



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1298/5/7/18

BETWEEN:

ACHILLES INFORMATION LIMITED

Claimant

- v -

NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant

ORDER

UPON the Tribunal making an Order on 26 May 2020 for the case management of the outstanding issues of Dominance and Damages in these proceedings (“the Further Directions Order”)

AND UPON the Tribunal’s Order made by consent on 20 January 2021 varying the Further Directions Order

AND UPON the application by letter dated 29 July 2021 from the solicitors for the Claimant seeking permission to rely on a five-page witness statement and exhibit by Mr Atle Gjertsen dated 29 June 2021 (“the Gjertsen Evidence”)

AND UPON considering the response dated 6 August 2021 from the solicitors for the Defendant objecting to the late admission of the Gjertsen Evidence and the reply dated 11 August 2021 from the solicitors for the Claimant

IT IS ORDERED THAT:

1. The Claimant be permitted to rely on the Gjertsen Evidence.
2. The Defendant be permitted to adduce a supplementary note (if any) by its expert, Mr Steven Law, commenting on the Gjertsen Evidence and its impact on his Expert Report, and/or to update the relevant part of the Joint Statement

of Experts, should he wish to do so. Any such note and/or update shall be filed and served by 4pm on 20 September 2021.

3. Costs in the case.

REASONS

1. The Gjertsen Evidence addresses a factual allegation made in the Defendant's Expert Report dated 11 June 2021, concerning the extent to which the Claimant's experience as an operator of a supplier assurance scheme in the oil and gas industry in Northern Europe (Achilles JQS), subject to competition from a rival scheme (EPIM JQS), is a meaningful comparator in this case. The allegation in question is that EPIM JQS appears to operate in only a portion of Achilles JQS's market.
2. The Defendant objects to the admission of the Gjertsen Evidence on the following grounds:
 - (a) The Gjertsen Evidence is out of time. Witness statements were ordered to be filed and served by 19 March 2021 with reply witness statements to be filed and served by 1 April 2021.
 - (b) The Claimant should have anticipated that the Defendant would dispute the appropriateness of the Claimant's experience of Achilles JQS and ensured that all relevant matters, including the scope of the supplier assurance markets, were covered in its evidence in a timely fashion.
 - (c) The Claimant's experience of Achilles JQS is in any event not a meaningful comparator in this case because of the significant differences between the North European oil and gas sector and the situation in the GB rail sector.
 - (d) The Gjertsen Evidence brings little clarity to the matters in issue.
 - (e) Admission of the Gjertsen Evidence will lead to disruption in the lead-up to the trial and increase costs.

3. The issue of whether or not the Claimant's experience of Achilles JQS is a meaningful comparator in this case is an issue to be determined at the trial. The Gjertsen Evidence is relevant to that issue.
4. The Tribunal accepts the Claimant's explanation for its failure to adduce the Gjertsen Evidence in accordance with the directions for filing and service of witness statements. The allegation that the scope of EPIM JQS is more limited than Achilles JQS's market was made for the first time in the Defendant's Expert Report. The Claimant's failure to anticipate this allegation, which the Claimant says does not reflect its own understanding of the situation, should not preclude the Claimant from adducing evidence to address that allegation now.
5. The alleged lack of clarity of the Gjertsen Evidence is not a valid ground for excluding it. It will be open to the Defendant to draw the attention of the Tribunal to any deficiencies in the Gjertsen Evidence at the trial.
6. The admission of the Gjertsen Evidence, a five-page statement covering a specific and narrow issue, should not cause undue disruption in the lead-up to trial or otherwise unfairly prejudice the Defendant. There is sufficient time for the Defendant to respond to the Gjertsen Evidence if it wishes to do so.

Andrew Lenon QC
Chairman of the Competition Appeal Tribunal

Made: 19 August 2021
Drawn: 20 August 2021