IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1298/5/7/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 September 2019

Before:
ANDREW LENON QC
(Chairman)
JANE BURGESS
MICHAEL CUTTING
(Sitting as a Tribunal in England and Wales)

BETWEEN:

ACHILLES INFORMATION LIMITED

Claimant

v

NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant

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A P P E A R AN C E S

Mr Philip Woolfe (instructed by Fieldfisher LLP) appeared on behalf of the Claimant.

Mr David Went (instructed by Addleshaw Goddard LLP) appeared on behalf of the Defendant.

Thursday, 12 September 2019

(2.06 pm)

MR WOOLFE: Sir, I appear for the Claimant, Achilles, in this matter and Mr Went appears for the Defendant. We have reached an agreement, subject to your view, on the running order of the matters. We agree that it should be as set out at paragraph 1 of our written submissions for today, which is to deal first of all with the terms of the substantive order, secondly with costs, thirdly with the application for permission to appeal, fourthly with a stay and fifthly with any other matters. We were proposing to take it one by one rather than us each present our submissions and everything all in one go, which will be easier, and I will go first on the terms of the order and on costs and Mr Went will go first on permission to appeal.

CHAIRPERSON: I will tell you what we had in mind, which was that we would hear you probably for about 20 minutes each, we would then retire and give a ruling, we would then give you some time to finalise the order, which we would hopefully then approve in the course of today. Does that seem realistic? I do not want to cut you off if you had something in mind.

MR WOOLFE: That seems very realistic. Obviously, a lot of it has been set out in writing.

CHAIRPERSON: That is the point, yes.

MR WOOLFE: If it is not a strict 20 minutes but certainly a short period each.

CHAIRPERSON: It is not a strict 20 minutes but we obviously know where you are both coming from.

SUBMISSIONS BY MR WOOLFE

MR WOOLFE: Thank you, Sir. In that case, on the subject of the terms of the order, you have our submissions already. The order we seek is at tab 18 of the bundle for today's hearing, bundle A. Not the one labelled with the large "A" but the one with the illegibly small "bundle A" written on the side. In terms of the substantive relief, the points are identified in my learned friend's submissions. They are effectively whether there should be a carve out for direct contractors and, if so, the scope of that, the length of time for implementation and whether or not there is a need for the Tribunal to authorise certain specific kinds of condition to be included in the scheme that Network Rail propose. Our basic point is the

substantive relief should bring the unlawful conduct to an end and provide a platform on which the Claimant can compete on the market. We hope that that aim is uncontroversial.

In terms of our order, essentially you can see that paragraphs 2 and 3 together would operate as a negative injunction requiring withdrawal, effectively, of the offending terms -- that is the intent, anyway -- and a positive injunction requiring recognition of equivalent schemes. Then we have a provision that they may impose reasonable and proportionate conditions on recognition, which is fairly sensible. That is framed in quite broad terms rather than the specific list which Network Rail proposes. Then we have in paragraph 4 and paragraph 5 essentially conditions as to transparency, that the conditions have to be published and there also the recognition has to be published with a liberty to apply.

There were two amendments, I suppose, which on reflection we would like to propose to the terms as set out in this order. I will deal with the simplest one first, which is there should be a general liberty to apply at this time -- I believe that is uncontroversial -- in addition to the specific liberty to apply for the Defendant. The second point relates to paragraph 2, where at the moment there is a carveout in brackets "save and so far as contracting directly with the Defendant in the role of principal contractors". The intent of that was effectively to leave the Principal Contractor Licensing Scheme undisturbed in accordance with the terms of the Tribunal judgment. On reflection, we would suggest that the simpler course, if we were adopting this wording, would be to delete the words in brackets and instead, in the first couple of lines of paragraph 2 of this order, say "the Defendant shall cease to impose on the suppliers or persons seeking access to its infrastructure" and then we suggest inserting the words "under the Sentinel or OTPO Schemes" and then the remainder of the paragraph followed. It is just tying the scope of this injunction specifically to those schemes rather than otherwise trying to carve out the Principal Contractor Scheme (**Several inaudible words**).

CHAIRPERSON: Can you repeat the words?

MR WOOLFE: After "infrastructure" we would have the words "under the Sentinel and/or OTPO Schemes" and the rest of it would follow undisturbed with the words in brackets to be deleted. We say this is quite a civil form of relief. Essentially, it would leave it to Network Rail to decide how it is going to replace the terms which are currently void and which it has been injuncted to remove.

Network Rail's order is at tab 19. It is significantly more complex and appears to be based on this contention that the Tribunal has found that Network Rail is entitled to apply the RISQS-only rule within the Sentinel or OTPO Schemes, to its direct contractors. In respect of that, I have a series of points. I think there are nine of them but we will see how we go.

The first point is that what this case is focused on is Achilles being able to provide supplier assurance for the purpose of authorisation schemes, not for the purpose of Network Rail's procurement. For that I will take you to paragraphs 43 and 44 of the judgment, you will recall, Sir. At 43, tab 2 of the bundle:

> "Network Rail uses the RISQS scheme in two main ways. First of all … licensing and authorisation teams use RISQS to ensure that undertakings wishing to obtain a licence … satisfy the requirements laid down [there]."

That is what we are concerned about. The second way in which Network Rail uses RISQS is that its procurement department uses RISQS as a prequalification system for suppliers and it advertises tenders through risks and treats people who are registered with RISQS as being prequalified. The point of this case is focused on that first paragraph, paragraph 43, not on paragraph 44. The terms of the Sentinel and OTPO Schemes are entirely within the scope of authorisation. These are authorisation schemes. That does not form part of Network Rail's procurement policy.

The second point is there is no health and safety reason to require exclusivity to RISQS, as the Tribunal found at paragraph 315. This was the central issue in the case, as you will recall. It was how the Defendant resisted the claim and it is one on which we have succeeded. No suggestion has been made, and we say nor could one be made, that the health and safety issues are different for direct contractors as opposed to others. No health and safety reason has been put forward for having a distinction within the terms of authorisation schemes between direct contractors and others.

Thirdly, we say therefore the clean and simple position for the Tribunal is to require the Sentinel Scheme and the OTPO Scheme to be non-discriminatory as our order proposes. They must not mandate the use of risks and no reason has been put forward for inserting into those schemes now some distinction between direct contractors and others that is not

there at the moment and, by doing so, Network Rail is asking the Tribunal to endorse, effectively, or rewrite scheme provisions, which are actually a matter for it.

The fourth point is we accept that, for its own internal operational and commercial reasons, Network Rail is entitled to choose where it advertises its tenders. That is the point of paragraph 44. It is all about Network Rail's internal systems and choices and it is not about the terms of the Sentinel or OTPO Schemes.

The fifth point is that if Network Rail chooses to continue to advertise all of its tenders through RISQS it will mean, of course, that anybody who wants to supply Network Rail directly will have to register with RISQS in order to be able to see those tenders. It does not necessarily mean that all such suppliers would have to be Sentinel audited by RISQS. That is a different point.

The sixth point is that any legitimate operational and commercial concerns that Network Rail might have about managing its direct contractors can be met by it choosing where it advertises its services or what conditions it imposes when it procures goods and services. There is no need to insert a different term into the authorisation schemes.

The seventh point -- I may be repeating myself now -- is that it is possible that a supplier may choose to be Sentinel audited by Achilles even if it also registers on RISQS in order to be able to see such tenders as pop up from Network Rail. That might be because Achilles offers a cheaper auditing service or it might be that it offers efficiencies for the supplier in terms of being audited by Achilles or other industry schemes outside the scope of this.

CHAIRPERSON: Can you repeat the sixth point again?

MR WOOLFE: The sixth point was that if Network Rail has any operational or commercial concerns about how it manages its direct contractors and it likes to see them on RISQS because it has them all in one place or something -- I am hypothesising -- those operational or commercial concerns can be met by Network Rail simply by choosing to advertise its tenders through RISQS and saying, "We use RISQS for our procurement purposes." If those are its concerns, it does not have to insert a term in the authorisation schemes, into the Sentinel Scheme, to say that if you are a direct contractor your Sentinel authorisation must come from RISQS.

CHAIRPERSON: Are you saying that when it advertises it could say, "We will want you to obtain supplier assurance from RISQS for all purposes under the other schemes if authorisation is needed under those schemes?"

MR WOOLFE: Well, I would not actually go that far. What I am saying is that there are not any good health and safety reasons why Network Rail has to require Sentinel auditing to be done by RISQS rather than by somebody else. That is what we have established in the judgment. If it is the case that Network Rail has some reason why it wants its suppliers to be registered with RISQS, as in to be signed up to RISQS as a system, then of course it can advertise all its tenders through RISQS and not through Achilles and it can advertise that fact so that people are signed up to RISQS. But it is a different question, then, whether or not they have to have their Sentinel audit done by RISQS. If Network Rail were to come forward in the future and say, "Here is our procurement policy. If you are going to supply us directly, we insist your Sentinel audit is done through RISQS," that would be a new case, effectively, Sir. It would be a new unilaterally implemented procurement policy against a background where the authorisation scheme says you can have your audit done by whoever. Now, the point is nobody has really led evidence on what the competitive effects or health and safety effects of that kind of conduct would be, but it would be a new point.

I think I had got to the seventh point, which is --

CHAIRPERSON: Yes, sorry. Can you repeat what the seventh point was, please?

MR WOOLFE: The seventh point was a supplier may choose to be Sentinel audited by Achilles even if it also registers on RISQS to see Network Rail opportunities. There are a number of ways this could work out. For example, a supplier may want to have access to track so it wants to be Sentinel audited and it may be interested in picking up work from Network Rail that has nothing to do with access to track, for example. That is one of the problems with the scope of relief that Network Rail is proposing that seems to say, "If you are a direct contractor with us, any Sentinel authorisation has to be through RISQS even if, in fact, the work you're doing for Network Rail is nothing to do with being on-track, if you see my point, Sir. But you may also want to register with RISQS to see Network Rail opportunities but still be Sentinel audited by Achilles because, for example, Achilles may offer a cheaper service for the audit or having the audit done by Achilles may be more

efficient for you because Achilles can at the same time be auditing you for the purposes of other industry schemes, if you remember the cross-industry point. For the Tribunal to endorse a distinction to be inserted into the Sentinel Scheme saying, "If you are a direct contractor, your auditing must be done only through RISQS," would unnecessarily restrict competition and could have a chilling effect in respect of those suppliers.

The eighth point is that if you had a requirement in the Sentinel Scheme which meant that an Achilles audit is valid for somebody who is not a direct contractor and you are allowed on-track but that your Sentinel authorisation would become invalid the moment you contract with Network Rail to do anything, it would be unnecessary and irrational, in fact, and also would create problems of monitoring. It would, in effect, be an entirely new term and there would be a new set of arguments about it. What the Tribunal should not do is endorse that kind of term here today. It would be much simpler for it to say the existing term must go and leave it to Network Rail to work out what can legitimately be put in its place.

The ninth and final point now. Much is made about the Principal Contractor Licensing Scheme. As we understand it, the point there is that the Principal Contractor Licensing Scheme only applies to people who both are principal contractors within the meanings of the relevant regulation and who also work on behalf of Network Rail, and the only term of the PCLS scheme that actually mandates risks is the one requiring audited compliance of the IMR module. That is what the Tribunal records at paragraph 26(2).

Now, I don't know if you have a copy of the PCLS Scheme to hand. You probably do not because it is not in today's bundle and was in the trial bundle. Can I hand up three copies for the Tribunal? Could I take you into page 14 of 26 and section 8? 8.2 specifically requires -- and this is what is recorded at paragraph 26(2) of the Tribunal's judgment -- that an organisation who wants to be a principal contractor for Network Rail shall have audited and verified compliance to RISQS IMR modules. That is specifically what mandates RISQS. Separately, below, there is a general requirement the organisation shall have audited and verified compliance with the Sentinel Scheme rules. There is not actually in there a requirement that the Sentinel audit be done by RISQS. In a sense, why would that be a requirement up to now if we were not in a two assurance provider world? But there is not actually any other mandation of RISQS in there. At 8.4(a) there is a requirement that

there be audited and verified compliance to what is called the RISQS product code or SSOW planning -- safe system of work planning -- but this is actually orange at the moment. To understand what red and orange mean, if you go back to the start of this document, on page 2 red requirements are ones in which no variations are permitted and an amber requirement is one in which variations are permitted subject to approved risk analysis.

As matters actually stand at the moment under the PCLS, the only thing that is absolutely mandated is audited compliance to the RISQS IMR module. People need to be audited against the Sentinel Scheme (**Inaudible**). In terms of the wording, I do not know who can do that. It is, I say, mandated but subject to the possibility of variation in respect of the safe system of work planning.

As we understand it, what the Tribunal held was that, given that this only applies to direct contractors, there is effectively no additional effect on the competition arising out of these terms. For our part, we do not read the Tribunal's judgment as having found that a distinction between direct and indirect contractors can be inserted into the Sentinel Scheme rules and the On-Track Plant rules for all purposes. Those are our points in respect of the substantive provisions of the order.

On time for compliance, we propose 21 days. They resist any time limit at all. We do say a time limit should be in. There is no magic to 21 days -- it can be 28, 35 or 21 -- but the problem is that Network Rail have not come forward and said, "We need X-amount of time," so it is very difficult to have any sort of debate over whether it should be 28 or 35 or 21. We do stick to our position it should be 21 days. We do specifically propose that the time limit should have a liberty to apply so that if they run into problems they can come back with reasons as to why it is going to take longer, but the Claimant cannot be left in limbo.

Finally, turning to the list of steps which Network Rail say should be in the order, our general concern is what we foresee is that down the line, instead of there being a discussion between the parties as to what conditions are reasonable and proportionate, we could end up having a rather unproductive discussion over whether the conditions Network Rail is thinking of including fit within one or other paragraph of the Tribunal's order. We can see the logic and the thinking behind a lot of this, potentially. Clearly Network Rail should be

able to impose substantive conditions and clearly it should be able to monitor compliance with those, and it may be necessary to have provisions regarding how information is provided and data format and so forth. We do not have a difficulty with the basic idea behind a number of these but we do say, for example, on monitoring you cannot impose a monitoring requirement that would be unduly burdensome and unreasonably disproportionate. What we do not want to be doing is having an argument in six or eight weeks' time with Network Rail saying, "We can do what we like in terms of monitoring compliance because the Tribunal said so." You can see the issues there.

There are also some specific problems with the wording of paragraphs 1(c)(iii) and (iv) in that it seems to be envisaging that there needs to be IT interfaces between the Achilles system and the RISQS system. That may be the case. It is not entirely clear to us why that would be the case in circumstances where we are effectively auditing people against the Sentinel Scheme and the On-Track Plant Scheme in circumstances where it is Mitie, I think, who run the database for Sentinel. Now, there may be some good reasons behind that or there may not be, but it would be much better for the Tribunal to say in broad terms they can have reasonable and proportionate conditions and then leave it to the parties to sort it out rather than seeking to prejudge now the drafting of the types of conditions which they may have.

A final point on that, for example, notification to the ORR, such notification may be necessary and, if it is necessary, clearly it is a reasonable step; if it is not necessary, it is not necessary and we do not need to include it in the order as something which suggests the Tribunal is mandating it must be done. It is that sort of thing we have concerns about.

Shall I deal with costs very swiftly while I am on my feet? The Tribunal's jurisdiction is in rule 104, to have regard to relative success, parties' conduct and so forth, and the costs can be either assessed by the Tribunal or sent to the High Court Costs Office. We say there should be an order for costs to be assessed not by the Tribunal but by the regular costs officer if not agreed, and we have asked for a payment on account of two-thirds of our costs. The updated figures are now set out at paragraph 5 of our submissions. Network Rail, by contrast, say there should be a further round of submissions on costs. It is not clear whether they are talking about the Tribunal carrying out a detailed assessment or whether they are just proposing a further round of submissions on liability for costs.

They suggest that we should get a lower payment on account because we lost on a series of points, one of which is this one about direct contractors. In respect of that, I seem to repeat everything I have said today: we do not see that as something the Tribunal has decided against us.

The second is object. On that, yes, clearly we did not succeed on object. However, the question is, how much shorter would a trial have been, how much less paperwork would there have been in this courtroom, had we not argued the object point? I would submit very little. It was a short part of opening submissions and was a pure point of law and there were a couple of authorities in the bundle -- maybe half a dozen. Everything else related to the effects on health and safety purpose.

Finally they say we lost in respect of the Principal Contractor Licensing Scheme. On that, again we ask how much shorter these proceedings would have been, and the answer is very little because most of the evidence on health and safety and on economics was common to all of the schemes.

Perhaps if I sit down now on those points.

CHAIRPERSON: Yes. Thank you.

SUBMISSIONS BY MR WENT

MR WENT: I think our starting point is that from our perspective the judgment is very clear in terms of its scope and that also stems from the clear concessions given by my learned friend on the final day of the trial. Obviously, we set out the points in some detail in our letter to the Tribunal on 2 August. That is at bundle A/12. There is no need to turn to that letter, it is just for your note.

In terms of the concession that is made, again we have referred to this in that letter and in our submissions in August so I do not propose to go back to precisely what was said on the last day of trial. It is very clear that the concession that is made relates to the imposition of RISQS as far as concerns those contracting directly with Network Rail, and there was a distinction as between the three schemes. More than that, there is a rationale given for this concession as well. The rationale was that Network Rail should be entitled to decide or to choose the assurance that should be taken by the supplier when it has contracted directly with that supplier. That is the rationale of the concession.

We have obviously, again in the submissions we made on 2 August, pointed out various paragraphs from the Tribunal's judgment. I do not intend to go back through all of those now. I think, though, there is one further paragraph that we have not noted in that submission, so perhaps we can briefly turn to that. That is at paragraph 149(1). This was looking at the extent of the market opportunity available to Achilles following the removal of the RISQS-only rule as required by competition laws. If you look at the second sentence:

> "The removal of the RISQS-only rule would only affect demand from buyers other than Network Rail participating in the Sentinel Scheme and the OTPO Scheme."

So it seems clear to us that what was envisaged by the Tribunal is that the imposition of the RISQS-only rule on Network Rail's direct contractors was not anti-competitive. That was the concession that was made on the last day of trial, so this, in effect, says that the removal of the RISQS-only rule would not affect demand for supplier assurance to know that there was a buyer in the Sentinel and OTPO Schemes, and we say that must be because the Tribunal accepted that Network Rail was a buyer in those schemes and it is entitled to impose the RISQS-only rule on its suppliers. That is the logical conclusion. Of course, this is not the only paragraph in the judgment, and the other paragraphs we have already noted to the Tribunal were 6, 28 and 44. We say that all those paragraphs point to the same conclusion.

Let me deal just very briefly with one point that was made in written submissions to you and I think has just been repeated as well, I think, by my learned friend, and that is this point about the bifurcated approach within the Sentinel and OTPO Schemes if Network Rail is entitled to require the use of RISQS for its direct contractors within those schemes. Of course, these arguments were not raised at the trial and were not taken into account by the Tribunal when preparing the judgment and so we do not think they should be given force on that basis. In any event, once a supplier seeks to provide services to Network Rail, it needs to be assured under RISQS and they cannot use an alternative supplier assurance provider, so on that basis we do not see how there could be any bifurcated approach that has been suggested. We also understand that there is not much switching between contracting directly with Network Rail and switching out of that.

On that basis, Network Rail considers it and certainly continues to specify RISQS as the supplier assurance for all the suppliers with whom it contracts directly. As we set out in our proposed draft order, that is without distinctions between the Sentinel, OTPO or PCL Schemes. As to precisely how that is worked into the order, I think there is certainly scope for discussion over that. It could, for example, come within the preamble to the order in terms of the scope of the Tribunal's judgment given there does seem to be material disagreement as between the parties on this point, but we certainly consider that it should form part of the order for that reason and to give clarity not only to Network Rail but of course the industry as well as to the precise effects of the judgment.

In terms of the form of the order, just very briefly, I think it has been suggested that our proposed order would somehow be requiring the Tribunal to redraft the terms of the relevant schemes. We certainly didn't have that in mind. Obviously, if the scope of the order was put into the preamble to the order, that may be one way to avoid any suggestion of that.

CHAIRPERSON: Sorry, can you just repeat what you just said?

MR WENT: Suggesting that just making clear in the preamble for the order the scope of the Tribunal's judgment.

CHAIRPERSON: I see, yes.

MR WENT: That is on the form of the order. In terms of timing --

CHAIRPERSON: Before you leave that, do you accept that the concession did not go as far as entitling Network Rail to impose on its direct contractors a requirement that its direct contractors impose RISQS on subcontractors, which is a point that was raised in correspondence by Achilles? In other words, that it cannot go --

MR WENT: Yes.

CHAIRPERSON: You accept that it stops at tier 1, effectively?

MR WENT: It stops at tier 1, exactly. I think that is clear from the discussion between my learned friend and the Tribunal on the last day.

Moving, then, briefly to timing, again we put in some detail about the issues facing Network Rail on this front. This is not just about publishing the criteria by which alternative supplier assurance providers can be accredited to provide assurance, but it also goes obviously to the internal procedures that Network Rail has to follow to get to that

position in the first place. Clearly, the Tribunal recognised -- this is at paragraph 243 and following of the judgment -- that there are various steps and various requirements that Network Rail can potentially legitimately impose are followed. We say that that simply cannot be done within 21 days. Now, Network Rail has obviously been good at examining the judgment since it was handed down and has been examining and discussing internally what needs to be done on that front.

Now, perhaps I can just highlight a few points. At paragraph 243 of the judgment:

> "Consistency could … be achieved by requiring that any provider of supplier assurance is effectively monitored against the relevant auditing standards."

As things currently stand, Network Rail considers that it would have to put in place a new standard. You may recall from evidence that there was a previous Network Rail standard that dealt with the requirements. That was NR/L2/CPR/302, but that was withdrawn in February this year, and Network Rail has in mind that it would have to put in place a new standard dealing with that and would also have to be brought up to date with the minimum -- there needs to be minimum requirements before they could actually reflect the fact that two or more supplier assurance providers are now entitled to provide assurance.

Now, there are also a dozen or so other Network Rail standards that reference RISQS. We set out in some detail the internal procedure that Network Rail has to go through when it is updating its standards. It involves risk assessments, safety assessments, forming working party groups, and to go through this process Network Rail says that it takes six months for standards to be revised, and there is good reason for that, obviously, within Network Rail.

We have talked about, briefly, the IT requirements to ensure interoperability. Again, that was dealt with at paragraph 248 and following of the Tribunal's judgment. Network Rail does not currently have a system for storing/utilising supplier assurance data and it is considering how best to deal with that issue. There is also the question of deciding on things like appropriate data format, and that is at paragraph 249 of the Tribunal's judgment. Again, Network Rail has been discussing with the RSSB and with Mitie with a view to considering the issue further when coming up with the proposal.

MEMBER 3: Sorry, can I ask a question?

MR WENT: Yes.

MEMBER 3: Have you also been considering this and discussing it with Achilles?

MR WENT: No, that would be the next step, so Network Rail has been forming the issue internally but obviously has in mind that these matters need to be discussed with Achilles as well, so that (**Inaudible**) by Network Rail.

There is also the question of updating Network Rail's health and safety management system. At the moment, at least, Network Rail's view is that the changes being considered would constitute a major change requiring the authorisation permission of the Office of Rail and Road, so the relevant submission is going to have to be made to the ORR as well, and that process takes at least three months. So, the notion that all of this can be done within 21 days does not make any sense to Network Rail, and they say that it is just simply infeasible. Certainly Network Rail is considering what needs to be done and actioning this, but the idea that it is to be done within three weeks is simply not possible.

CHAIRPERSON: How much time do you say Network Rail does need? How much more time?

MR WENT: As I have said, part of this requires new standards, updating the standards, and that process ordinarily takes at least six months.

MEMBER 3: Are those new standards going to be applying to the RSSB?

MR WENT: Yes.

MEMBER 3: I do not understand it, because you have a contract with the RSSB, you have the RSSB in place, you went through a procurement exercise, you had lots of standards and requirements for what they needed to do --

MR WENT: Yes.

MEMBER 3: -- and the judgment effectively means you are going to have to behave in a non-discriminatory way, subject to scope, in relation to Achilles or other competitors. I do not see why you need to suddenly move the goalposts for the relevant standards.

MR WENT: Well, you are right, of course, that there is a body of material there to be used in terms of Network Rail coming up with the new standard that it is proposing to draft and prepare. That is right. But, of course, there do need to be changes made to it given that now Network Rail has to recognise more than one supplier assurance provider. Of course, there needs to be mechanisms in place in terms of assuring those additional suppliers as well. The point is, in terms of Network Rail updating its standards, these are locked in and

difficult to change for good reason, and the process of amending standards within Network Rail takes time. These need to be considered very carefully. Obviously, I appreciate that the Tribunal did not find in favour of Network Rail in terms of the safety issues that were raised by Network Rail. Of course, part of the argument always has been that by allowing more than one supplier in the mix you add complexity. The Tribunal's answer to that, of course, is that complexity can be managed and, if so, there should not be a concern. But of course the Tribunal has not stipulated precisely how Network Rail should go about implementing the changes. Network Rail has to do that and needs to satisfy itself that the increased complexity within the market that is required given the judgment is properly considered.

MEMBER 3: I think we can all understand the interface complexities of going from one to two or more suppliers, but in relation to the underlying substantive standards, given that *ex hypothesi* you are a dominant company, you are not going to be able to discriminate between the people you let in, so that is why I am struggling with the concept that you are now coming up with new standards because you have a second supplier on the door. You said that they have to be new standards. What I am struggling with is why they need to be new given that you have one supplier of supplier assurance services in place after a careful tendering process. You can see why I am probing why you need six months for a whole bunch of new standards when you must have a bunch of standards in place, or requirements in place, for the existing supplier and you cannot discriminate between those suppliers.

MR WENT: Yes.

MEMBER 3: That is what the law of dominance means. I am struggling.

MR WENT: That is understood. It is not setting up a whole bunch of new standards. As I say, the suggestion is that the standard that was withdrawn earlier this year is resurrected and made good for the purpose of the current new environment, and there is a process Network Rail goes through when it is introducing changing standards. We have set out the process that Network Rail goes through in the submission we put in on 2 August. That process, as we said in that submission, even when, for example, there has been a fatality requiring changes to standards within Network Rail, that can take up to six months. It is a

very thorough process Network Rail goes through. It goes through that thorough process with good reason.

Then just very briefly on the last point, I think inclusion of the various measures in the order is paragraph 1c of our draft order. I wonder whether the concerns my learned friend raised might be alleviated. (**Pause**). Yes. We can potentially alleviate it by just simply adding a "may" before "include" so not making it prescriptive but just making clear the types of things that Network Rail is entitled to be able to implement with a view to complying with the order.

On to costs, again very briefly as you have our written submissions on that as well, we say, obviously, it is material that Achilles was not successful on the object infringement case but also, just as importantly, a concession was made in relation to direct contractors. Now, of course, some of my learned friend's submissions on costs in relation to direct contractors is premised on the assumption that they are right in terms of the scope of the judgment. Of course, we are right in terms of the scope of the judgment. This was a very material change/concession made right at the end of the trial in closing submissions. We did not have chance to deal with that in the pleadings, when preparing evidence, in pre-trial submissions during the trial, and even in closing submissions because this concession was made on the very last day of the trial in my learned friend's closing submissions. We say that that did have important implications to the way that the trial was conducted. There was some discussion during the trial itself on the slight mismatch at times between the evidence being presented by both sides, but there was a focus on our side on the Principal Contractor Licensing Scheme whereas the focus for Achilles was on Sentinel. Now, of course, if the PCLS (**Inaudible**) that direct contracting suppliers had been off the table from the outset then that would have led to a very different trial, we say, reduced in scope and with significantly less evidence. At least, on a rough estimate, on our side we think something like 20 to 25 per cent of the evidence that had been submitted related to the PCLS. On that basis we think that two-thirds of their costs is not a realistic estimate of their rebuttable costs and suggest that 40 per cent would be much more appropriate.

Those are my submissions on those issues unless there are further questions.

CHAIRPERSON: Thank you. Yes.

REPLY BY MR WOOLFE

MR WOOLFE: Sir, I will be very short. On the subject of the concession, at page 5 of the transcript of the last day, you needn't turn it up but I dealt with specifically a point made by Network Rail in their written closing where they had said that what Achilles was aiming to do was to have its assurance recognised in respect of auditing suppliers who do not contract directly with Network Rail, and what I said was wrong in a couple of respects. The second respect was, I said, that we are not asking that relief be limited to auditing services of suppliers who do not contract directly with Network Rail; what we are seeking, or what we were seeking, is that we be allowed to audit and provide assurance under the authorisation schemes. With respect, I did not concede on the last day the point that we weren't looking to provide assurance for direct contractors -- it wasn't to the authorisation schemes.

The second point, very briefly and without really repeating myself, Mr Cutting, you picked up on the point regarding the fact that the standards have already been set out. At tab 23 of bundle A for today's hearing is a table which forms part of the procuring process for the provision of contracts to supply the RSSB with the services that became RISQS, so the audit services and the IT services. On page 6 of that, you will see in the second column a series of numbers under "RFP" and then there are some numbers. I draw attention to, about a third of the way down the page, 107, 108, 109, 115 and 116. Those set out the standards, the RSO standards, which an audit provider must meet, and effectively what we are talking about in respect of auditing it for the Sentinel module is the audit standard. Network Rail was involved, and although this is the RSSB putting out the procurement, the RSSB and the RISQS Board include representatives from Network Rail, so Network Rail clearly have formed the view that these were the audit standards which it wanted to be applied.

We do say the idea that it takes, starting from now, six months to change the standards -- it is not clear whether that is said to run concurrently with or consecutively with the three months of getting authorisation to change the HSMS, if that is even necessary. It has not been well explained or explained in evidence exactly what these other standards are that need to be changed or in what respect. What we can see is there is a specific mandation of risks in the Sentinel Scheme and the OTPO Scheme which is not warranted. That

provision is in fact void at the moment under section 2(4). Currently under the general law, as contractual terms they are void and thus those provisions are not in place. Network Rail should press on to work out what it wants to put in its place. What we are suggesting is that they be required to publish the conditions swiftly. It may of course take a bit of time to get systems up and running but there is no reason to delay the first step.

That is everything I have to say in response to the order as posited.

CHAIRPERSON: Yes. Do you want to go on and deal with appeal?

MR WOOLFE: Yes. Mr Went can go first on that.

CHAIRPERSON: Yes.

SUBMISSIONS ON APPEAL BY MR WENT

MR WENT: I am conscious that you were seeking to keep this to 20 minutes a piece.

CHAIRPERSON: Never mind. We do have your …

MR WENT: Indeed. What I might do, just very quickly, is pick up on a few points that I anticipate my learned friend may make based on the written submissions that have been put in rather than going back over all the points that are made in the permission to appeal. Just very briefly, looking first at the existence of agreement, I think there is a theory made as to the distinction that we were trying to explore in the cases relied on by the Tribunal to reach the conclusion that the Sentinel and OTP Schemes constitute agreements within the meaning of the Chapter I prohibition. We also note the distinction that we are drawing appears to be the valid distinction recognised by the Court of Justice in *Bayer* at paragraphs 105 to 109. That is at the authorities bundle tab 7.

The distinction relates to whether what is being examined involves ongoing commercial relations or not, so the two cases relied on are the *VW* case, which involves a situation where there is already a contract in place and then an assessment of whether a further description formed part of those contractual relations between the parties. The *BMW Belgium* case again involved a situation where a contract had closed with the dealers and there was a proposal that in actual fact, although that was actually (**Several inaudible words**) dealers which then they signed and gave their consent in that way. Network Rail obviously accepts the important points of whether there is concurrence of wills, the form in which it is manifest being unimportant so long as it constitutes the basis of expression of the parties' intentions.

There is also the question of when an agreement can be born through tacit acceptance. Again, looking at the Court of Justice, the judgment in *Bayer*, there the court stated -- and this is at paragraph 102, and again that is the authorities bundle at tab 7:

> "For an agreement … to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where … such an agreement is not at first sight in the interests of the other party …"

So, if we consider the Sentinel Scheme, we say the rules are laid down by Network Rail and the suppliers are required to follow them. That is why there is no signing up by the suppliers. There is also no possibility for suppliers to withhold their consent if they want to supply works and services relating to Network Rail's management infrastructure. That is another point of distinction with the *BMW Belgium* case, where obviously the dealers could decide whether to sign the export ban circular or not. So, Network Rail's submission clearly is that there is no concurrence of wills, no tacit acceptance and the RISQS-only rule does not constitute a base of expression of the parties' intentions.

(**Several inaudible words**) very briefly on the undertaking point, the value point. I think again the written submissions on this should hopefully be clear. We would just say that -- and this was a point raised, I think, in the written submissions -- to the extent that Achilles argues that there is no evidence on the connection or otherwise between Network Rail's function of ensuring safety on its network and (**Inaudible**) activity, that of course equally applies to the Tribunal's own analysis which concluded that the two are not dissociable. That is at paragraph 102 of the judgment. In any event, Network Rail says that the relationship between the two activities is entirely different from the relationship between (**Several inaudible words**) downstream non-economic activities. We also -- again, this is pointed out in the written submissions -- have this dichotomy in as much as Network Rail -- it has been found that the concession meant that Network Rail can legitimately apply the RISQS-only rule when it is contracting with its own suppliers but cannot do so when it is not, so when there is an economic relationship it can apply the RISQS-only rule

but this rule cannot be applied when public buyers are involved with the suppliers so that the buyers do not have the economic relationship.

I think it has been suggested that a number of the points don't raise legal issues -- points of law, rather. Obviously, there can be (**Inaudible**) view of the facts on appeal including where there is no evidence of all the facts or the evidence does not support the conclusions that are drawn. We say that applies, for example, to the issue of market definition. I will not say anything more on that.

There are some points made about the *De Minimis* Notice and the Block Exemption Regulation. Obviously, we accept that Network Rail did not raise the *De Minimis* Notice during the trial and only referred to in passing the Vertical Block Exemption Regulation. On the *De Minimis* Notice point, Network Rail did very clearly argue the RISQS-only rule did not advance an appreciable restriction of competition, and clearly the *De Minimis* Notice provides important guidance from the European Commission which we say should have been taken into account at least given the requirements placed on the Tribunal by section 6 of the Competition Act, but similar considerations apply to the Vertical Block Exemption Regulation.

Even considering Network Rail did not raise the *De Minimis* Notice and Vertical Block Exemption Regulation at trial, of course that is not the end of the matter. There is scope for new points of law to be raised on appeal. At the end of the day, I think we would say that these two, the *De Minimis* Notice and Vertical Block Exemption Regulation, do raise points of law. There would not be any new evidence required to apply them. If one or the other does apply then there is the answer, and the RISQS-only rule does not fall foul of UK competition laws or the Chapter I prohibition in the first place. We do not see what prejudice there would be to Achilles in those two points we raise on appeal.

I think it also needs to be borne in mind when pursuing those points that those points go to the extent to which demand for supplier assurance can be said to be foreclosed through the RISQS-only rule (**Inaudible**) effects analysis that is being looked at.

Of course, we have already discussed the concession that we say Achilles made on the last day of trial in oral closing and on which Network Rail did not have a chance to comment during the trial. That concession says that to the extent the RISQS-only rule forecloses demand for supplier assurance with respect to supplier contractors contracting

directly with Network Rail, that is not anti-competitive, and that of course then assists in the potential application of the *De Minimis* Notice and the Vertical Block Exemption Regulation given that a much smaller portion of the market is, according to the judgment, we say, anti-competitively foreclosed.

Briefly on appreciable effect, I think it is suggested that the point at 15e of our PTA application that there is no legal point. The legal point we would say there is the misapplication and incorrect reliance on *OTOC*.

Then at 10 -- this is in the submissions for today -- my learned friend at 10.4.6 of his submissions for today says that the benefits of the tender process are irrelevant when considering appreciable effect. We would say that when examining the effects on competition, it must be by reference to the situation which exists on the market absent agreement of the restriction in question and therefore without the restriction and reservations (**Several inaudible words**) a very different affair, and it cannot be presumed that it would generate the same benefits identified by the Tribunal elsewhere in the judgment.

I think our submissions on objective justification -- I do not intend to say anything further on that. I think, equally, our submissions on the exemption criteria are set out in some detail, so unless there is anything in particular to assist the Tribunal on that point, I do not feel I need to go into more detail on that. Equally, I do not think much was said, at the moment at least, on abuse of dominance in the written submissions by my learned friend. I think our submissions on that can also stand and I do not intend to elaborate on them.

I do want to pick up briefly just on the compelling reasons. It has been suggested that because the Tribunal found there were not any safety concerns ultimately that measures have been put in place to avoid the safety concerns and therefore safety should not really be a consideration. As you know, Network Rail said from the outset that removing the RISQS-only rule imposes a material risk to safety. The Tribunal disagreed with that. However, that was because the Tribunal considered that it would be possible to put in place a significant additional set of supervisory activities to ensure that two or more supplier assurance service providers work to a common standard, their performance always compatible and linked to IT systems, and assuming those significant additional set of advisory activities are put in place effectively, safety should not be compromised. Of

course, on the other hand, if those significant additional set of advisory activities and supervisory activities are not put in place, effectively there could be a risk to safety. Network Rail's approach to the hierarchy of risk control is that it is better not to add complexity in the first place because of the risks that that engenders.

So, if Network Rail were to be successful on appeal, of course it would be required to implement an additional set of supervisory activities, and I would say particularly if Network Rail is rushed into this -- we have heard the three weeks being suggested by my learned friend in terms of the time considerations here -- that could without doubt give rise to the types of safety concerns Network Rail was at pains to emphasise to the Tribunal during the trial.

Yes. Are there any further questions on that?

CHAIRPERSON: No. Do you want to deal with stay as well?

MR WENT: Shall I deal with that now?

CHAIRPERSON: Yes.

SUBMISSIONS ON STAY BY MR WENT

MR WENT: I do not think there is any difference of opinion in terms of the relevant legal principles we need to apply. I think I have set them out in the written submissions for this hearing. Ultimately, of course, the question is whether there is a risk of injustice to one or both parties if the stay is granted or refused. We say that there is a risk of injustice to Network Rail if a stay is not granted while there is minimal risk of injustice to Achilles if the stay is granted. Again, we have set out our detailed reasons on this in our submission of 9 August 2019 (**Several inaudible words**) wasted expenditure, although of course we have already discussed the considerable efforts that would be required of Network Rail in order to comply with the judgment.

The first point that I would make on this is that safety can and should be taken into account when considering whether to grant a stay. I have explained just now the reasons for that, when considering compelling reasons for allowing permission to appeal.

The second point, just briefly elaborating on the point of confusion, the confusion we are talking about is the market being told now that if alternative supplier assurance providers are permitted to provide assurance services only to be told late in the day that that is not the case. We had already seen confusion in the marketplace when Achilles sought to continue

providing supplier assurance services and would have lost the RISQS tender. We say there is a real risk of similar confusion if the stay is not granted and ultimately Network Rail were successful on appeal.

Then Achilles claims that the longer they fought to re-enter the market would give rise to a high risk that the outcome of the case would be frustrated. I think we find we have some difficulty seeing why a company with a 20-year track record in the industry could not re-enter the market even after substantial delay. The contracts Achilles had with suppliers, as far as we understand, had already expired, so the position would not be different in a year's time in terms of any ongoing contracts, that there are not any. There is no evidence before the Tribunal that the high risk (**Inaudible**) frustrate the very outcome the judgment is aiming to achieve or that it would eliminate competition within the relevant market permanently. There of course can be new entry into markets at any time and certainly any company with a history of Achilles within the industry should be in a position to do so, we say.

We are in a different position now as compared with the point in time when the expedited trial was ordered, when the contracts are still existent, and the Tribunal found at paragraph 18 of its judgment ordering the expedited trial that, given Achilles' track record as a provider and supplier of assurance services, Achilles would be in a good position to win back customers whose contracts with them had expired, so again it is difficult to see why that would be any different in a year's time as opposed to now.

In addition, part of Achilles' case is that there are companies with an interest in cross-sector offering, so Achilles will continue, one assumes, to serve those customers and that will of course provide a useful way to re-enter the market at the relevant time assuming that Network Rail's appeal is unsuccessful. We have heard in evidence that I think the contracts are typically annual, a year in length, and so it will be a year until Achilles could challenge contracts that have already been entered into recently and that will apply, of course, on a rolling basis going forward, so again we do not see the prejudice that has been suggested by Achilles.

I think those were my submissions on the stay, Sir, unless there are any further questions.

CHAIRPERSON: No. Thank you.

REPLY ON PERMISSION TO APPEAL AND STAY BY MR WOOLFE

MR WOOLFE: Sir, I will genuinely be very brief on permission to appeal, because obviously that is primarily a matter between the intended Appellant and the Tribunal and I have already set out the points in writing. The only point I was going to pick up in particular is the suggestion that it does not matter that certain points were not raised about the *De Minimis* Notice and the Vertical Block Exemption because all that matters is now a legal point is being raised that the Tribunal need consider these. If it had been suggested in pleadings that the effect on the market needed to be quantified in the way that is now suggested, and absent quantification, as a matter of law the claim would fail because we have not shown how the *De Minimis* Notice or Vertical Block Exemption applied. Had that been pleaded then maybe the evidence would have taken a different course. No point was raised as regards the application of the *De Minimis* Notice or the Vertical Block Exemption and it cannot simply be raised now after the event. Otherwise, I am content to rely upon the points which are made in writing.

In respect of stay, I simply would reiterate that health and safety concerns are not at this stage a valid reason for imposing a stay in circumstances where not only has the Tribunal found against the Defendant on those, but none of the intended grounds of appeal raise health and safety points.

What is left, therefore, is matters of inconvenience. Although it is a matter to consider the risk of injustice on the facts of every case, such inconvenience does not normally amount to a risk of injustice. There is an inconvenience on the Defendant's side and you will recall, Sir, in the *BMW v HMRC* case, the inconvenience to HMRC of having to change various of its systems was rejected as a point. By contrast, the impact on the Claimant could be very severe. Contrary to what my learned friend says, it is not simply about the fact that contracts have expired already and therefore we will be in just as good a position next year as we are this year. The Claimant has relationships with people who it has audited. Relationships go cold if you do not meet people for a period of now a year, another two years and so forth. People move on and it may get harder to get back into the market; reputation gets forgotten. It is also suggested that the value of the cross-sectional approach that we are proposing will be just the same in a year's time, but of course it depends what happens in various markets for providing these kind of services over that

course of time. It would be unfair for my client to be prevented the opportunity to re-enter the market for any longer.

The final point, then, the big-picture point, is really about the kind of timeline that is being proposed. It is being suggested that this order be stayed pending a trip to the Court of Appeal. Now, absent any form of expedition in the Court of Appeal (which is, as you know, Sir, quite hard to obtain) on ordinary expectations we would get a hearing there sometime possibly before summer next year, the judgment would be coming round probably this time next year, and then it is being proposed by my learned friend that they should take six months plus at that point to change their standards and consider all these points in the round. That would mean between this rule being imposed in May 2018, we would be looking at some time around probably early 2021 before the situation was remedied. We appeared before this Tribunal in late 2018 seeking expedition. That would be a two-and-a-half-year process to try to get any form of relief. In circumstances where no compelling reasons have been put forward as to why it causes a risk of injustice to the Defendant or any compelling operation problems, we say there should not be any form of stay even if permission is granted.

Sir, that is everything I have to say on the stay and permission to appeal.

CHAIRPERSON: Thank you. We will now rise and consider our ruling.

(3.17 pm)

(A short adjournment)

(3.50 pm)

RULING

CHAIRPERSON: This is the Tribunal's ruling on consequential matters following our judgment dated 19 July 2019. There are four main issues to be addressed: the terms of the order, costs, whether to grant permission to appeal and whether to stay the order pending appeal.

Dealing first with the terms of the order, there are three issues here. The first is to whether, as suggested in Network Rail's draft order, the order should include a list of the reasonable and proportionate measures needed to ensure that the critical safety purposes of the Sentinel and OTPO Schemes are not compromised. Network Rail submits that the order should specify these measures or conditions; Achilles disagrees. In our judgment, specifying the type of measures that would qualify as reasonable and proportionate is not

necessary and should not be included in the draft order. The list is not particularly helpful as even on Network Rail's case it is non-exclusive and does not purport to define comprehensively what may amount to reasonable and proportionate measures and is likely to give rise to unnecessary debate. We agree that the better course would be for Network Rail to formulate the conditions which it considers to be reasonable and proportionate to notify Achilles in advance of publication of those conditions, giving Achilles the opportunity to bring the issue back to the Tribunal in the event of dispute. It is not necessary for that notice requirement to be included in the order. On this basis we approve paragraphs 3 and 5 of Achilles' draft order.

The second issue is as to the timing of the publication of the conditions. We accept that in order to bring to an end Achilles' exclusion from the market which we have found to be unlawful, Network Rail needs to address the proposed conditions or measures as a matter of urgency, but we agree with Network Rail that Achilles' suggested time limit of 21 days is unrealistic. It seems to us that it would be preferable to require Network Rail to publish its conditions as soon as reasonably practicable, and if Network Rail took an unreasonable amount of time, Achilles would have liberty to apply to the court for further directions. It seems to us that if there were no stay of the order, Network Rail should be in a position to go to the ORR for any approval required by the end of the year. I will come back to the effect of a stay in a moment.

The third issue is as to the scope of the prohibitory provisions of the order, in particular its impact on suppliers who contract directly with Network Rail. Achilles' position is that whilst the order may permit Network Rail to mandate RISQS as the supplier assurance for any supplier contracting directly with Network Rail under the PCLS, the order should not go further than that and permit Network Rail to require direct contractors seeking authorisation under the OTPO Scheme for the provision of on-track plant or authorisation under the Sentinel Scheme for workers needing trackside access to be assured via RISQS. For illustration, supposing Carillion is contracting directly with Network Rail and it needs an authorisation under the OTPO or Sentinel Scheme in order to carry out work, Network Rail could not require Carillion to obtain the necessary supplier assurance via RISQS. Network Rail's position is that the order should allow it to require direct

contractors who need authorisation under the OTPO and Sentinel Schemes to use RISQS as a supplier assurance scheme because that is what was conceded by Achilles.

Having reconsidered the transcript, we take the view that the key distinction in Achilles' case was between Network Rail's position as buyer free to impose RISQS on its direct suppliers and the position of other buyers who should have a free choice as regards supplier assurance. The concession as understood by the Tribunal and reflected in paragraph 6 of the judgment was that Network Rail should be free to require its direct contractors to obtain supplier assurance via RISQS for the purposes of all three schemes. What the concession did not entail (and this is accepted by Network Rail) was an acceptance that Network Rail would be entitled to require its direct contractors to impose RISQS on their subcontractors or that Network Rail might stipulate the use of RISQS by other buyers.

So the order should read, as per Achilles' draft, the first part of which is amended as suggested by Achilles with the insertion under "OTPO and PCLS" the words in parentheses (and I am not attempting to dictate what the order should say but this is to give an indication of what, in the Tribunal's judgment, it should say):

> "… save that Network Rail may require its direct contractors to obtain supplier assurance required under the PCLS, OTPO or Sentinel Schemes for the purposes of performing a direct contract from RISQS but, for the avoidance of doubt, Network Rail may not require its direct contractors to impose RISQS on their subcontractors."

(For ruling on permission to appeal and costs, see [2019] CAT 22.)

Regarding stay, as Achilles correctly submits, an appeal or pending application for permission to appeal does not generally have a suspensive effect on the order appealed against. Moreover, the Tribunal accepts Achilles' submission that a substantial delay in the implementation of the Tribunal's order may well cause it significant prejudice by making it more difficult to establish a competitive foothold in the relevant market, even taking into account its history of involvement in the industry. That would be a loss of opportunity for which damages may not be an adequate remedy. Also being out of the market would be damaging to existing relationships with clients. An appeal may take many months to complete. The Tribunal considers, nevertheless, that this is an appropriate case for a stay

of implementation of the order. Removal of the RISQS-only rule and the making of arrangements for the recognition of alternative supplier assurance schemes only to be followed by the reintroduction of the RISQS-only rule in the event of an appeal succeeding would undoubtedly cause confusion and possibly have adverse consequences for suppliers and contractors in the relevant market.

For these reasons, the Tribunal directs that implementation of the order, with the exception of the provision for Achilles' costs, be stayed pending Network Rail's application for permission to appeal to the Court of Appeal. If the Court of Appeal grants permission it will be for the Court of Appeal to decide whether to grant a stay pending appeal and/or, in view of the urgency from Achilles' point of view, whether to grant an order for expedition of the application for permission and of the appeal in the same way as the proceedings before the Tribunal were expedited. The Tribunal would, however, observe that the stay should not prevent Network Rail from planning for the implementation of the order. They should proceed with their internal planning and be ready to apply to the ORR for approval. If an application for permission to appeal or an appeal is unsuccessful, the Tribunal would therefore expect that Network Rail would be in a position to proceed to implementation of the order without any further delay.

I hope that that ruling is sufficiently clear on the disputed issues under the order. What I would propose now is to give you, say, half an hour to see whether you can agree a form of order which we will then approve.

(4.01 pm)

(Hearing concluded)