



Neutral citation [2018] CAT 15

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1298/5/7/18

Victoria House
Bloomsbury Place
London WC1A 2EB

19 October 2018

Before:

ANDREW LENON Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

ACHILLES INFORMATION LIMITED

Claimant

- v -

NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant

Heard at Victoria House on 19 October 2018

RULING (APPLICATION FOR EXPEDITION)

APPEARANCES

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

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

1. The Claimant, Achilles Information Limited (“Achilles”), represented by Stefan Kuppen, is applying for an order that the trial be heard on an expedited basis with a five day trial in December 2018. The application is opposed by the Defendant, Network Rail Infrastructure Limited (“Network Rail”), represented by James Flynn Q.C. and David Went.
2. In its claim form, issued on 2 October 2018, Achilles alleges that Network Rail has abused its dominant position in the market for the operation and provision of national rail network infrastructure in Great Britain (“GB”) by adopting a requirement that the Railway Industry Supplier Qualification Scheme (‘RISQS’) be the mandatory supplier assurance scheme in the rail industry to the exclusion of all other potentially competing schemes.
3. A supplier assurance scheme is an arrangement under which suppliers in the rail industry are able to satisfy customers that they are suitably competent and resourced, and can and do consistently deliver their products and services to the customers’ specification.
4. Achilles alleges, further or alternatively, amongst other things, that by adopting this requirement Network Rail is entering into an agreement or concerted practice between undertakings, which may affect trade in the UK, which has as its object or effect the prevention, restriction or distortion of competition within the UK.
5. The factual background to the proceedings is set out in Ms Ferrier’s witness statement on behalf of Achilles. In brief, in 1997 Achilles established a rail sector qualification scheme known as Link-Up. Subsequently, in 2014, the Rail Safety and Standards Board Ltd (‘RSSB’) established RISQS, which used the same platform and has similar characteristics and functionality to Link-Up. In the same year, 2014, Achilles entered into a contract with RSSB to supply website portal hosting, IT operation and audit services in connection with RISQS. In 2016 RSSB put the supply of services to RISQS out to tender. The tender was split into two lots, the first for an IT solution, the second for audit services. The successful bidders were Altius and Capita. Achilles was successful in being shortlisted for lot two, but withdrew from the procurement process

for various reasons. Provision of services by Altius and Capita for RISQS began on 1 May 2018.

6. Achilles contends that at the time of the tender RSSB envisaged that there could be competition in supplier assurance scheme services in the GB rail sector, and that it was only after the launch of the new RISQS scheme in May 2018, when it received a letter dated 14 May 2018 from Network Rail, that Network Rail stated that, in fact, there would be no competition in supplier assurance scheme services for its Principal Contractor Licensing and Plant Operator schemes or its Sentinel scheme, because only RISQS would be recognised by Network Rail.
7. The letter of 14 May 2018 was answered some two months later by a letter dated 26 July 2018, in which Achilles alleged for the first time that Network Rail's conduct in connection with supplier assurance was in breach of competition law. It asked for a reply by 3 August 2018.
8. On 17 August 2018 Fieldfisher, Achilles' solicitors, sent a letter before action setting out the basis of its claims and asking for a response by 18 September 2018, and seeking undertakings from Network Rail to, amongst other things, review and reverse its decision to refuse to recognise any supplier assurance scheme other than RISQS. In response, in a letter dated 30 August 2018, Network Rail's solicitors, Addleshaw Goddard, said that they would send a substantive reply by 19 October 2018. In a letter dated 3 September 2018, Fieldfisher objected to the time which Addleshaw Goddard was proposing to take in giving a response, and said that in the absence of a satisfactory response by 18 September 2018, proceedings would be issued without further notice, and proceedings were issued on 2 October 2018.
9. The principal ground on which Achilles is applying for an order that the trial be expedited is that Network Rail's conduct in specifying RISQS as the exclusive and mandatory pre-qualification scheme for the GB rail industry is causing serious damage to its business. Achilles says it is being shut out of the market and losing customers on a daily basis. There is a particular concern about the loss of business in the period January to May 2019. This is because customers subscribe for supplier assurance services by way of annual subscription. Many of its customers have already transferred

to Altius or RSSB, but there are some, 2,103, who have annual subscriptions which started between 1 January and May 2018 and which therefore come up for renewal in those months. If Network Rail continues to refuse to recognise Achilles' scheme all of its remaining supplier assurance customers are likely to be lost. Achilles still has the underlying resources in the form of specialist staff to handle this business, but if the matter is not resolved by 1 January 2019, or shortly thereafter, this will become economically unviable.

10. Achilles also complains that Network Rail's conduct is causing imminent and acute reputational damage to its wider business where it competes with Altius and Capita, who may be able to use Achilles' exclusion from the GB rail business to their advantage.
11. Achilles contends that there would be sufficient time for a trial to take place in December 2018 with a time estimate of five days. The key facts are unlikely to be in dispute. There is no need for extensive factual investigations or extensive evidence. It suggests that the case lends itself to a streamlined hearing as issues of abuse and objective justification can be tried on a preliminary basis, on the basis of an assumption of dominance. The fact that the case can be dealt with on the basis of an assumption of dominance is accepted by Network Rail. Achilles contends that this is not a particularly complex case and the issue of objective justification may at the end of the day be a matter of a cost analysis.
12. In response, Mr Flynn has referred me to the useful statement of criteria in deciding whether to grant an application for an expedited trial made by Warren J in the case of *CPC Group Limited v Qatari Diar Real Estate Investment Company* [2009] EWHC 3204 (Ch). The relevant criteria are summarised in Network Rail's skeleton argument as follows:
 - (a) The issue whether to grant expedition, and if so how much and on what terms, is a matter essentially for the discretion of the judge.
 - (b) The discretion must of course be exercised judicially. It is partly a question of principle and partly a question of practice.

- (c) The general principle under the CPR is that cases are to be brought to court as soon as reasonably possible, consistently, of course, with the overriding objective.
 - (d) The court has a wider responsibility: it must also take into account the requirements of other litigants.
 - (e) The applicant must therefore satisfy the court that there is an objective urgency to deciding the claim.
 - (f) The procedural history in any case is a relevant factor to take into account. Delay in seeking an order is a factor which may count against an applicant, although it is not necessarily conclusive.
 - (g) Urgency is a question for the court. The respondent's attitude is not really of importance unless the respondent can show some real prejudice to him if a trial is expedited in which he has a part to play.
13. Network Rail also referred to a further principle noted by Arnold J in the case of *Actavis & Ors v Eli Lilly & Company* [2015] EWHC 2124 (Pat) to the effect that the greater the degree of expedition sought, the greater the impact on other court users and on the court, and correspondingly the greater degree of justification that is required.
14. Network Rail opposes the application for expedition on the following grounds:
- (1) It refers to what it says was considerable delay on the part of Achilles in requesting the expedited trial. The first suggestion of an expedited trial was made in the application for expedition dated 2 October 2018. No suggestion of the need for an expedited trial was made in the earlier inter-party correspondence or in the letter before action. The first mention of urgency was Fieldfisher's letter of 3 September 2018. This is despite the fact that, according to Network Rail, RISQS has been a mandatory requirement of the Sentinel scheme and its Principal Contractor Licensing and Plant Operator schemes since 2014. In late December 2017 Network Rail reiterated that it would be

continuing with its longstanding practice of mandating RISQS, so Achilles has known since 17 May 2017 when it withdrew from the procurement process for the supply of IT and audit services to RISQS that it would no longer be supplying services for RISQS from 1 May 2018 and that Network Rail schemes would not recognise any alternative assurance service scheme. So, Network Rail contends, the request for urgency and an expedited trial is inconsistent with the history of the case prior to the request being made.

- (2) Network Rail further contends that the proposed trial timetable is impossible. It says that the claim raises complex issues, it may be necessary to have witness evidence to deal with the issue of objective justification. Expert evidence would be likely to be required in relation to issues of objective justification and market definition. There would need to be disclosure relating to the history of regulation and third party reports and practical schemes relating to railway safety. Network Rail points out that the Tribunal's Rules concerning fast-track trials envisage that the main hearing is to be fixed as soon as practicable, and in any case within six months, and in the one case in which the Tribunal has found that the fast-track procedure would be appropriate, *Socrates Training v The Law Society* [2017] CAT 10, the Tribunal ordered the substantive hearing on liability to take place almost six months after the defence was filed. It also refers to two other High Court cases where expedition was ordered: *Arriva The Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch) where a hearing was ordered over four months after the order for expedition, and the more recent case of *Unlocked v Google*, judgment of Mr Justice Roth of 14 May 2018, where trial was to take place some four months after the direction for expedition was given. Network Rail submits that it is simply not possible to compress the timetable within two months without jeopardising the fairness of the proceedings.
- (3) Network Rail contends that it would be seriously prejudiced if required to plead its case and prepare for trial within two months of receiving the claim form. It says it is faced with serious allegations of breach of *quasi* public law which can lead to the imposition of financial penalties and director disqualifications, and it would be prejudiced if not afforded sufficient time to consider and respond

properly to the serious allegations that have been made. It needs to consider safety issues and the interplay with other industry users who also use the same schemes. It says that complexity of the issues is highlighted by the fact that the allegations and theory of harm in the letter before action and the claim form are not the same. It is being asked to prepare a defence to allegations within three weeks of the claims being presented in their current form. It also says that the time estimate of five days is not realistic and that an eight day estimate would be more realistic.

- (4) Network Rail contends that there is no clear objective urgency. It disputes Achilles' submissions that 1 January 2019 is a critical date. It contends that Achilles should be able to win back those customers whose subscriptions run out in the first four months of 2019 if it is ultimately successful in its claims against Network Rail. Achilles operated a predecessor scheme for 21 years and ought to be able to rely on its track record. It also notes from Ms Ferrier's witness statement that it appears that Achilles is still managing to renew contracts with existing customers, despite the fact that it is not authorised and that only a few customers have referred to the fact that Network Rail does not recognise the Achilles scheme, which suggests that any reputational damage resulting from Network Rail's conduct would be limited.
15. Taking into account these competing arguments, I have come to the conclusion that it is appropriate to make an order for expedition in this case, but with a more extended timetable than that contended for by Achilles. I am going to direct that the trial should take place in the second half of February 2019 - that is to say in some four months' time.
16. I have reached this conclusion for the following reasons: first of all, the starting point is that the onus is on Achilles to satisfy me that there is an objective urgency. I accept that there is some urgency in that, based on Achilles' evidence, Achilles is losing business as a result of Network Rail's refusal to recognise Achilles as an authorised supplier, and that clients who sign up with RSSB rather than renewing with Achilles would be lost to Achilles at least for the forthcoming year.

17. However, I also accept Network Rail's point that Achilles' delay in pursuing a claim against Network Rail and seeking an expedited trial when it has known since May 2018 at the latest that Network Rail would not recognise its supplier assurance scheme, during which time customers have been signing up with RSSB, is at odds with its current stance that a resolution of the dispute is needed as a matter of urgency. Mr Kuppen sought to explain this "hesitation", as he called it, in taking on Network Rail on the basis that Network Rail is a major player in the industry and Achilles was reluctant to escalate the dispute. I am not satisfied that that is a sufficient explanation for the delay.
18. I also accept Network Rail's submission that there is no particular magic in the 1 January 2019 date. There are some 2,103 customers out of 6,480 with registrations expiring between January and May. If the trial takes place at some point between January and May and Achilles obtains relief in that period, it would be still in a position to obtain renewals from customers renewing in the period after relief is granted. With customers who renew before that date, given its track record as a provider and supplier of assurance services, as I say, Achilles may well be able to win those customers back.
19. A two month timetable would be exceptionally compressed and would require very strong grounds in terms of urgency which have not been made out, in my view. I bear in mind the more extended timetables that have been directed in the cases referred to by Network Rail where expedition has been ordered. It seems to me there is a real risk of Network Rail being prejudiced in its trial preparation if I were to direct that the trial takes place in December. The issues may be of some complexity. It may well be necessary to obtain evidence from third parties.
20. It seems to me that a timetable providing for a trial in the second half of February 2019 will, however, give Network Rail sufficient time to prepare its defence, and that timetable would be consistent with the need to bring cases on as soon as reasonably practicable consistently with the overriding objective.
21. For those reasons, as I say, I direct that the trial should take place in the second half of February 2019.

Andrew Lenon Q.C.
Chairman

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

Date: 19 October 2018