those buyers  
8 likely presented a potential target for Achilles in GB rail, and of the 88 buyers  
9 on RISQS at the relevant time, Mr Law considers that 18 were potential  
10 targets after excluding a number of categories, and those excluded categories  
11 were Network Rail itself, nine other RISQS Charter signatories, Transport For  
12 Wales, and then 56 buyers with which noone had procurement spend since  
13 2015, and three buyers with the BravoNR ID. Mr Law considered that seven  
14 buyers within the last two categories, which were also buyers on Achilles'  
15 building confidence that the construction scheme and/or UVDB, the utilities  
16 scheme of Achilles, should be included among the potential targets, as there  
17 was some evidence that a company that was already a buyer on Achilles'  
18 supplier assurance platforms on constructions or utilities might purchase  
19 a link-up by subscription as a bolt-on. So that was the position in the first  
20 report.

21 Then Mr Law refined his analysis in his supplemental report in term of the potential  
22 target buyers in light of the fact that Achilles had in the interim signed up one  
23 new buyer in Link-up with which Network Rail had procurement spend since  
24 2015, but which doesn't appear to be a buyer on building confidence or  
25 UVDB. Now although this increases the number of potential buyer targets,  
26 Mr Law considers that Achilles would have had only a 10% capture rate for

1 those buyers in the counterfactual.

2 Now we will see during the course of evidence the basis on which Achilles is  
3 contracting with that principal contractor buyer. That's obviously confidential,  
4 so I will not say anything about it here, but we say as a result that buyer  
5 doesn't provide any clear evidence that Achilles could actually win buyers who  
6 were direct suppliers to Network Rail except on the basis on which that buyer  
7 has been won.

8 So overall we say that Mr Law's approach makes eminent sense as he grapples with  
9 the facts in GB rail and takes note of the tribunal's findings in its liability  
10 judgment.

11 On the question of future losses Mr Law does not merely assume those future  
12 losses, but makes a reasonable estimate that Achilles' actual revenues would  
13 quickly reach the counterfactual level.

14 I then just wanted finally to address a couple of questions that would also need to be  
15 examined carefully during the course of the evidence and points which my  
16 learned friend has already touched on. I can deal with these briefly if we are  
17 okay to go on a bit longer.

18 **CHAIRMAN:** Carry on.

19 **MR WENT:** So the first point. Would Achilles have been able to re-enter the GB rail  
20 assurance market on 1st May 2018 or would this have been delayed? So my  
21 learned friend made much about what the standards would have said, absent  
22 the RISQS-only rule. I think, though, that this is to forget that Achilles had  
23 been the only supplier assurance provider in GB rail for over 20 years. We  
24 say it makes no sense that Network Rail would have put a detailed regime in  
25 place of the type it has now put in place with the NR203 standard when there  
26 had been a single provider of assurance since the 1990s and no prospect of

1 anyone else seeking to enter and compete.

2 Times have changed, of course, in terms of technology as well. What interoperability  
3 would have looked like 10, 15, 20 years ago is very different from today.

4 We ask why would Network Rail, using public funds, have put in place a detailed  
5 regime of the type now in place, following, of course, this litigation,  
6 and designed a technical system for intraoperability when Achilles was the  
7 only provider and when it would no doubt have required updating over time?  
8 Achilles certainly wouldn't have encouraged it and we can't blame them for  
9 that, but there's a lot of talk from Achilles about how well it can work if there is  
10 more than one supplier assurance provider in the market, but, of course,  
11 Achilles wants to be the only show in town, and there are sectors in which  
12 Achilles is the only show in town, because buyers in the market see the  
13 benefits and merits of that.

14 So we say that the multi supplier assurance provider regime would not have been as  
15 detailed in the documents in the way it is now and Network Rail would not  
16 have gone to the trouble of having intraoperability technology developed for  
17 this purpose in advance of Achilles asking Network Rail for equivalent status.  
18 Once a competing supplier assurance provider came along, then, of course,  
19 the full regime would have been put in place.

20 That's in essence Mr Blackley's evidence. If I just give you a note for that, it is in his  
21 third witness statement at paragraph 15 and that's bundle D, tab 8, page 78.

22 In terms of Network Rail starting to design the architecture allowing for more than  
23 one supplier assurance provider, we also say it's important that Achilles, as I  
24 said already, being the only supplier assurance provider in GB rail for over  
25 20 years, and benefitted from the RISQS-only rule and previously the Link-Up  
26 rule, and, of course, it's Achilles also that has considerable experience in

1 other supplier assurance markets and so would know how a multi-supplier  
2 assurance regime could and should work.

3 We have seen that it would have taken at least a year to do all the necessary -- to  
4 add all the necessary details to the standard, to prepare the intraoperability  
5 technology and for Achilles to develop the API, and the actual, though, shows  
6 that none of that is likely to have run smoothly. The actual shows that it didn't  
7 run smoothly. We say that that's also important for considering the  
8 counterfactual as well.

9 So that was the first point, and then the second -- I will deal with it even more quickly  
10 -- is whether Achilles was unreasonable or not re-entering the GB rail  
11 assurance market on the basis of the initial API solution that Network Rail had  
12 put forward. We simply say at this stage that it was unreasonable of Achilles  
13 not to have done so, and that if Achilles had accepted the initial API solution,  
14 it could have entered as early as September 2020, but we will explore that in  
15 more detail as we go through the evidence.

16 That's all I intended to say by way of opening. So unless you have any questions at  
17 this stage.

18 **CHAIRMAN:** Thank you very much, Mr Went.

19 **MR WENT:** Thank you.

20 **MR WOOLFE:** I assume we are breaking for lunch.

21 **CHAIRMAN:** Yes.

22 **MR WOOLFE:** I will call Miss Ferrier after lunch.

23 **CHAIRMAN:** Yes. Thank you. Let's say 2.05 pm.

24 **(1.06 pm)**

25 **(Lunch break)**

26 **(2.05 pm)**

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**KATIE FERRIER (called)**

**MR WOOLFE:** Sir, we move now to the evidence of Achilles' witnesses. The first witness we are calling is Miss Ferrier.

Can I ask you to go to the witness box now?

**KATIE FERRIER (affirmed)**

**Examination-in-chief by MR WOOLFE**

**MR WOOLFE:** Could you ask you, Miss Ferrier, to have bundle B, please, especially the confidential version of bundle B. Do you have bundle B?

**A.** Yes.

**Q.** For the benefit of the witness and the tribunal, the first three tabs in bundle B contain Miss Ferrier's first three statements that are sworn at the initial trial. I am not going to ask you to deal with those again but they are there for your note.

Can you turn to tab 4, please. First of all, do you recognise that statement?

**A.** Yes, I do.

**Q.** And can you turn to the last page, page 104.

**A.** Yes.

**Q.** Is that your signature?

**A.** That is.

**Q.** And is there anything in this statement you would like to change or correct at all?

**A.** I think it this one I have something to correct in. I can't remember the exact ...  
148.

**Q.** I think 188 might was the one. It might be useful.

**A.** Sorry, can you speak up?

1 Q. Go to paragraph 188 on page 78 of the bundle.

2 A. Yes, there is. So in this statement it says:

3 "Firstly, as explained above, it is not the case that the number of suppliers rises

4 and falls in direction proportion to the number of suppliers."

5 It should actually read "the number of buyers".

6 Q. So the number of suppliers rises and falls in direction proportion -- in direct

7 proportion -- to the number of buyers; is that right?

8 A. No, it does not fall.

9 Q. "... it is not the case that the number of suppliers ..."

10 A. In direct proportion.

11 Q. To the number of buyers. The second "suppliers" in the sentence should be

12 changed to "buyers"; that's your correction?

13 A. Yes, that's correct.

14 Q. Thank you.

15 Subject to that correction, is there anything this statement that you want to correct at

16 all?

17 A. No.

18 Q. And is that the evidence you would like to give to the tribunal?

19 A. Yes.

20 Q. Then can I take you to tab 6, to see your fifth witness statement. Is that your

21 statement?

22 A. Yes, it is.

23 Q. If you turn to page 183, the penultimate page, is that your signature?

24 A. Yes, it is.

25 Q. And is there anything you'd like to correct in this statement?

26 A. No.

1 Q. Are you content to adopt that as your evidence?

2 A. Yes, I do.

3 Q. Then, finally, if the witness could be passed the miscellaneous bundle, please,  
4 open at tab 7.

5 You should see it in front of you. It says "confidential sixth witness statement". Is  
6 that your statement?

7 A. Yes, it is.

8 Q. Again if you can turn to the penultimate page, page 53, is that your signature?

9 A. Yes, it is.

10 Q. Is there anything you would like to correct or add to this statement?

11 A. No.

12 Q. And are you content to adopt that as your evidence to the tribunal?

13 A. Yes.

14 Q. Mr Went will have some questions for you now.

15 A. Thank you.

16

17 **Cross-examination by MR WENT**

18 **MR WENT:** So if we can turn first to your fifth witness statement, so that was in  
19 tab 6 of bundle, page 165. If you can turn to paragraph 17, please.

20 A. 1-7?

21 Q. Yes, 1-7, paragraph 17. In the first sentence you say:

22 "A founding principle of Achilles' own approach to supplier assurance services is  
23 buyer and supplier choice."

24 A. Correct, yes.

25 Q. If we can turn to paragraph 19, just a couple of paragraphs down, the third  
26 line down, I will just read that out as well:

1 "So suppliers who wish to contract directly with buyers who require RISQS  
2 registration as a condition of supplying or tendering to supply to that buyer  
3 and then will choose to be a supply member on RISQS. Suppliers who wish  
4 to contract directly with buyers who require registration on an alternative  
5 scheme as a condition of supplying/tendering will choose to be a supplier  
6 member on that alternative scheme. Suppliers who wish to supply or tender  
7 to both categories of buyers may choose to be on both schemes."

8 **A.** Correct, yes.

9 **Q.** That's your evidence there. I just want to explore for a moment a little bit this idea  
10 of buyer and supplier choice. It is clear that buyers can ordinarily decide  
11 which supplier assurance scheme to use for their procurement purposes and  
12 supplier assurance purposes, or at least assuming that the RISQS-only rule in  
13 its original form does not exist, but otherwise buyers have a free choice as to  
14 which supplier assurance scheme to use; is that right?

15 **A.** That's correct.

16 **Q.** Now, if a supplier wants the chance to serve a particular buyer, it must follow the  
17 procurement and assurance requirements that have buyer; yes?

18 **A.** That's correct.

19 **Q.** So the supplier has no choice, in that sense at least?

20 **A.** In that sense, no.

21 **Q.** Yes. Actually if we can just briefly turn back to your fourth statement, because  
22 I think you pretty much make the same point. I think we just go back to tab 5.  
23 It is paragraph 218. Do you have that?

24 **A.** Yes, I have got that.

25 **Q.** Just the first sentence there. I think it is making a similar point. You say:

26 "The biggest single factor in driving supplier activity in supplier assurance is access

1 to buyers."

2 **A.** Exactly.

3 **Q.** Now, a buyer might require suppliers to ascribe to a scheme and be audited by  
4 the scheme, or it might just require subscription so the scheme; is that right?

5 **A.** That's right.

6 **Q.** And then it would let its suppliers choose which third party audit provider to  
7 obtain the assurance from?

8 **A.** Indeed, or sometimes they do it themselves.

9 **Q.** Or sometimes themselves. Okay.

10 So if a buyer wants to serve to buyers in an industry and the buyers each mandate a  
11 different supplier assurance arrangement, that obviously requires the supplier  
12 to multi-home if he wants to serve both buyers?

13 **A.** That's correct.

14 **Q.** Again, there might be multi-homing for subscription to the two different schemes  
15 and multi-homing for audits, or it could just be multi-homing for subscription  
16 but not for audits; is that right?

17 **A.** Yes, it depends what the buyers specify.

18 **Q.** It depends, as we seem.

19 So if buyers are willing to accept audits from different schemes at the suppliers'  
20 choice, so the supplier can choose, the supplier wouldn't need to multi-home  
21 for the audit; that's right.

22 **A.** That's correct.

23 **Q.** And I think something like that happens in the construction industry. So I think  
24 suppliers can multi-home been a subscription basis across different schemes,  
25 but then suppliers don't have to necessarily multi-home for the audits because  
26 there is a scheme in place which lets them choose which one to -- their audit

1 provider, they can choose that; is that right?

2 **A.** That's correct in construction.

3 **Q.** So it is buyers who typically dictate which supplier assurance service suppliers  
4 must or can use; yes?

5 **A.** That is correct, to a certain extent.

6 **Q.** Yes. Well, we will explore this more.

7 Then, as we said, suppliers typically follow their buyers' decisions, the buyers they  
8 want?

9 **A.** From a purely procurement perspective, yes they do.

10 **Q.** Just staying in your fourth statement, if we can go to paragraph 235, and again  
11 just your first statement there. you say that in practice your experience is  
12 multi-homing by suppliers is common and works effectively in a competitive  
13 market. So that's your experience, it is common and works effectively; yes?

14 **A.** That's right, yes.

15 **Q.** It's fair to say, isn't it, that suppliers wouldn't want to be paying twice for different  
16 supplier assurance schemes and two sets of audits if they can avoid that?

17 **A.** It's dependent on what value you really ask to the suppliers, because if you talk  
18 about the supplier subscription actually, it's quite a low value. So what we  
19 have tried to do in Achilles is shift the focus entirely from being on a buyer  
20 requirement to shift to a supplier value as well. So I will say for a £300  
21 subscription, the amount of value a supplier gets now is significantly more  
22 than it was, say, five or ten years ago because actually we have recognised  
23 that supplier revenue, you know, generates a lot of value for our organisation.  
24 So our shift away from just being focused on buyer requirement and putting in  
25 place entire teams to deal with suppliers has enabled that shift in value  
26 proposition I would say.

- 1 **Q.** But just to be clear, because I am not sure that quite answers the question that  
2 I posed, to if suppliers have a choice, they don't have to pay for two  
3 subscriptions, don't have to pay for two audits, they would generally prefer not  
4 to do that; right?
- 5 **A.** I would say they would not if they can't see the valley, but what I will say is that  
6 increasingly we are seeing that suppliers are seeing value to the just from  
7 a procurement perspective but from stuff we have developed such as  
8 benchmarking and other capabilities. So a supplier effectively pays a fee not  
9 just to access a procurement market but to access a report that tells them  
10 how they benchmark against their peers.
- 11 **Q.** And what about from the audit perspective, so would a supplier -- well, again, if  
12 they have a choice not to pay for two audits, one assumes they would avoid  
13 that cost?
- 14 **A.** I assume they would. If the audits were exactly the same, they would try to avoid  
15 it. However, we have seen some suppliers who have paid for an audit with  
16 ourselves as well as still maintaining their RISQS audit.
- 17 **Q.** And individual buyers equally are not going to be keen to have their suppliers  
18 paying twice for different supplier assurance schemes and two sets of audit in  
19 the same sector; is that right?
- 20 **A.** I think buyers -- it depends what they are driving. Because buyers have a choice  
21 as well in terms of they have a certain amount of obligations to fulfil. So  
22 actually if you think about it, if they want suppliers to answer questions that  
23 perhaps aren't covered by one scheme and are covered by more and they're  
24 more flexible and They can be specific to their scheme, I think it weighs in  
25 favour of them actually doing that.
- 26 **Q.** Okay. Perhaps we can look a bit more at the evidence on this point. So if we

1 can turn to bundle G6. Just for the tribunal's benefit I may refer to confidential  
2 documents during the course of the cross-examination but generally I will just  
3 have the witness read out the sections and won't discuss them in open court.  
4 There may be a point later on in the cross-examination where we need to go  
5 into closed session just to deal with a few confidential matters.

6 So yes. If you can turn to tab 275, please, if we look at the first page there it says  
7 "Link-up TransQ Comms". So I think these are the draft communications for  
8 1st May 2018. Is that right?

9 **A.** That's correct, yes.

10 **Q.** If we can turn to page 3014, so again my understanding of this is a mock-up of  
11 the new TransQ web pages I think. Is that right?

12 **A.** Yes, that's correct.

13 **Q.** You can see it says just slightly down on that page "tab suppliers". So I am  
14 assuming this would have been a tab within the TransQ website. Does that  
15 seem right?

16 **A.** It does say "community web page on site" at the top, but yes.

17 **Q.** Understood.

18 Then if you can just read the second bullet under "benefits" there. So it's talking  
19 there about a single pre-qualification questionnaire and audit. Yes?

20 **A.** That's correct.

21 **Q.** And that is seen as a benefit?

22 **A.** It is. I'm not sure whether this is the existing old site or the new one to be honest  
23 because it doesn't --

24 **Q.** No, sure, because this is draft communications?

25 **A.** Yes, correct.

26 **Q.** That at some point someone within Achilles has drafted?

1 **A.** Exactly, Yes.

2 **Q.** So it's a selling point as far as Achilles is concerned for TransQ; that's right?

3 This is one of the benefits for it?

4 **A.** This was the transport UK. I am not sure whether this was drafted specifically for

5 TransQ or whether it was the old site for previous, if I am honest looking at

6 this document.

7 **Q.** I don't think we need to worry too much. This gives us some sense of Achilles'

8 views on this matter I would suggest. I would suggest that you see this is

9 a benefit because you recognise buyers would typically want to avoid needing

10 to subscribe to two supplier assurance schemes and the associated costs

11 going with that?

12 **A.** Unless they have to.

13 **Q.** And so I guess you can see that this is a legitimate concern for suppliers to have,

14 not wanting to pay for more than one supplier assurance scheme if they can

15 help it?

16 **A.** Correct.

17 **Q.** If we can turn to page 3016, just over the page, and if you can read what's under

18 "what's covered" there.

19 **A.** You with like me to read it out. Yes?

20 **Q.** No, you can read it to yourself and I will ask a couple of questions on it.

21 So equally you recognise that buyers are wanting cost-efficient ways of achieving

22 supplier assurance; yes?

23 **A.** Correct.

24 **Q.** And it's legitimate concern for buyers to have?

25 **A.** Correct.

26 **Q.** And you recognise it says here that suppliers can get frustrated at needing to be

1 audited by multiple buyers; yes?

2 **A.** Correct.

3 **Q.** And presumably it's a legitimate concern that Achilles has working as April  
4 supplier assurance provider in the industry?

5 **A.** Correct.

6 **Q.** And that's why you reference it here on the proposed web pages for TransQ --  
7 leaving aside precisely which website it was for, but that's right. Yes?

8 **A.** Yes, that's correct. I think we've been doing it for 20 years, so it was highlighting  
9 that fact.

10 **Q.** So, of course, while you were selling TransQ on the basis it is would be a single  
11 RISQS qualification in GB Rail, your damages calculation is now based on  
12 considerable supplier multi-homing for subscriptions and audits; yes?

13 **A.** Correct, but we had all of their data in the system, so the way that we were  
14 marketing it was focused on the point we were that single place at that point in  
15 time.

16 **Q.** Yes. We will come on to the data point in a moment, but if your damages  
17 calculation is right in terms of how much supply and multi-homing there would  
18 be in the counterfactual, there is irony, isn't there, because you are asking  
19 suppliers to do the very thing that frustrated them; yes?

20 **A.** I don't think we were though, because we were keeping them with us in the  
21 scheme. I think what you are describing is how I would see it as multi-homing  
22 on to RISQS rather than multi-homing with ourselves. So this was more in  
23 terms of the fact they would continue and it always was in our mind that it was  
24 business as usual, you continue having this: don't get frustrated and go  
25 multi-homing over here. So that's how these communications are written.

26 **Q.** But we know that Network Rail was going to require its direct suppliers to remain

1 on RISQS for procurement and assurance purposes. We also know that  
2 other major buyers in industry were doing so. So I suggest to you that  
3 inevitably there would have been multi-homing and it is something you know  
4 that suppliers get frustrated at. Yes?

5 **A.** Yes. I think Network Rail at this point -- I mean, this is very close to the launch  
6 date -- we knew that Network Rail were going to mandate it to their suppliers.  
7 We were hoping -- it wasn't clear at this point. It was a little bit chaotic at that  
8 point in time, to be honest, but we were in conversations with buyers who  
9 were going to remain with you. So the messaging was very much business  
10 as usual. You stay here. The suppliers stay here. Sometimes you class it as  
11 a bit of inertia by suppliers. They want to continue to do the same thing. We  
12 accepted, however, there was going to be multi-homing because a new player  
13 was coming into the market. However, we were trying to give them a safe  
14 pair of hands, I think is the way to describe it.

15 **Q.** We can put that folder away. If we can turn to G4 and tab 185.

16 **THE CHAIRMAN:** Did you say G4?

17 **MR WENT:** G4, tab 185.

18 I think it is a fairly lengthy e-mail from Colin Flack, who I think it was head of  
19 transport at Achilles at the time?

20 **A.** That's correct, yes.

21 **Q.** And it is setting out some points to your COO, Estelle Whittaker, I think in  
22 advance of an Achilles' monthly leadership meeting. Then about halfway  
23 down -- I will just find the reference -- yes. It literally is about halfway down,  
24 just between the two hole punches, there's a sentence starting:

25 "In outline our strategy is to redefine~..."

26 Can you see that?

1 **A.** Yes, I see that.

2 **Q.** Then a little bit further on it says:

3 "We are looking to move the customers, whether suppliers or buyers, away from  
4 viewing supplier assurance as a necessary evil or some form of tax and  
5 instead the enabler that leads to a wider range of supporting products."

6 So there was a view within Achilles at the time that customers -- and this is your  
7 head of transport -- that customers, both buyers and suppliers, might view  
8 supplier assurance as a necessary evil and as some form of tax; is that right?

9 **A.** Yes. I think that's quite common in supplier assurance.

10 **Q.** That's all I want from this bundle for the minute. Can we turn to bundle 13,  
11 please, and tab 662? I think this is a confidential document so I will be careful  
12 here, but this is an e-mail exchange between Achilles and another company.  
13 If you turn over the page just to the second page in that tab and if you can  
14 read the first full paragraph starting:

15 "There is a situation ..."

16 **A.** Am I okay to do this in the confidential bundle?

17 **Q.** Just read it. You are okay read this, but don't read it out loud.

18 So you can see the cost of additional audit days is enough for some suppliers to  
19 withdraw from Sentinel and CDM ability, yes?

20 **A.** That's correct, yes.

21 **Q.** And presumably this will be a concern for buyers particularly when they are keen,  
22 for example, to be making use of (inaudible)S&Es; yes?

23 **A.** We, I think what I read into this is perhaps suppliers are just going it for -- they  
24 are not really checking what the audit days are for previously. In the new 302  
25 standard it was broken down in a bit more detail, so basically they decided not  
26 to do the audit days they didn't need any more, because it was an additional

1 cost.

2 **Q.** But it was described as a situation?

3 **A.** Correct.

4 **Q.** Okay. We will just put that away. If we could turn to G3, please, and tab 63A.

5 You will be familiar with this letter. I think the tribunal will. It is the 17 May  
6 2017 letter, when you withdrew from the tender. Can you look at the third  
7 bullet, please. That says:

8 "We believe that the implementation of the new model will, taken together, increase  
9 the cost of supplier assurance for the GB Rail industry."

10 So again the increasing cost of supplier assurance in GB Rail was something that  
11 concerned Achilles; is that right?

12 **A.** Yes, that's right.

13 **Q.** And we have seen that is because it is something that is important to your  
14 customers, both buyers and suppliers; yes?

15 **A.** That's correct.

16 **Q.** So supplier assurance providers like Achilles are always going to be live to the  
17 issue of supplier assurance costs in the industry, it's something they're going  
18 to be thinking before?

19 **A.** I think supplier assurance costs and the value it drives absolutely is something  
20 we are always concerned with.

21 **Q.** Understood.

22 We can put that one away. You will have seen -- it has been pointed out that your  
23 expert calculations potentially assume there would have been a significant  
24 increase in the value of the GB Rail supplier assurance market in the  
25 counterfactual from May 201 in the amount of £4.6 million; have you seen  
26 that?

1 **A.** That's correct.

2 **Q.** Do you accept that's a significant additional cost to the GB Rail industry?

3 **A.** I do, but I also accept there's additional value in that as well that's being driven.

4 **Q.** And you think that multi-homing among suppliers in supplier assurance works  
5 effectively notwithstanding it can give rise to significant additional costs to the  
6 industry. Buyers and suppliers see supplier assurance as a tax, a necessary  
7 evil, and suppliers get frustrated at being audited multiple times. You still  
8 think it works effectively?

9 **A.** I think the whole premise of the research we had conducted prior to withdrawing  
10 from the tender and the creation of our insights theme, we were shifting the  
11 value of our business proposition from being entirely buyer focused, which  
12 historically is how risks been positioned, to being much more supplier focused  
13 as well, so driving through the additional value in terms of what suppliers  
14 really see from that. So we saw an opportunity here to have a competitive  
15 edge, a competitive advantage, to really show the suppliers in terms of the  
16 benchmark -- we had data on how they had performed over the last 10, 15,  
17 20 years in some cases against their peers and we had worked with an  
18 insights team, invested heavily legal. So yes, we had accepted it would  
19 increase the overall value in terms of the cost in the market, but actually the  
20 value that would be driven for the supplier base which comes from that need  
21 to have a competitive edge was far greater value I think to the industry.

22 **Q.** Okay. We'll come on in a moment to the data issue a little bit later in this  
23 discussion.

24 But this idea that buyers would be keen to avoid suppliers paying twice for supplier  
25 assurance equally applies to Network Rail; right?

26 **A.** Historically they have been, yes.

1 **Q.** They are going to be keen to make sure their suppliers don't pay twice for  
2 different supplier assurance schemes and two sets of audits if it is something  
3 that can be avoided?

4 **A.** What they are keen is that their suppliers get value from something. So if we are  
5 repeating something that is exactly the same and they are having to do it  
6 I think actually what they are getting is the value of their specific need. So  
7 a buyer will specifically ask questions and the supplier that aren't necessarily  
8 covered by the existing scheme. So I think it is different.

9 **Q.** If we just turn to paragraph 24 of your fifth statement. That's in tab 6. So  
10 paragraph 24. So you say there just slightly into the sentence:

11 "Network Rail should have no interest in whether buyers specify one form of  
12 pre-qualification system or another."

13 Carrying on:

14 "Network Rail's interest should be ensuring that assurance is provided by credited  
15 schemes whose services preserve the safety and quality of work on the  
16 network."

17 However, you remember I am sure that the rationale that Network Rail gave to the  
18 RISQS-only liability trial was to avoid duplication of audit costs; right?

19 **A.** Yes, I believe so.

20 **Q.** And that was also part of the rationale for establishing RISQS; yes?

21 **A.** I can't recall in terms of the rationale for establishing RISQS in detail. I wasn't  
22 involved in that process.

23 **Q.** Can you turn to G2, tab 34. So this is principles of the railway industry supplier  
24 qualification scheme. If we just turn over the page to 1194. Have you got  
25 that?

26 **A.** Correct.

1 **Q.** Right at the top of the page, third bullet down, it says about RISQS adding value  
2 to both customers and suppliers, the third bullet there is reduce duplication of  
3 supplier assessment, thereby reducing cost."

4 So you can see this was built into establishing the RISQS?

5 **A.** I can see that there, yes.

6 **Q.** Now, if Network Rail's own suppliers are forced to be on a second supplier  
7 assures scheme and pay for that, we can see what your expert is suggesting  
8 the impact of that might be on the overall GB rail market. Presumably you  
9 could see Network Rail could be legitimately concerned about it?

10 **A.** Yes, I can.

11 **Q.** It could be concerned and it might potentially impact on the prices offered by is  
12 suppliers, given that the increase cost of the supply change could potentially  
13 filter down to Network Rail and other buyers?

14 **A.** It could do, yes.

15 **Q.** Okay. You can put that file away. If you look at paragraph 30 of your fifth  
16 statement. Have you got that?

17 **A.** Yes, I've got that.

18 **Q.** Just wait for the ... so there you say:

19 "While I agree with Mr Blackley's statement that buyers will generally try to limit the  
20 inconvenience and costs caused to their suppliers by their assurance  
21 arrangements, I do not think that these are the only important considerations  
22 for buyers."

23 So you do recognise that these are important considerations for buyers. Yes?

24 **A.** Yes, I do.

25 **Q.** And you thought this issue was sufficiently important to include on your TransQ  
26 website in the draft version of it at least for launch at 1st May 2018. Yes?

- 1 **A.** Yes, absolutely, because effectively then it was an inconvenience for suppliers  
2 switching over to the RISQS system. So we really did want to highlight it at  
3 that point in time.
- 4 **Q.** Again, we will come back to the sequencing on that, but you agree if the large  
5 majority of suppliers are required to be on one supplier assurance scheme  
6 because of the choice of the buyers in the industry, that would be a relevant  
7 consideration for another buyer thinking about moving to a different supplier  
8 assurance scheme if that meant requiring its buyers to be charged twice.
- 9 **A.** Yes, I would say it would only do it if it was offering additional value to meet their  
10 needs.
- 11 **Q.** One of the things they are going to weigh in the balance is "what is this going to  
12 cost my supply chain"?
- 13 **A.** Absolutely, yes.
- 14 **Q.** And you know that Network Rail's evidence is that the majority of suppliers in  
15 GB Rail seek to serve Network Rail directly; yes?
- 16 **A.** I wouldn't say the majority of suppliers in GB Rail. I think there is lots of  
17 suppliers. I think the majority of suppliers who were available at that point in  
18 time may have been servicing Network Rail. I am not sure of the numbers  
19 directly.
- 20 **Q.** We have Network Rail's evidence for that.  
21 And one could expect a very large number of suppliers would also seek to serve  
22 Transport for London and other RISQ Charter buyers as well?
- 23 **A.** That's correct, yes.
- 24 **Q.** Am I right in thinking there is in essence just one supplier assurance provider in  
25 utilities in the UK?
- 26 **A.** We hold the majority of them, but supplier assurance is done in various different

1 ways as well. So A lot of the big companies such as -- I want to say EDF and  
2 that's in my mind, they do it internally in-house, but we have a significant  
3 number of buyers and suppliers in the utilities market in the UK.

4 **Q.** So the UVDB, or utility assurance supplier scheme, it's the only scheme like that  
5 in the utilities industry, otherwise there are some utility buyers that may be  
6 doing it in house themselves?

7 **A.** Yes, some utility buyers recognise some of the other industry schemes such as  
8 the Build UK work for some work as well. Some of them don't specifically  
9 require utilities registration.

10 **Q.** So the buyers in that industry that have joined your scheme have decided they  
11 are best served by one scheme; yes?

12 **A.** Yes, that's correct.

13 **Q.** Perhaps we can just go to paragraph 37 still in your same statement I think, your  
14 fifth statement, paragraph 37. Here you said that Ken Blackley's view that the  
15 GB Rail industry would be better served by a single scheme run by the RSSB  
16 are not relevant to consideration ins this case.

17 But to be absolutely clear, there are obviously major buyers in at least one other  
18 sector in the UK who have the same view as Mr Blackley; right?

19 **A.** There are, yes.

20 **Q.** So we have seen that buyers drive the decision of suppliers when it comes to  
21 supplier assurance schemes. I want just to look at a few statements you have  
22 made in your fourth statement, please. That's just back a tab I think. If we go  
23 to paragraph 47(a) you say there there is natural customer inertia.

24 **A.** That is correct.

25 **Q.** Presumably suppliers will want to be on the same assurance scheme as their  
26 buyers; I think we have established that?

1 **A.** That is correct.

2 **Q.** If the buyers they want to serve move schemes and require the suppliers to be  
3 on it, the suppliers are going to move if they think that makes economic sense  
4 for them?

5 **A.** That's correct.

6 **Q.** To give an example, if Network Rail moves schemes and told its suppliers to  
7 move if they want to continue serving Network Rail, a large number of  
8 suppliers would follow Network Rail?

9 **A.** As long as they are not supplying other buyers on that scheme who remain on  
10 the scheme, that's correct.

11 **Q.** Then they end up multi-homing?

12 **A.** Exactly.

13 **Q.** Understood.

14 And this is part of the fact that supplier assurance is a two-sided market?

15 **A.** That's correct.

16 **Q.** Now, the other examples you give in this paragraph, they are not two-sided  
17 markets, are they. Mobile phone contracts, is that two-sided?

18 **A.** I am not sure. I can't comment on that.

19 **Q.** Well, I suggest it isn't.

20 And what about gyms?

21 **A.** I don't know about the markets of gyms either. Sorry.

22 **Q.** Well, I suggest they aren't two-sided markets and so something very different is  
23 at play in those markets.

24 Would I also suggest that this idea of customer inertia can certainly be broken by  
25 a buyer saying "move schemes". It is not the suppliers -- there is so much  
26 inertia among suppliers they wouldn't leave schemes if a buyer was insisting

1 on?

2 **A.** I think what we are trying to make here -- the point I was trying to make in this is  
3 around the subscription bases. People tend to roll along. And we have seen  
4 actually even in TransQ and other subscription based business that we have  
5 around the Globe that actually suppliers -- it just rolls on year after year.  
6 I think that's the point I was trying to make. That's very similar, if you have  
7 a magazine or gym membership, you actively have to cancel it.

8 **Q.** We will come on to exactly how that was going to work at the crossover point on  
9 1st May 2018.

10 If we just look at sub-paragraph (b) here, here you are saying the subscription model  
11 makes sticking with its existing provider very convenient and then you explain  
12 why. However, just to be clear, if a buyer requires its suppliers to move,  
13 them?

14 **A.** That's correct, yes.

15 **Q.** So there is not sticky necessary this that sense?

16 **A.** Yes. Exactly. If they are only supplying one buyer and that buyer moves,  
17 typically -- it will normally take a year or two for that happen, but they will  
18 move.

19 **Q.** We will look at that in a movement. But if buyers and suppliers to stay on the  
20 same scheme, the suppliers will stay on it?

21 **A.** Correct.

22 **Q.** If the buyers they want to serve want to move to a new scheme and require their  
23 suppliers to use it, then they will move to it even if it means entering data  
24 again?

25 **A.** That's correct.

26 **Q.** And if a new supplier assurance provider starts to operate in the market without

1 any buyers, suppliers wouldn't consider moving over; right?

2 **A.** No, you have to have a buyer. And we do have single buyer communities where  
3 there is only one buyer, but as long as that messaging from the buyer is "we  
4 require you to join this scheme", then they do join that scheme.

5 **Q.** And then just picking up on sub-paragraph (c) here, so I think you are saying for  
6 buyers a number of practical issues arise when thinking about moving  
7 schemes and then explain if a buyer over scheme it will move its supplier  
8 gradually over a 12 month period, which is what you just said, and therefore  
9 use two schemes for a period or straightaway, but then RISQ suppliers having  
10 a second subscription charge; that's right?

11 **A.** That's correct.

12 **Q.** That's the point you were just making.

13 So presumably the second supplier assurance scheme, though, who offer to take on  
14 suppliers without a subscription renewal payment until the 12-month period is  
15 up?

16 **A.** That is correct, similar to what we saw when RISQS took over from Achilles.

17 **Q.** Exactly, they offered --

18 **A.** Free subscriptions.

19 **Q.** Yes. So if the suppliers are repaid, Achilles, they are saying: you don't need to  
20 pay us again until the next renewal.

21 So there are ways around these issues?

22 **A.** Yes. And sometimes the buyers will pick up that fee and I am assuming Network  
23 Rail pro baby picked that fee up, so RISQS took over the service and  
24 accepted the Achilles' audits effectively and the Achilles' subscription for that  
25 period.

26 **Q.** Okay. Then if we can turn to paragraph 58 in this statement, and look at the

1 penultimate sentence there:

2 "The choice being available, the RSSB RISQS would have on the positive basis of  
3 why the newer RISQS was better than Achilles."

4 Yes?

5 **A.** That's correct, yes.

6 **Q.** Can we just turn to bundle G4, tab 159. I just want two turn to the tail end of this.

7 So page 1929. So I think this is a marketing piece by the RSSB to RISQ  
8 members from December 2017. If we look at what's being said here, so the  
9 first one:

10 "Over 1,000 buyers and suppliers signed up for a series of national events to learn  
11 about the enhanced RISQS scheme which goes live in less than six months.  
12 In addition to demonstration of the richly featured new software platform, they  
13 also had messages of support for the scheme from Network Rail and  
14 Transport for London. Feedback from buyers and suppliers alike was positive  
15 and many expressed their confidence that the enhancements would deliver  
16 the changes the industry needs."

17 There is then a statement from Gillian Scott at Network Rail reiterating the  
18 commitment to RISQ for their suppliers to Network Rail. Then there is April  
19 quote from Transport for London:

20 "The enhancements being introduced will give our buyers greater confidence and  
21 insight into the supply base they are engaging with to deliver goods and  
22 services to our railway."

23 Then a quote from Atkins Rail Solutions:

24 "I feel the system enhancements we have seen today will help the search and  
25 capability and make the whole process easier, slicker and smoother and  
26 ultimately that's what we are looking for. When the new systems goes live on

1 1st May 2018 buyers will benefit from the new configurable platform, more  
2 responsive to industry and legal challenges, the ability to integrate the new  
3 software with their own systems, auto alerts, buyer specific questioning and  
4 supplier survey templates, all available at no extra cost and live up-to-date  
5 supplier information."

6 Then lastly:

7 "Their suppliers will also get the new configurable platform providing prompt updates  
8 for industry requirements, notice to the tenders, pre-populated PAS 91 survey  
9 templates to avoid duplication and a dedicated helpline with two day  
10 turnaround from initial data submission."

11 So RSSB was positively marketing the enhanced RISQ, wasn't it?

12 **A.** It was, yes.

13 **Q.** This is very clear and coherent messaging from the RSSB?

14 **A.** From Network Rail and the RSSB, yes.

15 **Q.** And it says the buyers and suppliers were very positive about it. Yes.

16 **A.** The suppliers and buyers quoted in here, yes.

17 **Q.** I know you also that you can about the negative messaging and I will come back  
18 to that but I just wanted to look at that first. So if we can turn just back to your  
19 fourth statement to paragraph 154. Here I think part of what you are saying is  
20 your intention was to offer a discount to buyers to encourage them to move to  
21 TransQ. That was important to encourage the buyers to move so to?

22 **A.** So I think our intention and there is quite a well documented communication plan  
23 that spans all the way back to I will say September 2017 when we first  
24 launched the e-mail to the market telling them was really business as usual.  
25 So we would have issued new business schedules for buyers -- because we  
26 have an overarching contract, we would have issued that service schedule,

1 similar to when we moved from Link-up to RISQS, which was at the point of  
2 renewal, and, you know, whether it was a little -- we were intending to do  
3 exactly that again, basically do the same thing that happened previously, just  
4 issue a new service schedule at contract renewal point to take away the  
5 element that referred to RISQS basically.

6 **Q.** Okay. Again I want to come back to some of that in a little bit, but just to be  
7 clear, if a buyer was a free subscription on TransQ, multi-homed on TransQ  
8 and RISQS and didn't mandate its suppliers to be on TransQ, if its suppliers  
9 also needed to be on RISQS because of another buyer, the suppliers wouldn't  
10 likely choose to pay for both and RISQS and TransQ, would they?

11 **A.** Sorry, can you repeat that.

12 **Q.** I am just saying if you have got a buyer on TransQ on a free subscription basis?

13 **A.** Correct.

14 **Q.** Because you offered it for free. They are also remaining an RISQS?

15 **A.** Correct.

16 **Q.** They are not requiring their suppliers to be on TransQ. The suppliers can  
17 choose?

18 **A.** Yes.

19 **Q.** If their suppliers have to be on RISQS because of what other buyers are telling  
20 them, they are not likely to multi-home on TransQ if They can avoid the  
21 double cost. Right?

22 **A.** That's correct, yes.

23 **Q.** Okay. Good. All right. I just want to think a bit more about the period from  
24 May 2017 to May 2018 now. So if we can turn still in your fourth statement to  
25 paragraph 96, please and if I just get you to read that just to remind yourself  
26 what you say there. So you thought that the fact that the RISQ to 2750

1 contained the language of equivalence, that would entitle you to offer a  
2 competing service with your equivalent offering; yes?

3 **A.** Yes, that's correct. We assumed since we had been doing it for 20 years, so it  
4 would be acceptable to continue doing it.

5 **Q.** Okay. If we go to G3, please, tab 63. So I think we have already touched on this  
6 email. It is a report of the call by your CEO Susan Cooklin of Network Rail on  
7 15 May 2007. I think that was two days before you withdrew from the RISQ  
8 tender. Now, the impression that Achilles had from this exchange was that  
9 Achilles would be able to continue providing supplier assurance services in  
10 GB Rail as far as Network Rail was concerned; is that right?

11 **A.** That's correct, yes.

12 **Q.** They also said (inaudible) very high level; yes?

13 **A.** That's correct.

14 **Q.** If we could put that away. I then want to turn to bundle C. These are your  
15 exhibits to your witness statement. It is tab 10 when you have it.

16 **A.** It's coming up.

17 **Q.** Tab 10. I think these should be the exhibits to your witness statement.

18 **A.** Sorry.

19 **Q.** They're coming apart, are they?

20 **A.** I might just try and read it like this. Go on.

21 **Q.** So if you turn to page 555, this is the "Transport Sector Strategy" document by  
22 Neil Willings in September 2017. Neil is? What was his position? Was he  
23 Head of Transport?

24 **A.** He was leading the transport. He'd been leading the Audit Team, so he'd been at  
25 Achilles quite a while.

26 **Q.** So he's above Mr Flack or were they on a similar --

1 **A.** They were on the same level. Colin at that point was acting more as a consultant  
2 really.

3 **Q.** Okay. If we go to page 563, please, within this, it actually just says, "Proposed  
4 way forward", 2017, and if you go over the page to 564, then you can see this  
5 was 2017. If you look at the fourth bullet there, it says:  
6 "Believe that we can gain NR recognition of equivalence".

7 **A.** Correct.

8 **Q.** So you were hopeful at the time that Network Rail would give you recognition?  
9 **A.** Absolutely.

10 **Q.** There was no doubt (inaudible) with Susan Cooklin?  
11 **A.** That's correct.

12 **Q.** So you can put that away, that folder. If we can turn to G4, please, and tab 208.  
13 So this is another internal Achilles' document, this time from March 2018 by  
14 Colin Flack. If you can skip to page 2268, please. Sorry. My fault. That is a  
15 confidential document, I think, so I won't read anything out, but if you look at  
16 the bottom right-hand corner and the very first bullet starting "Network Rail ..."  
17 --

18 **A.** Correct.

19 **Q.** -- you can see what that says there, and then if you look at the top of that  
20 column, you can see "H2 goals".

21 **A.** Correct.

22 **Q.** And H2 there -- this was in March 2018 -- is referring to?  
23 **A.** This says "Update this from your work ...", so I'm assuming this was our business  
24 here runs to May. So this will be finishing in May.

25 **Q.** Yes. Okay. That's understood. All right.

26 **A.** I'm guessing this document is (inaudible) because it hasn't been updated from

1 the last couple of sectors that we were looking at previously.

2 **Q.** Understood. That makes sense. We can put that bundle away. Sorry to keep  
3 jumping around so much. If we can go to G6, please, and turn to tab 279?

4 **A.** 279?

5 **Q.** 279, yes. Have you got that?

6 **A.** Yes.

7 **Q.** So this is an e-mail from you internally at Achilles. If you look at the assumptions  
8 which are slightly down the page at point 3. So.

9 "Ken Blackley had stated that NR intended to use RISQS for their principal  
10 contractors. However, it is his view that he cannot and will not mandate this  
11 to be used further down the supply chain. We've not had this in writing, only  
12 verbally."

13 So Network Rail intend to use RISQS for their principal contractors, but at least what  
14 you were told is that Network Rail didn't intend to mandate it further down the  
15 supply chain. Yes?

16 **A.** Yes. There was a lot of noise at this point. I had auditors telling me that they  
17 couldn't use Achilles. I was trying to meet with Ken and with Gillian and to try  
18 to get some clarity and, you know, time was ticking away. That's the root  
19 cause of this e-mail, to be honest.

20 **Q.** And then if we can turn over the page to -- right at the top of the page, point (b), if  
21 you just look at that point for a moment. So you say that:

22 "Principal contractors must have audits from Network Rail but the rest of the supply  
23 chain is free to decide."

24 **A.** Yes.

25 **Q.** So that was your impression at the time?

26 **A.** My impression was the 164 or so principal contractors had to use RISQS.

1           However, the rest of the supply chain was open, but I think this was the  
2           messaging we were going to give. I think what was happening in the  
3           background was the auditors were being told, "No, you can't use Achilles.  
4           You have to use RISQS". There was no clear steer coming from Network Rail  
5           or from anyone else, to be honest, we were speaking to. So we were trying to  
6           be clear in terms of "This is the messaging. We need a clearer approach.  
7           This is how we're going to brief our team", which was we are recognised, we  
8           are equivalent and this is -- this all starts, as we understand it. So it was an  
9           internal briefing.

10 **Q.** Okay, and then if we just turn within that bundle to tab 300, please, so this is an  
11           e-mail from Chris Methven, your chief revenue officer on 11 April 2018. If I  
12           can ask you just over the page, so 319, right at the bottom there's  
13           a section saying "Context". If I can just ask you to remind yourself of that.

14 You can just read the bottom of the page, you don't need to read the rest of it.

15 So Achilles' understanding as at 11 April 2018 that the only business Achilles  
16           couldn't go after was the buyer fees and audit fees directly paid by principal  
17           contractors; that's what this is saying?

18 **A.** I think that was our belief through lack of communication and we were trying to  
19           be pretty punchy about it, to be honest.

20 **Q.** But that was your belief, that was your impression after various announcements  
21           made by Network Rail to its supply chain from 2017 onwards?

22 **A.** I think this is what we were trying to communicate to people internally.  
23           Everyone -- and I think there's lots of other correspondence within Achilles  
24           where people were worried about the lack of clarity as well. So this was: this  
25           is how we are going to position this, this is how we are going to position us as  
26           a business: business as unusual. We can go after everyone. Because we

1 haven't had any clarity. I think that's why we kept on writing this down and  
2 trying to give clarity to our internal teams.

3 **Q.** But just to be clear, it says in that "our current understanding is that the only  
4 business we can go after". So that is your chief revenue officer saying at that  
5 time that was Achilles' understanding; yes?

6 **A.** Correct.

7 **Q.** Then if we can go to tab 356 in here: so this is 26 April 2018 email from  
8 Colin Flack explaining that a question asked at a RISQ buyer event on 26th  
9 April showed that only Sentinel audits conducted by RISQ could be  
10 recognised. You can see in the middle of the page over the page starting  
11 "Thanks Colin". I am just trying to find the ordering of this. Right at the  
12 bottom of that page on 3332 it says:

13 "This changes the game somewhat. We need a new plan and fast."

14 Then your COO responds in the middle of the page:

15 "I agree this changes the game and we need to aggressively go another course."

16 Is that right?

17 **A.** Yes. I remember exactly where I was when I got this phone call to be honest,  
18 before the e-mail from Colin, telling us that our assumptions and, in fact, the  
19 auditors and all the rumblings people had been saying to us were correct and  
20 formally Network Rail had said they wouldn't recognise us and that was the  
21 first point where we had that realisation that actually what we had been doing,  
22 we felt a game had been played to be honest.

23 **Q.** That's when the penny dropped?

24 **A.** That's when the penny dropped, correct.

25 **Q.** If you just turn back to your full statement to paragraph 156. Yes. If you keep  
26 the folder available. Here you say:

1 "By May 2018 when it was apparent that Network Rail approval would not be  
2 forthcoming~..."

3 So obviously this was when you realised at this point, this was the game changing  
4 moment --

5 **A.** That's correct.

6 **Q.** -- when the penny dropped?

7 So you thought during in period -- we have been looking at the period from May 2017  
8 right up to April 2018. During that period you thought you would be  
9 recognised as equivalent and you hadn't heard Network Rail tell you anything  
10 different. So other than the principal contractors would need to be assured  
11 through RISQS. Yes?

12 **A.** Correct.

13 **Q.** I am just looking at the time. This might be a good moment just to pause, if that  
14 makes sense.

15 **THE CHAIRMAN:** Yes. Five minutes.

16 **MR WENT:** Five minutes. Very good.

17 **THE CHAIRMAN:** You will no doubt remember you are not allowed to talk to  
18 anybody about your evidence when you are in the witness box.

19 **A.** Yes. Thank you.

20 **(Short break)**

21 **MR WENT:** If I could ask you to turn to G3, please, and tab 76. So I think that you  
22 had issued a release to RISQS members on 14th September 2017. You  
23 probably recall that?

24 **A.** That's correct, yes.

25 **Q.** This is the message that went to RISQS buyers on that date. This is actually the  
26 one that was sent to Alstom I think. Here you are saying if you turn over the

1 page, so 1646, you are saying:

2 "Achilles will continue to offer rail assurance services through Link-up."

3 **A.** That's correct, yes.

4 **Q.** It says second paragraph down I think:

5 "The service that you use today will remain in place. Link-up is the proven,  
6 compliant and established service that fully meets the needs of the GB Rail  
7 industry. Building on this Achilles is committed to further investing and  
8 developing Link-up to meet the evolving needs of our customers."

9 Yes. You see that?

10 **A.** That's correct, yes.

11 **Q.** There is no mention here, is there of any specific changes to the service or any  
12 specific new functionality?

13 **A.** No. I think there is a comms plan at that we put together before this, which must  
14 be in here somewhere, which was really focused around actually not trying to  
15 alarm anyone or doing mass marketing or anything like that. It was really: it is  
16 business as usual, we are going to continue to provide your service, and that's  
17 how we breached all of our internal and effectively this e-mail was that  
18 external loo he.

19 **Q.** As I said, this is the one that was sent to Alstom. If you go back a page at the  
20 bottom they say they are interested in finding out more and may be interested  
21 in attending the event at County Hall, which I think was happening on  
22 October 10th from my recollection.

23 **A.** That's correct.

24 **Q.** If we could turn to tab 90, please, in the same folder and when you get there, just  
25 over the page to the second page there. So this is an e-mail from Neil  
26 Willings. If you look at point two here, it is Alstom saying that it thinks there

1 was only room for one supplier pre-qualification programme and as a supplier  
2 they had no desire to have to be on two different schemes; yes?

3 **A.** Yes. I think here Alstom were particularly interesting because they were not  
4 a big customer of us. I think they were a buyer customer. They are more  
5 supplier side. Actually that is why we were interested in their response to  
6 start W the big bonus he said highlighted here was the fact we would have all  
7 the data and we could continue to service people as well.

8 **Q.** So again the idea that suppliers want to avoid multi-homing if They can help it.  
9 That seems to be part of the message there; yes?

10 **A.** Yes, exactly.

11 **Q.** Okay. I think we can put that folder away. Just going back to your fourth witness  
12 statement, paragraph 92, please, in the third sentence there I think it is, third  
13 or fourth, towards the bottom:

14 "The belief held by me and other senior commercial officers in Achilles at the time  
15 that we could retain a very substantial part of you are existing real  
16 subscriptions and revenues and add value to it."

17 That's what you say there, yes?

18 **A.** Yes, that's correct.

19 **Q.** Let me just turn on to paragraph 151, please. Just a similar message I think  
20 there. Given your industry reputation et cetera, you say you were confidence  
21 that the vast majority of customers would choose to stay with Achilles.

22 **A.** That's correct.

23 **Q.** Much the same message.

24 Then at paragraph 184 you say that Achilles was extremely confident that the quality  
25 of its certificate vase at May 20, 2018 would have led to a large number of  
26 suppliers choosing to stay with Achilles either instead or as well as joining

1 RISQS; yes?

2 **A.** That's correct.

3 **Q.** If we go back to your bundle C again, tab 10, and when you have it, if you can  
4 turn to page 555. Do you have that? This is just the UK sector presentation  
5 from September 2017 we have already looked at. If you go to page 563,  
6 please, again that's just the proposed way forward. Then if we go on to  
7 page 565 and then work stream 1.

8 I am not certain whether this is confidential or not.

9 **MR WOOLFE:** (Inaudible).

10 **MR WENT:** Okay.

11 So if you look at work stream 1, if you look at the heading there wither it says  
12 "salvage". Yes?

13 **A.** Yes.

14 **Q.** And if you look at the second bullet, please, where it says "improve"?

15 **A.** Yes.

16 **Q.** And then the next bullet, please.

17 **A.** Yes.

18 **Q.** And then the next one after that it talks about some buyers. Yes?

19 **A.** That's correct, yes.

20 **Q.** So here at least it is not saying that you thought that the majority of buyers and  
21 suppliers would choose to remain on TransQ?

22 **A.** I think it was saying we didn't pursue the aggressive comms strategy. The whole  
23 principle was let's not be pushy about this. I can probably find it if I looked  
24 hard enough: there is a whole comms strategy around this which defines what  
25 we are going to say and what we are going to do, which is business as usual.  
26 So this is some can choose to remain, some don't, but we don't have this

1 pushy comms. That was the whole purpose of this.

2 **Q.** So this was an internal strategy document by your head of transport or a senior  
3 person within the transport group, yes?

4 **A.** Correct, yes.

5 **Q.** So these were his views at the time.

6 We can put that binder away. If we can go to bundle G3, please, tab 71.

7 **A.** 71.

8 **Q.** 71, yes. This is actually just a different version of Neil Willings' strategy  
9 document. The bundle index dates this version at 4th September 2017. So  
10 this is before your announcement to RISQS members we saw a moment ago  
11 and it is before Network Rail's announcement to its supply chain later in  
12 September.

13 If we can turn to page 1631, please, if you look they bottom right-hand corner there  
14 is an H2 goal there where it starts -- right at the bottom it says "10". So this  
15 was Achilles' aspiration at the start of September 2017 that it would have  
16 these agreements -- verbal agreements from RISQS buyers in H2; yes?

17 **A.** Yes.

18 **Q.** Then if we go to 1637, in the same document and if you look under -- there's  
19 a section saying "KPI" and if you can read what it says starting "full".

20 **A.** Correct. Yes.

21 **Q.** And then under "confidence of achieving", you can see what's written there as  
22 well.

23 **A.** Yes.

24 **Q.** I won't read it out, because I think this is all confidential.

25 So I just want to compare that document with what you say at paragraph 91 of your  
26 statement. So here you say included confirmation that (inaudible) included

1 confirmation that 10 buyers had given verbal commitment to stay with RISQS  
2 and not move to the new RISQS contract; yes?

3 **A.** Yes, that's correct.

4 **Q.** But that's not consistent with the internal document we just looked at, which  
5 talked about an aspiration to have ten oral agreements by H2; yes?

6 **A.** So if I look at 91, it was confident of the prospect of business on May 2018. At  
7 a kick-off meeting in early September ... so I think this was when we were  
8 going through that process. I haven't put the exact date, but when we -- we  
9 issued the comms and I think if you look at actually straight after that, 72, the  
10 whole comms plan is there in terms of doing it. When those comms went out,  
11 the overwhelming response we had back from the market was incredibly  
12 positive and I think it was here if you look at it, it says, you know, "we are  
13 continuing business as usual". We weren't going to send out lots of  
14 communications because we weren't supposed to use the word "Link-Up" in  
15 our marketing, but what we were doing was having individual communications  
16 with buyers across the industry. We were having one to ones. We were  
17 having phone conversations. So as a result of at that process we got positive  
18 feedback from lots of buyers.

19 **Q.** Understood, but I am looking at the internal documents at the time and seeing  
20 what they reflect at the moment --

21 **A.** So that was early 2017. And then this was -- later only a week or so later we  
22 issued the comms.

23 **Q.** We can move on and see what your internal documents say after that. So if we  
24 go to G4, please. I think we can put G3 away for the moment. G4, tab 152,  
25 please. So this is one of your documents, your own.

26 **A.** Yes.

1 **Q.** So Link-up ability update now and next. If you can turn to 1902 within it. No,  
2 that's the front page, isn't it? Just turn over the page.

3 **A.** Uh-huh.

4 **Q.** You say under the heading "engagement so far":  
5 "Positive response from buyers in proceeding with our own solution."  
6 Then you list five buyers.

7 **A.** Correct, the ones that I had personally spoken to. So this was my presentation,  
8 what I had done.

9

10 **Q.** But this is a general presentation about Link-Up ability new and next.

11 **A.** I was asked to give an update of what I done and my proposals around Link-Up.

12 **Q.** You were obviously key to developing the strategy around this, with Colin Flack  
13 and others?

14 **A.** I was key, but Colin was also working in parallel with other customers that aren't  
15 mentioned in here. That there are conversations that are positively, and  
16 I don't want to say the names of the companies to be honest, because this is  
17 I am assuming still confidential.

18 **Q.** But you were working very closely with Colin throughout this period?

19 **A.** Yes, I was.

20 **Q.** But in this presentation you didn't think to mention that you had seen interest  
21 from some buyers and Colin had seen interest from other buyers; you didn't  
22 think it was worth mentioning that?

23 **A.** No, this was my presentation of what I had done personally.

24 **Q.** Okay. As we said and you just explained, this was after you put out the  
25 communication in September and after you held the event at County Hall on  
26 10th October; that's right?

1 **A.** Correct, these are my personal engagements with buyers.

2 **Q.** If we can turn in the same bundle just on to 170, please. So this is an internal  
3 Achilles' e-mail of 24th January 2018 and then right at the bottom couple of  
4 paragraphs up you say:  
5 "One request for you is simple."  
6 Then basically there's a request to you and Colin to identify the first five to ten buyers  
7 that Achilles must retain; yes?

8 **A.** That's correct, Yes.

9 **Q.** So the top five to ten, between you you have been asked to say who those are.  
10 All right. Then if we can turn on to tab 181.

11 **A.** 181?

12 **Q.** 181, yes. Again this is another Achilles' internal e-mail from 6 February 2018.

13 **A.** Uh-huh.

14 **Q.** And then within here, at point (a) indented you can see that even then you still  
15 envisaged that you might even retain Network Rail as a buyer. Yes?

16 **A.** I think to be honest at this point in time it was pretty chaotic. We were receiving  
17 nothing. We were hearing things from auditors, things from buyers, things  
18 from suppliers, different messaging from Network Rail, so I think everyone  
19 had an opinion on who we would retain at this point in time.

20 **Q.** This is one of the senior project managers and if you look at the penultimate  
21 bullet in her email, right at the end:  
22 "At least reporting on possibly on something that Colin has said, we would be  
23 satisfied in year one if we were to retain 25% of Suppliers."  
24 **A.** Correct.

25 **Q.** But it doesn't say that this was your actual expectation, doesn't provide any  
26 back-up to that figure obviously.

1 | If we can go to 186, please.

2 | **A.** Just got it here.

3 | -

4 | **Q.** That's in the same -- I am still in G4. Tab 186.

5 | **A.** Yes.

6 | **Q.** So again this is another internal e-mail from 21st February 2018 and it appears

7 | that a business case has been prepared for the company named there. Yes?

8 | That's one of the buyers who appears to have expressed interest previously,

9 | one of the buyers you mentioned in your presentation of December. Yes?

10 | **A.** Correct.

11 | **Q.** If we can turn on to 202 within this same binder, so these are referred to as

12 | board slides in the index and the bundle index puts them at 1st March 2018.

13 | So if you go to page 2206 -- it may not be. Give me a moment. Just give me

14 | a moment to check I am in the right place. Yes, I think it is. Sorry. Just give

15 | me a moment. Ah, yes. Right at the bottom under "transport" on 2226. Then

16 | there is a heading "The TransQ global product will replace" and then right at

17 | the end of that there's a mention that three companies are all interested.

18 | **A.** Yes. I am not sure whether these are the final ones, because it still says "to

19 | update", but it does say that down there, yes.

20 | **Q.** But this is three. There is consistency, though. You mentioned five in

21 | December. We have three of those here I think. So there's consistency

22 | through the time period here; is that right?

23 | **A.** There is three there, that's right.

24 | **Q.** Only three.

25 | **A.** We also have Deutsche Bahn here. If we do think to the point of time there were

26 | more than three. It is just we listed some of the key ones on here.

1 **Q.** We will see in a moment from some other documents there is a document that  
2 RSSB raised that confirmed that Achilles, you were planning to offer  
3 competing service and we will see without saying that wasn't going to be  
4 possible. So again this comes after that release by the RSSB. We will come  
5 on to the (inaudible) in a moment, but just in terms of the chronology.

6 What I would suggest to you is that the level of customer interest noted in the  
7 contemporaneous documents at the time, it just simply isn't consistent with  
8 the idea that you were confident the majority of customers would move to  
9 TransQ?

10 **A.** I don't agree with that. I think there's listing different customers on here. We're  
11 listing the key ones, and if I go back to the whole principle that if you have one  
12 buyer that has a strong messaging, the majority of suppliers will remain there.  
13 So for us it was about getting those key few buyers to make sure that the  
14 suppliers stayed and they see the value through some big buyers. That's  
15 what we just would basically report on some of the big names.

16 **Q.** Okay. When looking at the level of customer interest I think it is important to  
17 appreciate you didn't have a freehand in advertising your new service in the  
18 run-up to 1st May 2018. So we have seen also you issued a release to all  
19 RISQS members in September 2017 and then you had the event at County  
20 Hall on 10th October, but I just want to see what was happening just before  
21 that event. So I think if we keep out G4, because I will come back to at that in  
22 a moment, and just go to G3, tab 115, I am sure you remember receiving this  
23 letter. This is a letter dated 9th October 2017 from RSSB to Achilles, basically  
24 raising concerns over the performance of the contract. That's right?

25 **A.** That's correct, yes.

26 **Q.** And RSSB asserted that Achilles advertising competing services during the

1 session was a breach of contract; yes?

2 **A.** That's right, he yes.

3 **Q.** There is reference to the fact that Achilles can't use the name Link-up without the  
4 permission of RSSB; yes?

5 **A.** That's correct, yes.

6 **Q.** And over the page it reminds Achilles -- I think it is the second sentence right at  
7 the top under "communications" -- that all RISQS related communications  
8 need to be approved by the RISQS scheme manager; yes?

9 **A.** That's correct, yes.

10 **Q.** Okay. We can put that folder way and just go back to G4, please. I just want to  
11 go back briefly to your presentation of December for a moment. So that's  
12 back at tab 152. If you get there, you can turn to page 1906.

13 **A.** Uh-huh.

14 **Q.** So this slide shows what you hope to have done at certain points in time. So if  
15 you look at the bottom left-hand corner and the heading "by the end of  
16 January 2018", then about halfway down the bullets it says -- there's one  
17 starting "before marketing".

18 **A.** Uh-huh.

19 **Q.** Three bullets up from the bottom it mentions "flexible".

20 **A.** That's correct.

21 **Q.** And then "analytics".

22 **A.** That is correct.

23 **Q.** Then if we look seven bullets above that headed "by the end of April 2018" and  
24 then it says "commence". I will not read this all out, because I think it is  
25 another confidential document. There is a bullet starting "commence". It talks  
26 about transition. It says "focus group". Then the penultimate bullet there says

1 "launch". You can seek what's written there. Then the bullets under  
2 May 2018, that starts with "relaunch". Talks about establishing the group.  
3 Then start engagement with community (inaudible). Then at the bottom  
4 right-hand part under heading "by the end of December 2018", so this is  
5 a year on, there's a bullet there starting "establish global".

6 **A.** Correct.

7 **Q.** Also "establish global focus".

8 So it looks as though here you didn't -- at least at this point in at that December 2017  
9 you weren't gearing up completely for a TransQ global offering; that was  
10 waiting till a bit later?

11 **A.** So I think -- am I allowed -- this is not confidential, I am allowed to talk freely?

12 **MR WOOLFE:** This one isn't actually marked in the index.

13 **A.** So the plan is we were already engaging -- if you go back to the customers that  
14 are in the list previously, we were seeking to global customers. That's who we  
15 thought was the biggest market, those who were working across different  
16 sectors globally and in the UK as well for utilities and construction. So we  
17 were doing that, but the plan was for us by the end of December to really  
18 have that global focus group. It wasn't that we were just going to start it at the  
19 end of December, it was all in flight, we had a whole project team from --  
20 I want to say from the start of the RISQS bid actually and that project theme  
21 did never stop working. We had A whole theme working on this.

22 **Q.** Okay, and then if we could turn on to tab 161, please. So this is the  
23 December 2017 RISQS newsletter, the back end we have already had a look  
24 at. If we just see your CEO's reaction to it. The first page here, right at the  
25 bottom, second sentence with where it says "need to get". I think it is marked  
26 as confidential. So I will just let you read that part to the bottom. So your

1 COO wanted to push matters forward; is that right?

2 **A.** Yes, this is the point we were receiving different messaging from different people,

3 I think its right to say.

4 **Q.** Slightly up the page Colin Flack's e-mail, if you can read the sentence starting

5 "Katie and I", just that very first sentence.

6 **A.** That's correct, yes.

7 **Q.** So at this point in time after the RISQS (inaudible) start pushing matters more

8 quickly now; yes?

9 **A.** Yes, I think this is when we started to get communications from suppliers in

10 particular that we were being, stitched up is the way to say it and actually

11 things were being said in the background that: you were not going to be

12 compliant on that. And it is not what we were hearing directly. And I think if

13 you look at the rest of the e-mail chain, it's -- and there's other e-mails to the

14 same extent, that we were confused because it is not the massaging we were

15 getting from the like of Graham Cox and the RSSB. We felt that we were

16 being led astray, put it that way.

17 **Q.** I will go in a moment to look at some of the announcements, communications

18 that were put out by Network Rail and RSSB. So we can see what the market

19 was being told. We will come on to that in a moment.

20 If you can turn to the next tab and then just around the second hole punch I think it is

21 you can see again what your COO thinks is happening here if you need that:

22 "Thanks. Sounds fine."

23 Then on from there. So this was the concern that RSSB were trying to transition all

24 of their new solution -- everyone to the new solution and so Achilles needs to

25 get out in front; that was his response, wasn't it?

26 **A.** Uh-huh, correct.

1 **Q.** Then if we go on to 178 in this tab -- in this folder I mean. This is Achilles'  
2 internal e-mails at the start of February. So at the top of the page it said the  
3 company Network Rail there was one of your customers who was positive  
4 about the solutions that Achilles offer; yes?

5 **A.** Yes, that's correct.

6 **Q.** And then the e-mail also says that it is Colin's Flack's call as to what can actually  
7 be said to the company at this time; correct?

8 **A.** That's correct. I think this is when all of our customers are asking us "Are you  
9 going to be Sentinel equivalent?" and we couldn't give a clear message.

10 **Q.** If you can turn to G4 -- sorry -- 179, just going on to the next one. If you look  
11 right at the bottom of the page, so the second half of the page, this is  
12 an e-mail from your COO on 5th February and then if you could read the  
13 sentence, just the sentence starting:  
14 "I am keen to complete ..."

15 So this was all in process at the start of February, is that right?

16 **A.** I think we had a detailed project plan that we tracked weekly and it was all being  
17 monitored. The Chief Commercial Officer wanted an update on it, that is  
18 correct.

19 **Q.** And asking for an end to end review.

20 Then if you could go to 181(a), which in mine at least comes after 182. I don't know  
21 whether that's the same for you.

22 **A.** 181. I have got 181. Is that right?

23 **Q.** But it is 181(a). It comes after 182 in my bundle.

24 **A.** I have 182(a).

25 **Q.** I have got it marked -- ah, it looks like a 1 to me. So 182, which makes more  
26 sense.

1 So at the end of this e-mail chain at 2083(d), this is the RISQS transition guide  
2 bulletin that was sent to RISQS members on 6th February 2018. Then if we  
3 go back to 2083(b) and right at the bottom of that page, you will see  
4 Colin Flack comments that:

5 "This is good news. It is the first recognition that we are supplying a scheme and it  
6 was their opportunity to say that it's not valid."

7 He also says that Achilles very nearly have all of our collective ducks in a row and he  
8 is pretty confident that Achilles could start making some proper noise toward  
9 the back end of next week.

10 So again this is all a work in process in terms of finalising communications and next  
11 steps; yes?

12 **A.** Yes. I think there was a fair amount of discussion internally around should we  
13 just go ahead and say again we are compliant when we knew there was all  
14 this noise in the market, and when this transition guide came out, there was  
15 a debate as to whether we should just sort of bite the bullet and go ahead and  
16 say "we are compliant".

17 **Q.** We will come in a moment to the reasons given in the internal documents for the  
18 delay, but I suggest to you that's not what the internal documents say as to  
19 the reasons for the delay. We will come on to that in a moment.

20 Turning back to the first page in this tab, you say right at the bottom -- this is from  
21 you.

22 **A.** Uh-huh.

23 **Q.** Right at the bottom:

24 "Achilles really need to move forward our comms."

25 So at this point you were anxious to move the comms forward?

26 **A.** Correct.

1 **Q.** Then Colin Flack replies, just below the second hole punch, that it shouldn't be  
2 done in haste, and at the end of his e-mail he says:  
3 "The plane is about to take off."  
4 Then you rely at the top of the page that you agree that Achilles needs to be  
5 cautious on comms. You then mention that you have heard that people are  
6 incredibly concerned about working with Capita, given recent negative press;  
7 yes?  
8 **A.** Yes, I thought we were missing a trick by not just not saying we are complaint  
9 and we could crack on and do this.  
10 **Q.** And if you don't act quickly you will have missed the boat --  
11 **A.** Exactly.  
12 **Q.** -- to get some mileage out of that?  
13 So you were keen to move the communications forward. But you didn't get any  
14 communications out at that stage, did you?  
15 **A.** No, we didn't, because there was real concern that if we communicated to the  
16 customers, and actually they were right in the end, the feedback Colin was  
17 having was very much that actually: you are not compliant and you are going  
18 to look ridiculous when you send these communications out again.  
19 **Q.** Okay. If we go to tab 185, please. Again this is a lengthy e-mail from Colin Flack  
20 to Estelle Whittaker on 28th February 2018. So in the first answer Colin is  
21 setting out that the plan is to have the more complete package to meet the  
22 needs of the transport sector in general. You can see that in the second line,  
23 "the complete package". Then you can see there is the part in brackets a few  
24 lines down where he mentions that:  
25 "Achilles has a great relationship with Great Western but haven't expanded that  
26 relationship across the whole First Group."

1 Yes?

2 **A.** Yes.

3 **Q.** Then in the second answer, just below the second whole punch, Colin Flack says  
4 at the start of this response that:

5 "Achilles has been cautious in the communications to date."

6 And that's what we have seen, there is caution. He then identifies in the first  
7 sentence the reason for the caution. So he says:

8 "Not least due to the difficult relationship with RSSB and the drawdown of RISQS."

9 That's right, isn't it?

10 **A.** That's correct. Exactly what I was saying.

11 **Q.** So this is a contemporaneous document giving the reason for the delay in  
12 communications. It's the difficult relationship with RSSB and the drawdown of  
13 RISQS. That's right, that's what's said here at least?

14 **A.** And the drawdown -- it is the lack of clarity around the whole situation, absolutely.

15 **Q.** Well, let's read on. It says:

16 "We are currently at the latter stage of developing a detailed comms plan, which will  
17 be coming into action within the next ten days."

18 So again, at this point of time on 18th February the comms plan still isn't ready;  
19 right?

20 **A.** I think if you go back to the beginning of where I showed the document in  
21 September, we had a comms plan. I think we wanted to develop it, we had  
22 a whole project plan around this. It wasn't a comms plan. People were  
23 genuinely concerned from a reputational perspective that we were going to  
24 issue something that was factually incorrect because we were not getting  
25 clear guidance and that's where I completely disagreed with Colin at some  
26 point and said to him: this is wrong. We have to get ahead of the game. We

1 have to say that it is, and people like our chief legal officer were saying "No,  
2 we can't because we have not got clarity and it is going to give us a big  
3 reputational damage. So I think that's where there is this you know --

4 **Q.** Colin Flack as head of transport is saying that you were in the latter stage of  
5 developing a detailed comms plan; that's what he is saying in this email?

6 **A.** I think he had probably had a comms plan, I think I had a comms plan, I think we  
7 all had differing views because of the chaos of the situation.

8 **Q.** As I said, there is mention of the difficult relationship with RSSB and the draw  
9 down of RISQ. If we carry on, he says:

10 "We have a slightly schizophrenic existence at the moment in that there is no  
11 restriction on what we say and do with the development of communications  
12 surrounding TransQ global to the wider transport community. The same could  
13 not be said of specifically UK Rail, ie the target RISQS audience. We do now  
14 believe that we have a deep enough understanding to allow us to  
15 communicate effectively with our post 1st May rail customers."

16 So there's also mention here that there has been delay tomorrow comms because  
17 you didn't previously think you had sufficient understanding to communicate  
18 effectively; that's what he is saying, yes?

19 **A.** That's correct, yes.

20 **Q.** And then in the last sentence of this paragraph you can see that he talks about  
21 lost time, but that's not necessarily a bad thing, Colin goes to on to say, that  
22 RSSB has not been giving a clear and coherent message. Although when we  
23 looked at the December release by RSSB, you confirmed that you thought it  
24 was a clear and positive message?

25 Yes?

26 **A.** I thought it was, because they didn't say we weren't an equivalent. And I think

1 that was the point of the last ...

2 **Q.** If we turn on to tab 201. So this was the transport strategy for 2018 by  
3 Colin Flack. Just for reference, there are a few versions of this in the bundle.  
4 There's also one at G4, tab 208, one at G4, 209 and also possibly one at 214  
5 as well.

6 Anyway, for this version if we turn to page 2202. So if you can read the sentence  
7 starting -- if you can read the first bullet to start with. So there's mention of  
8 original contract there. This is expressing concerns about the concession  
9 contract, yes?

10 **A.** So this is -- if you look at the legacy issues regarding the particular contract and  
11 restricting our room for manoeuvre and product development, so RISQS was  
12 very restrictive in terms of the questions you asked, the responses you were  
13 going to get, the audits. The way that we worked was very focused. Actually  
14 I think that's what this is saying.

15 **Q.** Then if we turn the page and look at the second bullet there starting "The  
16 decision".

17 **A.** Correct.

18 **Q.** If you can read that.

19 **A.** Yes.

20 **Q.** Do you accept what he was saying that?

21 **A.** That may have been Colin's view. I think we documented quite clearly why we  
22 withdrew from the tender. I don't think Colin was in the organisation at the  
23 point we withdrew from the tender, so maybe we had not expressed it clearly  
24 to him as an individual, but ...

25 **Q.** Then you look at the third bullet.

26 **A.** That's correct, yes.

1 **Q.** And that stems obviously from the letter you received from RSSB in  
2 October 2017.

3 **A.** And I think this was a concern again that we were not going to have this Sentinel  
4 equivalent, so we would not be able to go to market. This was March, this is  
5 when things were coming that -- you know, the wheels were coming off  
6 effectively.

7 **Q.** Then just read the fourth bullet as well on that page. I think it is just revisiting  
8 themes that we have seen already, but if you can just read that. Those are  
9 themes we have seen already. Yes?

10 **A.** Yes, that's correct.

11 **Q.** If we turn on to 205, please, so this is a position paper by Colin Flack dated  
12 3rd March 201. If I can get you to read the second sentence under the  
13 background section, starting "However".

14 Again, that's just picking up on a point we saw in the presentation just now; yes?

15 **A.** That's correct.

16 **Q.** Then if you look at 2233, over the page. Then there is a top set of bullets here.  
17 If you can just get you to read the final bullet there starting:

18 "It is clear that ..."

19 So there is obviously a sentence here that a significant part of the supply chain will  
20 follow Network Rail; yes?

21 **A.** Yes, that's correct. If they were mandating they had to use it, then of course they  
22 would follow.

23 **Q.** Then if I can get you to read the text at the bottom under -- bottom of the  
24 page under the "Achilles' response". I think if you can read all of that. Have  
25 you read that to the bottom of the page?

26 **A.** Yes.

- 1 **Q.** So it confirms that you couldn't use the Link-Up name during the contract?
- 2 **A.** That's correct.
- 3 **Q.** You couldn't compete with RISQS during the contract. Yes?
- 4 **A.** That's correct.
- 5 **Q.** It confirms that there was certain baggage with the brand name mentioned there;
- 6 yes?
- 7 **A.** Yes, Colin and I had a disagreement on this, because I thought Link-Up was
- 8 actually quite a good historic name to use that people associated. It had been
- 9 there for 20 years and actually people genuinely do refer to it and still do
- 10 today, even if they are not Link-up members, as Achilles Link-up. So, you
- 11 know, Colin and I had a big did he was agreement whether we should call it
- 12 Link-Up or TransQ, so that's where that comes from, that sentence.
- 13 I recognise from correspondence that Colin and I had the discussions that we
- 14 had.
- 15 **Q.** But this was Colin's view as head of transport?
- 16 **A.** It had a bit of baggage, yes.
- 17 **Q.** And the sentence at the top of the next page, I think this explains the use of the
- 18 name TransQ; yes?
- 19 **A.** That's correct, yes.
- 20 **Q.** Then if you can read on page 2235 if you can read the part -- just right at the top
- 21 of the page the part starting "However"?
- 22 **A.** Uh-huh.
- 23 **Q.** I don't think I am breaching any confidence because it is something there is
- 24 reference in the tribunal judgment, but it is acknowledging that Achilles had
- 25 some reputation issues during the contract period; yes?
- 26 **A.** I agree. Big customer base. Some people loved us. Some people didn't love us

1 and there were lots of people between.

2 **Q.** Then if you turn over the page and look at the top bullet there, if you just read the  
3 first sentence "As a follow-up ..."

4 **A.** Uh-huh. Yes.

5 **Q.** So obviously it shows the difficulties with communicating with RISQS customers?

6 **A.** Exactly, which is why we adapted the approach right from September to have  
7 individual one-to-one conversations with customers rather than any sort of  
8 mass marketing.

9 **Q.** But it is showing the difficulties stemming from the non-complete that you had  
10 imposed on during the concession contract; that's the reason for it?

11 **A.** It meant we couldn't go out and advertise in press, but actually we were having  
12 those conversations with buying organisations that you see documented  
13 previously. And we did take the risk, we did issue an e-mail that strictly  
14 speaking we shouldn't have to set the tone and then carried up in terms of  
15 one-to-one conversations with people.

16 **Q.** Then if you can read the first sentence of the next point, starting "One final point".  
17 This is confirming that you weren't putting communications out because of the  
18 non-compete you were subject to in the concession contract?

19 **A.** That's correct, yes.

20 **Q.** If we go on to tab 208, please, I think this must be a different version of  
21 Colin Flack's Transport Sector strategy. If we go to 2268, page 2268 within  
22 that, if you look at the bottom right-hand corner, right at the bottom, the  
23 bottom square bullet. We may have looked at this already, but it is that same  
24 point again about the 10. Yes?

25 **A.** So I don't think this has been updated. I think this is just a cut and paste from the  
26 slide deck in September' 17. It even says on here "update this" and hasn't

1 actually ever been updated. So it said in September 2017, ten verbal  
2 agreements in H2 and this is the same slide from September' 17.

3 **Q.** Yes, but an internal Achilles' strategy document referencing the ten verbal  
4 agreements here?

5 **A.** Yes, because I think if we had ten, we could debate internally how many buyers  
6 do you need to have a strong community and that ranges from three to ten.  
7 So we had aimed for ten verbal agreements from buyers.

8 **Q.** Then if you just turn on to page 2273 and under "assumptions" -- have you got  
9 that? Page 2273 under "assumptions", the very first point about sustainability.  
10 You can see that?

11 **A.** Sorry. Yes.

12 **Q.** It talks about a time period for the sustainability solution. Yes?

13 **A.** It says 30/11/17.

14 **Q.** Yes, and talks about a time-frame when it can be delivered?

15 **A.** I am not sure that's whether it is delivered or whether it has been delivered by  
16 then.

17 **Q.** Then if you can read the three bullets.

18 Well, we can't see what quite is at the top there, but ...

19 **A.** I am not sure whether this is a generic document that has half attempted to be  
20 updated. Really I am not --

21 **Q.** If you go to page 2276 and if you just read the three bullets right at the top there,  
22 again we have seen these already. And also the confidence of achieving that,  
23 you can see.

24 Then if you look under "target" just to the right of that it says ten again. You can see  
25 that?

26 **A.** Yes.

- 1 **Q.** You can see "by when" it says 30th April 2018. So this has clearly been updated  
2 and said that that is --
- 3 **A.** The ten buyers retained in Link-up.
- 4 **Q.** That was the aspiration, to have ten --
- 5 **A.** Correct.
- 6 **Q.** Okay.
- 7 Then if we go back to pages 2271, please. There is a slide here looking at execution  
8 of strategy across three aspects. We can't see what's written here, but it says  
9 that sadly Colin doesn't think that think of this was followed through on.  
10 Right?
- 11 **A.** Yes, I am not sure how much Colin was talking with people, because if you go  
12 back to some of the slides I was doing at the time, there was lots of e-mails  
13 and meetings happening between Colas and various other people. So I think  
14 it probably is a bit reflective that we were not that joined up as an organisation  
15 at this point.
- 16 **Q.** Okay. If we turn back now within the same folder to 187, please. This is not  
17 terribly readable. I am not going to spend very long on it but this is dated  
18 I think 21st March 2019 and this is described as the business readiness status  
19 dashboard in the bundle index. This is obviously really detailed. It obviously  
20 shows there were many moving parts still at 21st March 2018 or, to use  
21 Colin's metaphor, many ducks to get in a row. Yes?
- 22 **A.** You can see there on the market engagement on the back, conversations were  
23 happening. Colin and Mel owned those but there were lots of people involved  
24 in this because lots of these are existing customers as well, that are in other  
25 communities.
- 26 **Q.** Yes. He mentioned some specific customers there. The time-frame is March to

1 June. Yes?

2 **A.** That's correct, yes.

3 **Q.** So this is sort of happening at the time, but forward looking to June as well; yes?

4 **A.** Correct.

5 **Q.** I assume that these people, you know, Mel, this is all being reported back to you  
6 and Colin, so you know what's going on?

7 **A.** Yes. In a sense.

8 **Q.** Then if we can turn to tab 279. That's in G6. So this is from 3rd April 2018. If  
9 we look at next steps under point -- this is one of your e-mails. If we look at  
10 "next steps" under point 4. So you are saying that you need to have a clear  
11 approach for TransQ existing buyers and that this needs to be agreed. Yes?

12 **A.** Absolutely. I think we have gone through this e-mail before.

13 **Q.** Yes. We looked at sort of parts of it. But it wasn't yet agreed, this was still  
14 a work in progress?

15 **A.** So we had got comms plans. This was me saying we need to revisit those  
16 comms plans, because things were in chaos, no-one knew who was going to  
17 be an approved supplier assurance provider at this point. I was making heavy  
18 assumptions that we should just go and say we are and be brave about it.  
19 There was a disagreement internally I would say about whether we should  
20 make that statement or not. So this was me trying to lay it out, because I was  
21 a little bit frustrated about that lack of clarity, so I was laying it out: this is what  
22 I think we should be doing.

23 **Q.** Then right at the bottom here you acknowledged that not everybody will agree  
24 with the whole of your proposal. And I think that's what you are suggesting,  
25 that there were different points of view --

26 **A.** Absolutely.

1 Q. -- within Achilles at the time.

2 A. Correct.

3 Q. So this was still being debated at the start of April, yes?

4 A. Yes, we had absolutely no clarity from Network Rail and I think that was creating

5 us just being unsure of what to do.

6 Q. Well, to be clear, the documents we have been looking at point to the

7 non-compete being a material issue in being able to market your forthcoming

8 product; yes?

9 A. I think it was an issue. I think the bigger issue was the lack of clarity around

10 Sentinel approval. That's what comes back in every single one of these

11 documents, is we could not continue to offer it. And that's what our auditors,

12 our suppliers were asking the question repeatedly and we couldn't answer

13 them.

14 Q. Well, to be clear, because we have already looked at this a bit earlier during your

15 evidence and it was clear from the evidence that you were confident

16 throughout this whole period that you would be recognised?

17 A. I think we were helpful. There was no clarity in it. The wheels started to come off

18 the chain I would say in December when people were communicating and

19 Network Rail were communicating with people, whether officially through

20 e-mails or in conversations, that they were not going to recognise us as a

21 supplier assurance provider, that our audits would not be recognised.

22 Q. Okay. Well, I suggest to you the documents we have been looking at don't

23 suggest that and still in March you had been told by Mr Blackley, for example,

24 that you could provide assurance and we've seen that already. So I am not

25 going to revisit it, but we have already looked at that?

26 A. He didn't write to us. We asked for that in writing from Gillian, from Ken and we

1 had nothing. So it was conversations. And actually what was founded was  
2 correct, that we were not going to be approved.

3 **Q.** If we can go to tab 298, this appears to be your COO's proposed letter to all  
4 RISQS buyers on 11th April 2018. You were telling them what you were  
5 offering. Offering a new service and they could all join. Then if you look at  
6 the last two sentences of the penultimate paragraph starting:

7 "We recognise ..."

8 So you were recognising in this draft letter from your CEO that Network Rail can only  
9 require its principal contractors to be on RISQ; that's what you were planning  
10 to tell the market?

11 **A.** Yes.

12 **Q.** And we have seen already that was your internal thinking as well at April 2018.

13 I am not sure, was this letter ever sent? It is not obvious it was?

14 **A.** No it wasn't.

15 **Q.** Then if we go on to G6 at 309, so this is an internal e-mail on 16th April. It's just  
16 identifying the various supplier communications were needed. We will come  
17 back to the contents of the letter in a moment, but it is just showing that you  
18 were progressing matters.

19 If we can go to -- we can put that binder away. If we go to G5, please. Just give me  
20 a movement. I may have got you to put away G6 when we actually need to  
21 be in that. So just give me a moment. Sorry. Just give me one second. Yes.  
22 Sorry. If we can go back to G6 and tab 327. It is page 3231. So this is  
23 an e-mail to Skanska on 17th April 2018. If we can just look at the second  
24 paragraph starting:

25 "I appreciate ..."

26 So this is very clearly saying that:

1 "Due to contractual obligations Achilles are prohibited from communicating to  
2 existing RISQS customer base anything that relates to our future offering."  
3 That's right?  
4 **A.** That's correct.  
5 **Q.** So clearly identifying the contractual, the non-compete restriction that was  
6 preventing you from doing that; yes.  
7 **A.** We were not allowed to use the name Link-Up, or speak to them, that's correct.  
8 **Q.** Okay.  
9 So as far as I can see -- because you confirmed the COO letter wasn't sent out we  
10 were looking at just before this?  
11 **A.** That's right.  
12 **Q.** So as far as I can see, you didn't put out any communications to RISQS  
13 members between September 2017 and 1st May 2018, or possibly 30th  
14 April 2018?  
15 **A.** No. We weren't allowed to. So, like I said, we were having those one-to-one  
16 buyer conversations, meetings, around it.  
17 **Q.** But you were telling Skanska here you couldn't --  
18 **A.** We couldn't put anything in writing.  
19 **Q.** You were prohibited --  
20 **A.** We weren't allowed to.  
21 **Q.** All right. We can put that binder away now. If we can turn back to G4 please. If  
22 we can look actually first -- Sir, just thinking about timing, would it be all right  
23 to run on just slightly after 4.30? All right. I am just thinking in terms of the  
24 next points.  
25 Just going back to your statement for a moment, your fourth statement at  
26 paragraph 58, please.

1 **A.** Sorry, paragraph?

2 **Q.** 48 -- 58 rather. We can keep G4 out for a moment. So we have already had  
3 a look at this statement, but you are saying here that the marketing of the  
4 RISQS scheme at the time was on the negative basis that: if you want to work  
5 in rail, you need to move to be on RISQS after May 2018. And for what this is  
6 worth you repeat that at paragraph 68.2 of your fifth statement. I don't need to  
7 show you it.

8 I want to have a bit of look at what the RSSB and Network Rail were saying during  
9 this period but we'll come also explicitly to look at the documents that you  
10 have exhibited as well, but if we can start at C4, which is where your exhibits  
11 are. So this is at tab 10 again. If you turn to page 550 within tab 10. Have  
12 you got that?

13 **A.** Yes.

14 **Q.** So RISQS member newsletter. It is announcing Altius and Capita being  
15 appointed on 22nd June 2017. Then if we look at the messaging here from  
16 RSSB in the bullet point, it is introducing a new easy to use platform with  
17 more functionality to replace the current outdated IT system. Responding  
18 more quickly to changes in industry requirements. Providing the ability to  
19 integrate with our own supplier systems. Introducing the ability to access data  
20 in the scheme. Improving cost effectiveness, etc. So these are similar to  
21 messages we saw in the December release we have already looked at.

22 So you would agree that this is positive messaging from RSSB?

23 **A.** Yes, that is correct. It is before we issued the fact that we were going to compete  
24 to the market in September.

25 **Q.** Yes. We will look on and see the messaging after that as well. So if we turn to --  
26 I think we can put that away. If we turn to G3, please, and tab 103 within that.

1 We have already referred to this and my learned friend may have taken us to  
2 this document earlier, but this is the Network Rail release message to its  
3 supply chain through BravoNR on 22nd September 2017; yes?

4 **A.** Yes, that's --

5 **Q.** It is confirming its direct buyers would need to remain an RISQS?

6 **A.** That's correct.

7 **Q.** I think we can put that folder away and then go back to G4. If you go to tab 137,  
8 please, within that. So this is an e-mail exchange between Richard Sharp at  
9 RISQS and a person called Leigh Howells in September 2017. If we go to  
10 page 1859, so just over the page, within it. So right at the end of the e-mail --  
11 well, Leigh Howells is asking a question following the Bravo announcement  
12 that we have just seen, or one that is similar. Right at the end of the email he  
13 says he works for 160 companies; yes? You can see that at the bottom.

14 **A.** That's correct.

15 **Q.** A little further up you can see he is completely pro RISQS. Correct?

16 **A.** Correct.

17 **Q.** He will be pushing all of his clients down that route.

18 **A.** Correct.

19 **Q.** But he is asking in essence whether they would still be able to supply Network  
20 Rail, TfL, under that scheme. Then if you look the Richard Sharp's response  
21 at the top of the page, it's that Network Rail require anyone working for them  
22 to be qualified through RISQS.

23 **A.** Correct.

24 **Q.** And on the previous page --

25 **A.** It also says it underpins the Sentinel scheme and I think that was the critical  
26 point --

1 **Q.** Let's just go back to see how this is clarified in this e-mail chain. So on the  
2 previous page Leigh Howells' e-mail in the middle of the page says that it is  
3 the first time he had read that Network Rail would require anyone working for  
4 them to be qualified through the RISQS scheme, so again it is talking about  
5 direct contractors. Then Richard Sharp clarifies right at the top of the  
6 page that this is just talking about NR, Network Rail, as a buyer and that other  
7 buyers obviously are free to mandate other qualification schemes to their  
8 supply chain. Yes, that's what is said?

9 **A.** That's correct, but the critical thing is the Sentinel, the RISQS underpinning  
10 Sentinel and Network Rail licensing.

11 **Q.** Yes, but you have Richard Sharp giving a clear message in relation to Leigh  
12 Howells and he is says that Network Rail as a buyer is requiring RISQS, but  
13 the message from RISQS, from Richard Sharp, is that other buyers are  
14 obviously free to mandate other qualification schemes; yes?

15 **A.** However, if you require Sentinel, you can't use another qualification scheme.

16 **Q.** Yes. Well, that was the effect of the RISQS-only rule.

17 If we go to 159, please, within here, again right at the back end of this we have the  
18 December 2017 RISQ newsletter we have already looked at and which I think  
19 you agreed was putting out a positive and clear message. Just whilst on that  
20 just look at -- if we can look at the section on 1930 under invoicing, if we just  
21 note this in passing. You see at the bottom that RISQS was assuring  
22 members that they would remain RISQS members; yes?

23 **A.** Yes. I think we were pretty annoyed by some of these statements, rather than it  
24 being positive. It implies we were taking money off people for RISQS  
25 membership, which we weren't. We were taking money off -- I think that's  
26 some of the e-mail chain that you look back at. Achilles weren't particularly

1 happy about it either.

2 **Q.** Yes. You weren't overly happy about something that RSSB was saying?

3 **A.** Inferring we were taking money for something we shouldn't have.

4 **Q.** Then if you turn on, please, to 182A, which again we have obviously already  
5 looked at.

6 **A.** To what, sorry?

7 **Q.** So this is going on to 182A. I think we have already looked at this e-mail chain.

8 I want to go to 283B within that. Again, we have already seen this, but in  
9 essence Colin Flack is saying it is good news that RSSB has put out this  
10 release saying its recognition of Achilles as buying a competing scheme; yes?

11 **A.** That's correct, Yes.

12 **Q.** So RSSB has issued a press release that you were planning a competing  
13 service; yes?

14 **A.** That's correct, yes.

15 **Q.** And its certainly not saying, is it, that Achilles was not permitted to operate in the  
16 market, was it?

17 **A.** No, it wasn't in their communications.

18 **Q.** Yes, but this is what suppliers and buyers will be reading on RISQS; yes?

19 **A.** That's correct, yes.

20 **Q.** Now, that's similar to one of the documents which you say shows that RSSB and  
21 Network Rail were marketing RISQS on a negative basis.

22 Let's keep that bundle open for a moment. Oh, actually I think we can find the  
23 document in here. So if we go to 180 within here, tab 180, so this is the same  
24 document exhibited to your fourth witness statement at pages 47 to 51. So it  
25 is the one you are saying is negative marketing. So it is a document from 5th  
26 February 2018 and if I can just ask you to read the first paragraph under the

1 picture.

2 Have you read that?

3 **A.** Yes.

4 **Q.** Just that paragraph. So that's a positive message about the enhanced services  
5 and audits, yes, initially?

6 **A.** Yes.

7 **Q.** Then on the top of the next page, if you can read the second sentence starting:  
8 "However, we understand ..."

9 Again, this is RSSB acknowledging that Achilles plans to operate a competing  
10 scheme; yes?

11 **A.** Yes.

12 **Q.** And it goes on -- so you have them acknowledging the competing scheme. It  
13 goes on:

14 "To maintain your access to the GB Rail market through RISQS ..."

15 Which it describes as the only supplier qualification scheme run by the industry for  
16 the industry:

17 "... please ensure a number of things."

18 So if you want to maintain your access through RISQS, you have to do certain  
19 things?

20 **A.** That's correct.

21 **Q.** So RSSB acknowledges Achilles' competing services at the top of the page and  
22 says what we need to do to maintain access through RISQS are these things.

23 **A.** It says if you want to maintain access to the GB Rail market --

24 **Q.** Through RISQS?

25 **A.** -- that's only through RISQS.

26 **Q.** Through RISQS, that's what you need to do.

1 Then if we go to -- give me a moment. Just thinking about that for a second, it is true  
2 to say at this point in time, this is February 2011, that RISQS was the only  
3 qualification scheme run by the industry for the industry; that's right?

4 **A.** RISQS, yes, that's correct.

5 **Q.** And RSSB are being very careful to ensure that Achilles couldn't market  
6 a competing scheme during the concession; yes?

7 **A.** That's correct, yes.

8 **Q.** And you would naturally expect RSSB to make as much of this as it could when  
9 Achilles wasn't entitled to advertise a competing service; yes?

10 **A.** Yes.

11 **Q.** You would do the same in those shoes?

12 **A.** Yes, that's correct.

13 **Q.** If you can turn over the page to 2076 I think. Just below the bullets:

14 "So depending on your renewal and audit dates ..."

15 **A.** Sorry.

16 **Q.** Yes, I have lost it as well. Don't worry, it was just something in passing. I will  
17 come back to that if that's important.

18 So that was the first document you cite. If we can go to the second document, which  
19 is at tab 216. So this is the same as the document you cite where you  
20 provided exhibit to your fourth statement at pages 52 to 53. Again, it is  
21 another release by the RSSB, so it is not a release from Network Rail. Yes?

22 **A.** Yes.

23 **Q.** And the heading is "Act now or potentially raise rail network access warns  
24 Network Rail".

25 **A.** Yes.

26 **Q.** Then it leads with a quote from Gillian Scott that Network Rail has made clear

1 that to maintain its Sentinel status, suppliers will need to be on RISQS  
2 assured and that if suppliers leave it until will end of April they risk being  
3 invisible to buyers from 1st May. That's right?

4 **A.** Yes, that was in her time as assurance manager at Network Rail and not at the  
5 RSSB. She moved after that.

6 **Q.** Now, it is true that if buyers remained on RISQ and didn't move to TransQ, any  
7 suppliers wanting to continue to be visible to those buyers would need to  
8 remain on RISQS; yes?

9 **A.** Not necessarily. If we had retained the buyers, they would still be visible  
10 because we would still have the data in the system.

11 **Q.** I said if they buyers remained on RISQS. So if they buyers that the suppliers are  
12 wanting to serve, if they remained on RISQS, then the suppliers to remain  
13 visible to those buyers would have to stay on RISQS? The buyers they want  
14 to serve?

15 **A.** So if the buyers had moved to RISQS, then the suppliers would have had to  
16 move to RISQS to remain visible.

17 **Q.** Yes. Okay. We can disagree maybe slightly about the terminology, but I think  
18 we are making the same point.

19 Then if we look at the last paragraph on the first page here, just where it says  
20 "enhanced RISQS scheme". If you just have a quick look at that.

21 **A.** Where?

22 **Q.** It is on the first page, 236, the last paragraph:

23 "The enhanced RISQS scheme goes live."

24 You can see that is more positive messaging from RSSB about the enhanced RISQ  
25 service; yes?

26 **A.** Yes. I think at this time we were having questions from suppliers specifically

1 around why we hadn't migrated the data, and I think some of that was implied  
2 in the last piece of marketing we looked at actually as well. So if you look at  
3 the live up-to-date supplier information, we did give the RSSB all the data,  
4 everything they required, they didn't put it all into the system and I think we  
5 were getting a lot of backlash from suppliers as to why we hadn't provided all  
6 the data, which we had done at that point in time. So I think this is why there  
7 was live up-to-date supplier information and previously questions around "why  
8 haven't we been provided supply data".

9 **Q.** Understood. We will come to look at some of the data issues as well in due  
10 course.

11 But I would suggest to you that having looked at the documents we have just looked  
12 at from summer of 2017 through to March/April 2018, that there was no  
13 consistent messaging by Network Rail and RSSB that Achilles wasn't  
14 permitted to operate in the market. That wasn't what the communications it  
15 was putting out were saying and it wasn't what it was saying individually we  
16 see in e-mails to suppliers; that's right, isn't?

17 **A.** It I think there's a mixture of it and if you look at this very headline, "Act now or  
18 potentially lose your rail market", I don't think that's positive -- sorry.

19 **Q.** I was going to say that RSSB actually communicated to RISQS members that  
20 you would be offering a competing product; yes?

21 **A.** Without the Sentinel access, and despite asking numerous times everyone that  
22 we could, no-one would give us clarity on it. It was pointless us offering  
23 a service without the Sentinel access, because it was meaningless to buyers.

24 **Q.** I think we have already said obviously RSSB is going to be doing everything it  
25 can to make the enhanced RISQS successful, isn't it?

26 **A.** That's correct, yes.

- 1 **Q.** You would be doing the same?
- 2 **A.** Exactly.
- 3 **Q.** You had the non-competes in place so you couldn't market as you wanted to;
- 4 right?
- 5 **A.** We wouldn't have done -- if you go back to our comms strategy in
- 6 September 2017, it was business as usual. The best way you can retain
- 7 people is to make life easy for them, rather than this, you know: you've got
- 8 to do all of this work. Actually it's: just carry on doing what you've done. You
- 9 don't need to update your processes or change things, it's business as usual.
- 10 So that was our strategy, all the way through.
- 11 **Q.** And we can see that RSSB and Network Rail were keen to make this a success
- 12 and we have also seen that part of the reason for that is they thought that
- 13 having a single industry scheme with everyone buying into that would mean
- 14 there would be less assurance costs for the industry; yes?
- 15 **A.** That's what they believed.
- 16 **Q.** So even without the RISQS-only rule, RSSB and Network Rail would have been
- 17 putting these messages out anyway.
- 18
- 19 **A.** I don't agree with that.
- 20 **Q.** I would also suggest to you that you had so few buyers interested in TransQ
- 21 because of the dynamics that existed in GB Rail, and I mean by that the
- 22 number of buyers, suppliers to RISQS, the Network Rail had committed,
- 23 others had committed and the fact you were not permitted to advertise
- 24 a competing scheme during the concession contract, and we have seen when
- 25 it has taken you too long to get all your ducks in a row?
- 26 **A.** No, I disagree with that completely.

1 **MR WENT:** That might be a good moment to pause.

2 **THE CHAIRMAN:** 10.30 tomorrow.

3 **MR WENT:** I am meant to be finishing up on my cross-examination. I just note I am  
4 a good way through. I might be slightly squeezed. I don't know if I can go into  
5 the afternoon or we might start early.

6 **MR WOOLFE:** I don't think we need to be starting early, but I'm wondering whether  
7 we need as much time for the expert as perhaps we thought. Perhaps we can  
8 discuss after court is cleared, but if we start at 10.30, we could --

9 **MR WENT:** Make it work.

10 **THE CHAIRMAN:** Very well.

11 **(4.47 pm)**

12 **(Court adjourned until 10.30 am**  
13 **on Tuesday, 12th October 2021)**

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?