IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1298/5/7/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 October 2018

Before:

ANDREW LENON QC
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

ACHILLES INFORMATION LIMITED Claimant

- and -

NETWORK RAIL INFRASTRUCTURE LIMITED Defendant

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Mr Stefan Kuppen (instructed by Fieldfisher LLP) appeared on behalf of the Claimant.

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

CASE MANAGEMENT CONFERENCE

THE CHAIRMAN: Good morning.

MR KUPPEN: Good morning. I am Stefan Kuppen, I am appearing for the claimant today; Mr Flynn QC and Mr Went appear for the defendant.

As the Tribunal will be aware, this is a hearing to hear the claimant's application for expedition of the proceedings and, if you are with us on that, corresponding directions to a trial. You will have seen yesterday, you will have received two separate sets of directions. We have had some further discussions since then. The result is that, in terms of structure, there probably are no differences between us, it is simply on the dates, what exactly an expedited timetable means, and I am afraid that we will need the Tribunal's assistance on that once we get there.

THE CHAIRMAN: Yes.

MR KUPPEN: In terms of the application, I am intending to cover that under three headings, and I think that matches essentially the way it is being addressed in the defendant's submissions as well. The first one is to deal with what we might term good reason, or to say why we say that objectively there is a real and pressing urgency in this case. The second point is why we say this case is suitable for expedition, and that covers essentially any burden on the other party or any prejudice that might arise from it. Then third, to term it 'other factors', which include the conduct of the proceedings thus far and what the defendant says has been delay on our part, which we reject.

The Tribunal obviously will need to consider as well the role of other litigants who may suffer and the Tribunal's resources, and probably I can be of little assistance on that point.

THE CHAIRMAN: I do not see that as a major consideration in this case.

MR KUPPEN: If I turn first to urgency: to explain where we are coming from it is probably useful to take a very brief step back and just explain how the current situation has arisen. It appears that there is at least some confusion about the nature of the arrangements that we have seen over the last few years. My client, Achilles, offers supplier assurance services or pre-qualification for suppliers in the rail industry. Ultimately what that means is that they operate a database or a system where suppliers of services to the rail industry enter certain data, which is then audited and which is available to purchasers to view, and can be relied upon because it has been audited. Achilles has been providing that service since 1997 under originally the brand name of Link-Up. In 2014 that system, that Link-Up system, was brought under what is essentially the umbrella of the Rail Safety Standards Board, and was at that point renamed to RISQS.

Importantly, that arrangement over those four years from 2014 to 2018 was a very different one from the one that we are seeing now. During the period 2014 to 2018, Achilles continued to be the contact point for customers. It had the customer relationships, it got paid by the customers, and it was responsible for all aspects of providing the services. The role of RSSB was essentially to lend its name to a system that was based on its safety standard. And for that RSSB received a fixed fee, which one might, for want of a better word, call a concession fee.

That is quite different from the arrangement that is in place now where, in essence, RSSB took over the running of RISQS and decided to outsource its day to day operation because it did not have that capability itself. So the role that is now being played by Capita and Altius is quite a different one from the role that was previously played by my client, and from a customer perspective the contracts transferred, or are transferring, from Achilles to RSSB, not from Achilles to Capita or Altius, who, from the customer perspective, are essentially invisible.

This is essentially to explain why we say there is an existing business for my client that is at risk here, and why it is not quite the same as looking at an outsourcing contract, which is simply being transferred from one provider to another.

The arrangement with RSSB between 2014 and 2018 was always, by contract, a time limited arrangement. When in 2018 RSSB decided - they decided earlier than that, but with effect as of 2018 - to take the system in-house, essentially it decided that at the end of it it wanted to operate RISQS itself. Importantly, it was never clear, or it was never understood by my client, that RISQS would be the only possible, or the only allowed system in the rail industry. As a result, when RSSB tendered or put out RFPs for the essentially back office operation of the RISQS scheme and Achilles lost out under the lot one part of the procurement, it ultimately withdrew from the second lot on the basis that, firstly, it was not comfortable with having the separation between the auditing and the operation of the database business; and secondly, because it felt that it was better off re-entering the market as an independent competitor.

Frankly, if it had thought at that time that withdrawing from the second lot of the procurement was the end of its UK rail business, it clearly would not have done that, in that event it would have approached the procurement in a totally different way.

Why did my client think that it could operate its own business following the end of its arrangements with RSSB? Supplier assurance ultimately is based on a rail industry

standard, which is drafted by the RSSB, and that standard specifically contemplates that there is a multitude of possible assurances and RISQS is only one that is being listed.

Similarly, the contract which my clients had with RSSB contained a non-compete clause. The non-compete clause specified that during the term of 2014 to 2018, my client could not operate its own system. If that would not have been a possibility at all, that clause would simply have been unnecessary; and similarly, one might have extended the non-compete clause to run beyond the life of the contract.

The same is true with the current procurement, or with the 2018 procurement, which similarly contained a non-compete requirement for anybody bidding to operate part of the system. In correspondence, it was further clarified that that meant that my client could not resurrect the Link-Up grant during the duration of the contract that was being procured for because that would lead to a conflict of interest, but again from the RSSB side, from the author of the standard, quite clearly it was considered that at least it is possible to have a separate system.

That brings us to the situation where we are now where, contrary to expectations, and contrary to what informed my client's conduct, it is simply not able to operate its own system which it has been operating since 1997. As a result, the business is essentially dying because, absent recognition by National Rail as the gatekeeper and as the author of the scheme rules, there is simply no value in its services to its customers.

Achilles has always assumed to only retain part of the business, and that part of the customer base would naturally end up on RISQS, as it happens in a competitive market, but it certainly had never expected to be entirely excluded from the market.

For the moment, Achilles is retaining the underlying resources of its rail supplier assurance business, essentially in the expectation that this matter can be resolved and that in due course it will be able to offer its services again. Therein lies the urgency, because the revenue is essentially trailing off to zero. The relevant contracts are pretty much all annual contracts. Given the switchover on 1 May, the revenue has been trailing off since then.

In addition, it is becoming increasingly difficult to retain what are essentially now idle staff, and I understand that just recently one of the specialist rail auditors left for RISQS on the basis that Achilles simply is no longer in the UK rail business. The further we get away from 1 May 2018, so the switchover, the more difficult it also becomes for my client to re-engage with its customers. It is quite natural to do this on an annual basis, but once we are getting closer to the anniversary of the switchover, necessarily the natural kind of engagement cycle with its remaining client base disappears. Ultimately, the business will

just disappear from the market, because it will not be economically viable to maintain it. That would likely be irreversible, we say.

Maybe, as has been pointed out to us, the reputation of having been the incumbent is not going to die overnight, but once customers are settled on the other system and staff are lost we are essentially down to zero per cent market share with no base to provide our services. It will be either extremely costly or essentially impossible to rebuild that position.

It is in that sense also that we say that we need the resolution of this by 1 January, or at the very least very early on in the year, and it is not, as has been put to us, an entirely arbitrary date, but it is simply that up until that point we still have at least some mass of existing customer relationships.

THE CHAIRMAN: You have some at 1 February. You will have some at 1 March 2019.

MR KUPPEN: Yes, we will have a disappearing kind of window of being able to contact people.

The second point is that in alignment with the fiscal year of the rail industry more generally, our fiscal year comes to an end at the end of April. Again, January is kind of the point where one then needs to start thinking about readjusting revenue base, reducing head count, and take similar measures if it does not look, or is not clear whether there will be any revenue in the following business year to support.

Ultimately, if Achilles disappears from the market, that is not just of importance to us, but is of wider importance, because it means the loss of a competitor in the rail industry. It is not just any competitor, it is an experienced competitor, it is a well respected competitor. Frankly, it is a competitor who has more experience than the new suppliers of the supplier assurance system. Competition in the form of an alternative scheme available to participants in the rail industry is bound to have the usual benefits of competition in the form of price, choice, innovation, which competition for the market every four years just simply cannot deliver, and that is ultimately relevant not just to my client but to everybody in the rail industry down to consumers and tax payers.

It is worth maybe flagging also that the effect on my client does not just extend to the rail industry in the narrower sense. On the one hand there are reputational concerns because questions are being asked as to why a successful and long-established competitor is simply being excluded from the market; but the second one is, as the defendants point out in their submissions, the Sentinel scheme operated by Network Rail, for instance, has also just been adopted by Transport for London as its scheme. So the foreclosure effect potentially stretches beyond the direct national rail market, but extends to other things like, at the very least now, Transport for London.

If we then turn to why we say it is also feasible to expedite these proceedings, and say it does not place an undue burden on the defendant - we can maybe leave aside for the moment what exactly an expedited timetable would mean, because clearly there is some debate about that as well, the general point we are making is that this clearly is a case which is suitable for a streamlined approach.

Mr. Flynn's submissions remind us of how complex competition cases can be. That is undoubtedly true, but clearly that depends on the specific case. A good example of that is that the defendant's submissions refer us to a quote from the case of *BMI Healthcare v Competition Commission*, which refers to how redolent with technical and complex issues competition cases tend to be. That case is a very good example of that. It was a dispute at the end of the market investigation by the Competition Commission into the private healthcare market in the UK about just how much confidential data needed to be disclosed in a data room so that the gist of the proposed decision by the Competition Commission could be understood. Clearly, that is a much more complex matter than we are dealing with here.

It is simply not correct to say that this case is undoubtedly complex because the factual framework is clear. The conduct that we complain about does not need much elaboration. It is simply that the scheme rules prohibit us from offering an alternative service to RISQS. We do not need complex economic evidence that you typically see in competition cases to say that this has an effect on competition, because clearly being excluded is a foreclosure effect, it is not a question of whether economic analysis can substantiate an effect of a conduct which is much less clearly defined.

This is also not a case where we are dealing with a secret cartel or anything else where we would need to trawl through tens or hundreds of thousands of pieces of disclosed evidence. The facts, in our submission, are quite plainly out there for everybody to see.

Now, I appreciate that the defendant's response is likely to be, well, that there is an objective justification for what they are doing, and that will need some substantiation and some support on the evidential side. Again, that is undoubtedly correct, but the efficiencies that we are talking about here are simple cost efficiencies, costs savings from operating one system and not several. That is again not complicated economic evidence, but it is probably a brief statement by an accountant.

The second aspect that is being hinted at is safety. It is being said that safety is something that needs to be considered extremely carefully. That is fine, but to that we say two things. First of all, we are not some upstart provider, we have been operating this system for 20

years without any concern about whether we are safe. Secondly, if you look at Network Rail's own letter from May 2018, which essentially triggered this, the justification given there was simply one of a reduction of overheads and audit burden, no mention of safety. So, yes, there will be some disclosure and there will be some evidence needed to substantiate this case, but it is a far cry from what we would typically see in a competition case where the factual basis is likely to be hotly debated and the economic effect is going to be subject to quite substantial dispute.

Similarly, we are saying that this is a trial which lends itself to splitting the issues and essentially looking at a simplified version of liability first. Similar to the approach that was taken - I think we referred to *Streetmap v Google*, I think it is probably safe to assume that there is some form of dominance by Network Rail. In reality, there simply is just no way around Network Rail for providing services in the rail industry in the UK. The same is true for market definition. There may be a dispute of what exactly the right market is, but that is not really going to affect either a finding of dominance or, we say, the effect of any foreclosure, which is obvious. We are being excluded from the market entirely, irrespective of how that market has been defined. So, from that point of view, we think it is entirely possible to focus an initial trial simply on a question of abuse and a potential objective justification in the context of Chapter I, whilst leaving aside the possibly more complex topics of dominance and market definition.

THE CHAIRMAN: That is accepted in the defendant's draft directions, is it not?

MR FLYNN: That we would not be dealing with dominance?

THE CHAIRMAN: Yes.

MR FLYNN: Yes, it is, in our draft directions.

MR KUPPEN: It was not entirely clear whether the same applied to market definition as well, but we say that market definition is not something that needs to be considered.

Finally, if I can turn to other points which, I guess, primarily address the point of delay, which is being raised against us. We entirely accept that the conduct of a party is relevant to take into account. But the reference in the defendant's submissions to the *Gleave* case just simply is not appropriate in the current context.

THE CHAIRMAN: Sorry, to which case?

MR KUPPEN: *Joseph Gleave*, it is in paragraph 9 of the defendant's submissions. It is *Joseph Gleave & Son v Secretary of State for Defence*. The point here really is just that that case talked about a leisurely procedural history and, more specifically, about the nine weeks that it took to exchange pleadings.

The situation here is an entirely different one. First of all, the background to all of this is that it simply was never clear to my client that they could not operate an alternative system. Therefore a reference to May 2017 when lot one of the procurement was decided simply is not the relevant starting point. The relevant starting point, we say, is the May 2018 letter from Network Rail which in our mind for the first time made it clear that Network Rail would take the view that we simply cannot operate our own system.

The letter that I am talking about is in the bundle----

THE CHAIRMAN: Yes, I have it.

MR KUPPEN: Essentially, this is the first time we say that we understood that the fact that the Sentinel scheme referred to only one scheme, and that is RISQS, was by design and with the intention of not allowing any other scheme, and not simply as a reflection of the fact that at the time RISQS was the only system, because, as I said earlier, on the basis of the wording of the standard which expressly refers not just to RISQS but to equivalent schemes as well, it had always been our understanding that it is possible for other supplier assurance systems to exist.

If we look at the procedural history from there, it looks entirely different, because after that we immediately sought to resolve the issue. Clearly we are talking about Network Rail as the largest stakeholder in the rail industry and my clients as a long standing industry participant, and in many ways partner of Network Rail. So it is perhaps not surprising that we did not go from zero to 100 in terms of getting to litigation. But, after May things moved quite swiftly.

THE CHAIRMAN: The first letter I have got is a letter dated 26 July. What happened between May and July? It is a two month period.

MR KUPPEN: As I understand it, between May and July discussions continued. I am just trying to - even if we assume for the moment that we are going from May to July, this is essentially two months for a long standing industry participant to say ultimately we have to take this to a completely different level of not looking at it from the point of view of any negotiations, where really we just want the other side to sit down with us and come to a sensible conclusion.

THE CHAIRMAN: But all this time on what I understand your client's case to be, your customers are drifting away, and it must have been clear that unless something was done about it that situation would continue?

MR KUPPEN: That is true. At that point it was clear that the business was disappearing, but what was not clear is that it would not be possible to resolve it in a different way. That is

why I am saying, going from 14 May to 26 July is not an undue delay in coming to the decision that actually we have to take on the largest stakeholder in our industry in a much more formal and legalistic way, rather than in the way we have been used to dealing with them for the last 20 years.

You will see that the letter of 26 July essentially mirrors ultimately in terms of what is being asked for under the heading of 'Resolution' that then finds itself in the letter before action in August. I think especially from the letter of 26 July which, under the heading of 'Resolution' on page 11, asks for Network Rail to "immediately" review and reverse its decision, and point (iv) to, "without delay", work with Achilles to issue a public statement in respect of that, it is clear that there is urgency on my client's side, even if the letter before action does not use the word 'urgent'.

Then the letter before action equally did not take us anywhere, the application for expedition was made in the claim form and, therefore, in our view, at the earliest possible point in time.

Therefore, we say this is a million miles away from the "leisurely procedural conduct" that is being described in *Gleave*, and more fairly describes perhaps some hesitation on behalf of my client to escalate the matter to the extent it has now escalated, because it is certainly the case that my client never intended and never wanted to find themselves in this situation and in this room, but were fully expecting to be able to resolve this through a sensible discussion within the industry context.

Those are the points I want to make. It is probably too early to talk about directions.

THE CHAIRMAN: Thank you very much.

MR FLYNN: Sir, good morning. Sir, our position is in two parts: we say this case is not suitable for expedition. In many ways it is for the reason that, as the claimant acknowledges, it is not a suitable case for an interim injunction because there are complex issues which require proper resolution before a judgment can be given.

The alternative point is that we complied with the Tribunal's direction and drew up what we thought was a stretching timetable, should you, contrary to our primary submission, order expedition. The timetable that I think you have seen is not one that we recommend to the Tribunal, but it is one that we have mapped out in case you are minded to order expedition.

Dealing, firstly, with suitability - you have seen our submissions in our skeleton argument, and I am not going to repeat everything there - essentially we say that the claimant's approach has not been expeditious. We say that there is no objective urgency justifying expedition and there would be severe prejudice to the defendant.

As regards a lack of expeditious conduct, perhaps the starting point is that there is, as we understand it, no change in policy. Network Rail has always mandated the RISQS scheme since it came into force in 2014, and as far as I am aware it also mandated the use of the predecessor to that scheme.

What has happened is that whereas Achilles has been administering the scheme since it came into force in 2014, and its predecessor since 1997, what has happened is that they lost the contract to provide it and they did so in the course of a tender process which the RSSB divided into two lots. And you will have seen that Achilles were on the short list for one of the lots and not the other, and at that point they pulled out of the tendering process.

That was around April 2017. So they have known since the tender began at the latest that if they did not succeed in the tender they would not be providing the services, and they have known since effectively forever that it was Network Rail's policy to mandate the use of RISQS.

So we say that May of this year is really not the starting point for considering whether their conduct is expeditious. Plainly, there is an incomplete record before you because, as Mr Kuppen fairly admitted, there is no record of any discussions between May and July of this year. In any event, we say that is not the starting point.

Mr Kuppen this morning mentioned matters which are not in the witness statement, saying that there was a change of the system in that what he calls his client's customers were transferred to the Board rather than to the two new providers of the services. That is not in the witness statement and I am not immediately able to say whether there is any force in that point, but at the least there are plainly factual disputes between the parties based on what has been said today, including the effect of, and meaning of, any apparent non-compete clause in the contract to which he drew your attention. Since there had never been a possibility that anyone else would be providing the specific assurance services that Achilles had the contract for, it is really not clear what the purpose of any non-compete would be other than to focus minds on performance of the duties under the contract.

In relation to objective urgency, we say there is no magic in the January 2019 date. As you, sir, have pointed out, there will be customers in February, there will be customers in March, and so on. Indeed, it seems that they are signed up, possibly on annual contracts, but on a rolling basis. So they are not signed up on one particular date in the year. They can be signed up at any time. That is something, arguably, they should not have done on an annual basis, but are telling their 'customers', when it was clear, or a possibility, that they were not going to be holding the tender after April of this year.

The particular suggestion that there is a 'tipping point' we have dealt with at paragraphs 35 to 38 of our skeleton. We do not understand what is meant by that. It is really partly the point I have just been rehearsing, but it is referred to as a 'tipping point' for the market. At most, it may mean a 'tipping' point for the applicant, but we do not fully understand what is being said there.

There is some consternation on the part of my clients at the suggestion that other than its RISQS 'customers', the claimant has some other business in railway assurance services. You may have noted in the annex 5 to Miss Ferrier's witness statement there is just a little table of their projected revenues and you will see that that is headed 'RISQS - financial year 2019', I believe. So, as far as we understand it, their business in this area is linked to the RISQS contract.

As far as prejudice to us is concerned, again we have developed this in the skeleton. There are clearly complexities in the regulation of this industry. It will take time for appropriate evidence to be assembled and for disclosure. This is not just about an objective justification, it may go to whether there is an abuse at all, in particular in circumstances where, even if it is taken as read that Network Rail is dominant, as alleged, the other relevant markets mentioned in paragraph 28 of the claim form are markets in which, however they are defined, Network Rail is not active. So it is not just a question of objective justification, there may need to be detailed evidence about that.

It is quite likely also that any evidence would have to come from, or be informed by, discussions with relevant people at RSSB rather than within the knowledge of my client, Network Rail. That would go, for example, to the tender process for the contract which Achilles pulled out of. That is not something which we administered.

Possibly this does not go to the actual prejudice to us in relation to the expedition point, but I think it was treated like that by Mr Kuppen this morning: this case is not just about allowing one person in to provide these services. If they are right it will require a wholesale change of policy, not only by my client but by other participants in, let us call it broadly, the rail industry, where what they have been trying to do is actually centralise these registers of accredited people and companies so as to make sure that things are not falling between the cracks. The mention of TfL coming on board, which Mr Kuppen made, is actually a very good example of that, because it is known that people who have been effectively, if I can use the term loosely, struck off in relation to Network Rail were not struck off in relation to TfL, although arguably they should have been.

That is the point about centralising on this and the point about the problems that will arise if there is a proliferation of potential suppliers, and obviously if one is allowed in then it could be any number who objectively meet the criteria of the relevant standard. There would probably be a problem to exclude people who did not.

Broadly, those are the submissions we make in relation to suitability for expedition. We say it is not suitable and it is not necessary, and it has not been pursued with the necessary vigour.

Briefly on the timetable, should you not be with us on that, we have put forward a timetable which corresponds pretty closely to that ordered by the Tribunal in the *Socrates v The Law Society* case which, as you, sir, will know, was a case under the Tribunal's own fast-track procedure, which has not been applied for here, but that is expedition in any other name. The cases were comparable in the sense that there was a Chapter II and a Chapter I claim pursued by Socrates there. They are not comparable in that, as I think has been admitted this morning, whereas in the *Law Society* the services which Socrates provided, or had been providing, were also provided by the Law Society and the vice was effectively taking them in-house and mandating the use of the in-house training as opposed to the external training that had previously been permitted. It is not the case here. This is not a service which Network Rail provides, it is a service which it needs for principally safety and operational efficiency on the railway. The cases are different in that respect, but in some respects comparable.

Mr Kuppen made reference to the shorter timetable in the *Google* case, which is a case where an interim injunction had been applied for and refused - *Google v Unlockd*. That case, of course, focuses only on Chapter II and Chapter II issues. So we say that is less of a comparison in the Tribunal's own practice.

The idea of rushing, if I may call it that, rushing to judgment by 1 January in accordance with Achilles' timetable, we say is simply impossible to achieve when you consider what is going to be needed. We have not even talked about expert evidence yet, but there will have to be some, or at least evidence from people who are very knowledgeable about the industry. Their timetable assumes that everyone is available, everyone has got nothing else to do, and in respect of experts who might be approached, that they are not conflicted.

So we say it is simply impossible, and furthermore it would put an impossible burden on the Tribunal because, with the best will in the world, it is not being suggested by Achilles that the thing could be finished before mid-December, and they are hoping for a judgment round about 1 January. We say that is simply unworkable.

In relation to our own position, perhaps I should just make a couple of points so that Mr Kuppen can hear them. It makes no provision for intervention, and this is a case where it is conceivable that there would need to be intervention by other railway industry participants, or the Board. That would need to be factored in. As I have already said, the requirements for disclosure and the searches that go for disclosure and preparation of witness statements is likely to be extremely heavy in this case. Even in our timetable, we say that is stretched, and possibly itself unsafe in speed. Therefore, if you are minded to go down that route, it is important that there should be liberty to apply in case of difficulties in that regard.

I think, in short compass, that is an outline of our position, sir.

THE CHAIRMAN: Thank you. Do you have anything to add, Mr Kuppen?

MR KUPPEN: Yes, can I just make a couple of points? The first one was it has now been pointed out to me what happened in the period May to July. In the August letter by Network Rail, which is on page 13 of the correspondence, there is reference to a May 2018 meeting, which had been arranged but did not happen because Achilles' CEO had at short notice to return to the US. What happened there is that his father had passed away and as a result the process temporarily ground to a halt on our side. That is just for reference.

The second point is that it was put that it is not in the witness statement that the business was transferring from Achilles to RSSB. That is mentioned at paragraph 14.4 of the witness statement.

Similarly, the previous arrangement of an annual fee that was payable to RSSB is at paragraph 16.3 of the claim form.

There is a final point, just the comparison to *Socrates*, which was fast-tracked. The fast-track, frankly, is not just about speed, despite its name, but similar to the fast track, or more generally tracks in other courts, it is just as much about controlling costs and keeping, for instance, evidence in check and similar things. We say the fact that *Socrates* went to the limit of the six month period allowed for the fast-track process does not really tell us anything about whether that timetable was as expeditious as it could have been or would have been if expedition had been ordered as well.

THE CHAIRMAN: Thank you. I am going to rise to consider the parties' submissions and I will give a short judgment at, I hope, 11.30.

(Short break)

For Ruling see [2018] CAT 15

THE CHAIRMAN: I am going to ask the parties if they can rework the draft directions that they have made and hopefully agree something. Shall I now rise for - shall I give you half an hour? Would that be enough?

MR FLYNN: Shall we see what we can do in half an hour, sir? It probably is just a question of flexing the dates, because I think, as Mr Kuppen said earlier, at least yesterday agreement was reached, I think, on the structure that we propose.

THE CHAIRMAN: Yes.

MR FLYNN: So I think we should be able to do something. It may just be a question of adding or subtracting a few days here and there.

THE CHAIRMAN: Yes.

MR FLYNN: Could I make a particular point in that connection, so that all can hear it? That is as to the defence, which we might have been working on had it not been for this application. We will be, I think, suggesting, and if necessary applying for, a bit more time than 1 November in the light of developments. Let us see how we get on in the next half an hour.

THE CHAIRMAN: I am not entirely clear as to what is happening about the issue of market definition, whether that is going to be something that is a live issue at the trial, or whether that is something that is also going to be a matter for an assumption.

MR FLYNN: Yes. I think the suggestion has always been from Mr Kuppen's side that the trial would proceed on the basis that we are dominant as alleged, which is what basically Network Rail does, and we are happy to do that.

THE CHAIRMAN: Yes.

MR FLYNN: Other markets are defined, and it may be that we do not need to go into those. It may be the legal question of what is the relevance of the markets on which we are not active, however defined. So it may not be necessary to go into that in much detail, but I think I need to reserve the position and discuss it with the clients before giving a definitive answer to that point.

THE CHAIRMAN: Thank you.

(Short break)

MR KUPPEN: Sir, we have spoken and we have reached agreement on pretty much all aspects of the order and propose to draft it up for the Tribunal and send it across in due course after this.

The one minor snag we have is that we acknowledge there is a difference for the moment in the estimate of how long the trial will take, whether it is five days or eight days. The

compromise we have reached is that we say that we list it provisionally for an eight day window and if, closer to the time, it becomes clear that it is manageable in five days we will indicate that to the Tribunal as soon as possible. The minor difference there in terms of envisaged dates is that we would prefer to start the eight day window on Monday, 18 February, and if necessary run over into the following week. This is partly, of course, driven by the desire for urgency and expedition, but also partly due to the fact that we have counsel availability issues - it is not myself, but different counsel - in the second week of the second half of February. Therefore, we would like to start on the 18th and, if necessary, run over into the final week.

I think Mr Flynn's suggestion is to start the eight days window backed against the end of the month and therefore either take the final week of February, or, if necessary, start three days earlier in the previous week. That is the only dispute.

MR FLYNN: I think that is a fair description, sir. Two points on it: firstly, our suggestion would mean opening the window, as it were, on 20 February, which is a Wednesday. You will appreciate that this is going to be a tight timetable for the Tribunal as well as the parties. That would give the Tribunal a couple of reading days. Should it turn out, against our expectation, that this is a five day case, that week would then go and the case could run from Monday 25 February. We think that is unlikely, but that is a suggestion that would give everyone, frankly, including the members of the Tribunal, more time to digest papers that would be arriving pretty shortly before the trial date.

Secondly, in relation to counsel availability, we say that it is not usually the Tribunal's practice to be governed simply by that. It may be that Mr Woolfe has something in his diary for the following week. It is quite likely that one or other or both of Mr Went and myself will not be available for those dates. That is not something by which you, sir, set the date which you proposed. So we say that our approach is a more convenient one and fairer to all parties, and counsel availability is not the test here.

THE CHAIRMAN: Yes. Sorry, what was your proposed start date, the 18th?

MR KUPPEN: The 18th, yes, to open the window on the 18th, and if necessary run over into the following week. Our position still is that five days should be sufficient.

MR FLYNN: I am not going to turn it into a ding-dong, but it is more likely to be sufficient, if it can be done in five days, if the Tribunal has had a chance to read in and is able to focus the parties' submissions in the five days. I think going in cold on the Monday when other important documents will effectively just have arrived, including the skeleton arguments, is not a recipe for a concise trial.

THE CHAIRMAN: Yes. It seems to me that, given the risk, which I do not want to encourage, of slippage in the dates then it probably would be prudent to go for the later date - that is to say 20 February. I appreciate that that may not be convenient to counsel, which I am sorry about.

MR FLYNN: Thank you, sir.

THE CHAIRMAN: So are you going to lodge an agreed order?

MR KUPPEN: Yes, we are going to amend the draft and send it to the Tribunal this afternoon, as soon as we have done that.

THE CHAIRMAN: Okay. Is there anything else?

MR KUPPEN: Not from us.

MR FLYNN: Not from us, sir. The agreed order provides for costs in the case, sir.

THE CHAIRMAN: Very good. Thank you.