

Achilles v Network Rail: Signalling a Shift Towards More Standalone Competition Litigation?

March 10, 2022

The Competition Appeal Tribunal (CAT) has granted a claim for damages by Achilles Information Limited (“**Achilles**”) against Network Rail Infrastructure Limited (“**Network Rail**”).¹ The Judgment is the CAT’s first damages award arising from a standalone claim since 2016,² and follows the CAT’s earlier finding that Network Rail had breached Chapter 1 and Chapter 2 of the Competition Act 1998 (the “**Act**”).³

The Judgment is notable both as a claim in which liability was established through proceedings in the CAT, rather than by a competition authority rendering an infringement decision, and in the claim for damages reaching trial and judgment, rather than settling. It comes at a time when a number of complainants are choosing to bring standalone claims before the CAT and serves as a reminder that private enforcement can provide an effective means of redress for competition law disputes, encompassing not only damages but also issues of liability.

The Judgment also provides a helpful summary of the relevant legal principles for awarding damages in competition claims. In particular, the Judgment reaffirms that difficulties in quantifying a claimant’s precise losses are unlikely to act as a bar to recovery, and in such instances the CAT will adopt a “broad brush” approach in order to calculate damages.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

LONDON

Jonathan Kelly
+44 20 7614 2266
jkelly@cgsh.com

Paul Gilbert
+44 20 7614 2335
pgilbert@cgsh.com

Paul Stuart
+44 20 7614 2207
pstuart@cgsh.com

Ranulf Outhwaite
+44 20 7614 2228
routhwaite@cgsh.com

¹ *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2022] CAT 9 (the “**Judgment**”).

² *See Sainsbury’s Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11.

³ *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20.
clearygottlieb.com



Background

Network Rail owns and operates the majority of the mainline rail infrastructure in Great Britain (GB). Achilles is a provider of supplier assurance services,⁴ including to the GB rail industry.

Achilles' claim related to Network Rail's requirement that companies working on its managed infrastructure had to obtain supplier assurance through a supplier assurance scheme run by the RSSB⁵ known as "RISQS", and not any alternative scheme (the "RISQS-only Rule"). Between 2014 and 2018, Achilles was the sole operator of the RISQS scheme under a concession agreement with the RSBB (the "Achilles Concession").

Following a procurement exercise, the RSBB awarded a new concession to two of Achilles' competitors (Altius and Capita), who began providing supplier assurance services under the RISQS name from 1 May 2018.

In October 2018, Achilles brought a standalone claim in the CAT against Network Rail pursuant to Section 47A of the Act. Achilles alleged that the RISQS-only Rule was in breach of Chapters 1 and 2 of the Act. Achilles claimed that, as a result of the RISQS-only Rule, it had been unable to provide supplier assurance services to the GB rail industry through an alternative scheme upon the expiry of the Achilles Concession.

On 22 October 2018, the CAT made directions for an expedited trial on the preliminary issue of liability. On 19 July 2019, the CAT held⁶ that the RISQS-only Rule breached Chapter 1 of the Act (the prohibition on anticompetitive agreements),⁷ and, on an assumption that Network Rail held a dominant position in the

market for the operation and provision of access to national rail infrastructure in GB Chapter 2 of the Act (abuse of dominance).⁸ The CAT's finding on liability was upheld by the Court of Appeal on 5 March 2020.⁹

Following an Order by the CAT, Network Rail introduced a new standard from 5 September 2020, which abandoned the RISQS-only rule and permitted assurance services to be provided by other providers meeting the new standard.

Achilles Claim in Damages

The Judgment considers Achilles' claim for damages resulting from Network Rail's breach. Achilles alleged that it was forced to become dormant in the industry from 1 May 2018 (upon the expiry of the Achilles Concession) until April 2021, when it launched an assurance scheme called Link-Up, which complied with Network Rail's new standard.

Achilles further claimed that its three-year absence from the market had permanently damaged its ability to compete with the RISQS scheme, and that this would continue to result in future losses even after the launch of Link-Up.

Achilles quantified its total losses to be £12,061,968, whilst Network Rail quantified Achilles' damages as between £581,081 and £1,817,704.

The Legal Framework for Assessing Achilles' Damages Claim

The Judgment contains a helpful summary of the legal principles the CAT applies in assessing damages claims arising from competition law infringements.¹⁰

⁴ Supplier assurance refers to arrangements implemented by a customer organisation to establish that a supplier is suitably competent and adequately resourced and can consistently deliver its products to the customer's specification.

⁵ Rail Safety and Standards Board

⁶ *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20.

⁷ On the grounds that Network Rail's agreements with its suppliers which required them to obtain supplier assurance only through RISQS had as their object or

effect the prevention, restriction or distortion of competition within the UK.

⁸ On the grounds that, by adopting a strategy of excluding competition in respect of supplier assurance schemes in the rail industry and requiring supplier assurance to be provided only through the RISQS scheme, Network Rail had abused its dominant position in a manner that was not objectively justified.

⁹ *Network Rail Infrastructure Ltd v Achilles Information Ltd* [2020] EWCA Civ 323

¹⁰ See Judgment, at 5.

- A breach of Chapter 1 or Chapter 2 of the Act is actionable as a tort for breach of statutory duty. In order to recover damages, Achilles was required to show on the balance of probabilities that it suffered actionable harm or damage as a result of Network Rail’s breach.
- In order to prove that Achilles’ loss was caused by Network Rail’s breach, Achilles had to satisfy the “but for” test.¹¹ The measure of Achilles’ loss was determined as the amount of damages that would place Achilles in the situation it would have been in had the tort not been committed.
- In the context of proof of loss, a distinction is drawn between past facts and future or hypothetical events. In assessing damages, past facts – which are established on the balance of probabilities – are treated as certain by the CAT. For future/hypothetical events, the CAT will estimate the chances of a future event occurring and reflect those chances in the amount of damages it awards.¹²
- The CAT demands only as much certainty and particularity in proving damage as is reasonable, having regard to the circumstances and to the nature of the acts by which the damage is done. The fact that it is impossible for a claimant to prove the exact sum of its loss is not a bar to recovery. In many cases, the assessment of damages will involve an element of estimation and assumption accomplished by the exercise of “*sound imagination*” and a “*broad axe*” or a “*broad brush*”.¹³
- The need to make assumptions and estimates is “*particularly acute*” in the context of the assessment of losses resulting from competition law infringements. Quantifying loss is not a

question of mathematical calculation, but turns on developing a robust understanding of what would have happened in the counterfactual.¹⁴

- The assumptions on which the counterfactual is based must be realistic.
- The counterfactual world is “*purged*” of the competition law infringement in question and its consequences and any other unlawful conduct. The CAT therefore assumed, for the purposes of the counterfactual scenario, that Network Rail would not have engaged in any further violation of competition law or any other unlawful conduct.
- A claimant cannot recover damages for losses which it could have avoided by the taking of reasonable steps to mitigate its losses. It is for the defendant to plead and prove any case on mitigation.¹⁵

The Counterfactual Scenario

To determine the counterfactual scenario that would have existed but for Network’s Rail breach, the CAT considered the following four factors.

When Achilles would have launched its Link-Up service to compete with RISQS

The CAT accepted Achilles’ contention that, but for the breach, it would have continued to provide supplier assurance to the GB rail industry from 1 May 2018 by introducing the Link-Up service. Accordingly, Achilles lost three years of business as a result of Network Rail’s breach.

The CAT rejected Network Rail’s assertion that there would have been a two-year delay in the launch of Link-Up, such that Achilles would have been unable to compete with the RISQS scheme during this period.

¹¹ Namely that, but for Network’s rail breach, Achilles would not have sustained the loss claimed.

¹² See *Mallett v McMonagle* [1970] AC 166, at 176.

¹³ See *Asda Stores v Mastercard Inc* [2017] EWHC 93 at 306(1) to 306(3); and *Mastercard v Merricks* [2020] UKSC 51, at 51.

¹⁴ See *BritNed Developments Ltd v ABB AB* [2018] at 12(8)(d).

¹⁵ See *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC and others* [2020] UKSC 24 at 207-216.

The CAT found that Achilles would have been able to compete with Network Rail from 1 May 2018 because:

- In the counterfactual scenario, Network Rail would have taken reasonable steps to resolve any regulatory or technical issues preventing other providers from competing with RISQS from 1 May 2018 onward.
- Network Rail knew from at least October 2017 that Achilles intended to continue providing supplier assurance services to the GB rail industry.
- The changes that were eventually made to Network Rail's standard to enable Achilles to compete were straightforward and could have been made within a few weeks.
- In the counterfactual scenario, Network Rail would have been proactive in ensuring interoperability between its systems and those of non-RISQS supplier assurance schemes. The CAT found that any delays to achieving interoperability were the fault of Network Rail, not Achilles.

Which party would have had incumbency advantages?

Achilles claimed that, as the sole operator of RISQS under the Achilles Concession, it would have maintained the advantages of incumbency when launching Link-Up. By contrast, Network Rail submitted that the RISQS scheme itself would have been seen as the established and incumbent scheme by buyers and suppliers, even when no longer operated by Achilles.

The CAT held that the debate over incumbency was “sterile,”¹⁶ and that neither Link-Up nor RISQS would have had a clear incumbency advantage for the following reasons.

- Both schemes had some advantage in terms of a recognised brand name.¹⁷

- Under the concession agreement, both parties would have had a copy of, and the right to use, information submitted by suppliers.
- There was mixed evidence of the strength of Achilles' relationships with buyers and suppliers.
- Whether suppliers wished to be registered with the RISQS scheme or Link-Up, it was necessary for suppliers to take active steps rather than simply allowing a subscription to renew itself automatically.
- There was some discontinuity between the scheme run previously by Achilles under the RISQS brand and the new RISQS scheme run by Capita and Altius after 1 May 2018.

The use of Achilles JQS as a valid comparator case

In establishing the counterfactual scenario, Achilles invited the CAT to consider the performance of its supplier assurance scheme (“Achilles JQS”) in the Nordic oil and gas sector when faced with competition from a new entrant.

The CAT took the view that there were significant factual differences between the situation of Achilles JQS in the Nordics in January 2019 and that of Achilles in the GB rail industry in May 2018. Accordingly, the number of buyers and suppliers retained by Achilles JQS in the face of competition from a new entrant could not be taken as a reliable indication of the numbers of buyers and suppliers that would have been retained by Achilles in the counterfactual scenario.

Number of buyers and suppliers retained by Achilles

In calculating the number of buyers and suppliers that would have been retained by Achilles, the CAT considered the following factors.

The CAT noted that its previous judgment on liability held that buyers and suppliers might well eventually

¹⁶ See the Judgment, at 110.

¹⁷ Between 1997 and 2014, Achilles operated a rail industry qualification scheme called Link-Up, which was a precursor to RISQS.

“single-home” to RISQS,¹⁸ such that Achilles would be unable to compete to any material extent under its Link-Up scheme. This was because:

- Network Rail’s and its direct contractors’ continued use of RISQS was likely to lead to a significant proportion of all other suppliers for Network Rail managed infrastructure-related works to use RISQS in order to simplify their dealings with direct contractors.
- The business demand of significant buyers had been committed to RISQS.
- It would be difficult for Achilles to compete successfully on price or to win significant volumes of business without significant differentiation in the type, scope or quality of their offer.

The CAT held, however, that even if buyers and suppliers did “single-home” to RISQS, this would not “*happen overnight*” and it would “*take some time for the final pattern to emerge.*”¹⁹

The CAT further noted that the buyers’ decisions are responsible for determining whether suppliers move to a particular assurance scheme. Accordingly, the number of buyers that would have been retained by Achilles in the counterfactual scenario was critical to determining Achilles’ loss.

In determining the number of buyers that Achilles would have retained, the CAT considered: (i) Achilles’ internal strategy documents between September 2017 and April 2018, which indicated that Achilles expected to retain only a minority of the buyers then on RISQS; (ii) the impact of customer inertia; (iii) Achilles status as “*tried and tested*” provider;²⁰ (iv) apprehension on the part of buyers as to the capacity of other providers to provide an equivalent service through the RISQS scheme; and (v) the prospect of an enhanced service from Achilles in due course.

The CAT recognised the difficulties in predicting the number of buyers and suppliers that would have been retained by Achilles with precision. By applying a “*broad brush approach,*” the CAT nevertheless concluded that a “*significant*”²¹ number of suppliers would have been retained by Achilles in the counterfactual scenario:

- In FY2019, Achilles would have retained 30% of its FY2018 buyer base and 50% of its FY2018 supplier base.
- In FY2020, those percentages would have reduced to 25% of buyers and 40% of suppliers;
- In FY2021, the percentage of buyers would have reduced to 20% with 40% of suppliers.

Future Losses

Achilles also claimed future losses, on the ground that its prolonged absence from the market had left it significantly less well placed to compete with RISQS. Achilles submitted that it would be unable to achieve actual revenue equal to more than 50% of the revenues than it would have been able to generate in the counterfactual scenario in the years FY2022 – FY2026.

The CAT determined that, as a result of its market absence, Achilles would in fact achieve only 50% of the revenues that it would have generated in the counterfactual scenario in the years FY2022-FY2023. The CAT held, however, that Achilles would have regained its competitive position from FY2024, so that no further damages were recoverable in respect of FY2024 onwards.

Computation of Losses

The CAT awarded Achilles damages of £3,874,077, of which £2,591,415 related to Achilles’ lost profits, and £1,282,662 related to Achilles’ loss of future profits.

This figure was approximately a third of the £12,061,968 claimed by Achilles. This disparity largely reflects the CAT’s unwillingness to accept the

¹⁸ *i.e.*, only use the RISQS scheme and no other assurance schemes.

¹⁹ The Judgment, at 134.

²⁰ *Ibid.* at 145.

²¹ *Ibid.*, at 148.

performance of Achilles JQS in the Nordics as a valid comparator case, and the CAT awarding future losses for FY2022-FY2023 only.

Conclusion

The Judgment reflects two current trends in UK competition litigation.

First, Achilles' decision to bring a standalone action before the CAT is consistent with the growing number of complainants opting to litigate liability as well as damages, as opposed to (or in addition to) lodging formal complaints with competition regulators.

Standalone claims may be viewed as an increasingly attractive option for complainants, whether bringing collective proceedings (see, for example, *Gutmann v London and South Eastern Railway & First MTR South Western Trains*²²), or individual claims (such as Achilles).²³ Although litigation can be more costly for claimants than assisting a competition authority investigation,²⁴ seeking to establish liability as part of a standalone claim can have the following advantages:

- Whilst a competition authority might not choose to pursue a complaint, a claim is guaranteed to come before the CAT.
- Litigation may proceed more quickly than competition investigations, particularly if the issue of liability is expedited by the CAT. In the *Achilles* case, the CAT reached a preliminary judgment on the issue of liability within approximately nine months of Achilles issuing its claim.²⁵
- The CAT can order the disclosure of documents to the claimants, providing them with direct access to evidence that may not be available to

a complainant during a competition authority investigation.

- The CAT may award an interim injunction to prevent a defendant from undertaking the alleged anticompetitive conduct whilst the claim is heard, whereas such injunctions are much less commonly granted during competition authority investigations.
- Parties have the option to settle litigation, whereas an investigation by a regulator cannot be stopped by the parties.

Second, the Judgment reflects the readiness of the CAT to adopt a "broad brush" to when calculating damages, in circumstances where the Court is unable to precisely quantify a claimant's losses. This reflects the Supreme Court's ruling in *Mastercard v Merricks*,²⁶ which confirmed that the "broad brush" principle "*is fully applicable in competition cases.*"²⁷

The Judgment is therefore likely to provide further encouragement to complainants considering bringing standalone claims in the CAT as a means of establishing liability for competition law infringements and obtaining redress for any damage they have suffered as a result.

...

CLEARY GOTTLIB

²² [2021] CAT 31

²³ *Churchill Gowns Ltd v Ede & Ravenscroft Ltd* [2020] CAT 22

²⁴ Including paying the defendant's costs if the claim is unsuccessful.

²⁵ See also *Socrates Training Ltd v Law Society of England and Wales* [2017] CAT 10, where the CAT

handed down its judgment on the issue of liability within approximately 13 months of Socrates issuing its claim.

²⁶ See *Mastercard v Merricks* [2020] UKSC 51, at 51.

²⁷ *Id.*