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IN THE COMPETITION

Case Nos. 1258/5/7/16

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 October 2016

Before:

THE HON. MR. JUSTICE ROTH
(President)
MARGOT DALY
DR CLIVE ELPHICK
(Sitting as a Tribunal in England and Wales)

BETWEEN:

UKRS TRAINING LIMITED

Claimant

- and -

NSAR LIMITED

Defendant

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Mr. T. JONES (instructed by Berkeley Square Solicitors) appeared on behalf of the Claimant.
Mr. G. WIGNALL (instructed by Greenwoods Solicitors LLP) appeared on behalf of the Defendant.

**HEARING
DAY ONE**

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(10.30 am) (Proceedings delayed)

(10.47 am)

THE PRESIDENT: We have sitting with us for today Judge Vukelic who is the President of the High Commercial Court of Croatia. He is on a judicial visit to this country and he is with us just for today to see how we deal with competition cases in this jurisdiction.

We will also take a short break at about 11.45 am or thereabouts for the benefit of the transcribers. So if you want to keep an eye out for that, at a convenient point we shall rise.

Yes, Mr. Jones.

MR. JONES: Sir, members of the Tribunal, Judge Vukelic, good morning. I act for UKRS, the claimant. Mr. Wignall on my right acts for NSAR. To my left is my pupil; we have all agreed it makes sense for him to join me here on the bench.

THE PRESIDENT: Absolutely.

MR. JONES: There is an agreed timetable. You will have seen that there are six witnesses, but that only four of them are to be cross-examined, because Mr. Wignall doesn't wish to cross-examine UKRS's witnesses.

We anticipate that the oral evidence will be completed today. We anticipate that there will be relatively short opening speeches.

There is, it seems to me, a little bit of give in the timetable in the sense that now we know Mr. Wignall is cross-examining UKRS's witnesses that obviously frees up a little bit of time. Sir, I have just been handed before you came in a proposed amendment to the defence by Mr. Wignall. I don't know, sir, whether Mr. Wignall intended to deal with this now or later. It may be, though, sir, that I should just hand over to Mr. Wignall to explain whether he does want to deal with this and then, sir, you can (inaudible) how to handle that.

THE PRESIDENT: Yes, Mr. Wignall.

MR. WIGNALL: Well, I'm grateful to you, sir, and to the members of the Tribunal for your time, which was at my request.

So on any view it must be better that I tell you what the nature of the application is. I will be making the application. I would have thought it would be better to make the application now.

THE PRESIDENT: Yes.

Application by MR. WIGNALL

MR. WIGNALL: It arises out of the response to paragraph 3 of the claim form. You will find that, sir, in bundle 0 at the second tab on internal page 3.

1 MS. DALY: Sorry, what paragraph, please?

2 MR. WIGNALL: It is paragraph 3 on page 3 of tab 2.

3 Now, you will see that the averment is that on 17th May NSAR decided that UKRS had
4 breached these various rules relevant to the RTAS scheme and that its accreditation would
5 be suspended for three months.

6 The response to that is in the next tab, tab 4, on page 7. Now, paragraph 5, you will see, sir,
7 that the reply is, the response is paragraph 3 of the claim form is admitted. It goes on in that
8 sentence to say that there is no mechanism enforcement of the trading provider's suspension.
9 I understand clearly from discussions this morning that the legal entitlement to suspend by
10 means of RTAS is actually held by Network Rail, although it is made in close conjunction
11 with a recommendation by the defendant. And, indeed, you may remember seeing the
12 statement of Guy Wilmhurst-Smith who says that only Network Rail can decide to take
13 away a Sentinel card.

14 Sir, I only have, I'm afraid, at the moment the one manuscript version of my proposed
15 amendment and I would have thought it would be most convenient for me to read that out to
16 the Tribunal and then secure some copies. Shall I just take the liberty of reading it out?

17 THE PRESIDENT: Yes. It can presumably be typed up and provided for tomorrow?

18 MR. WIGNALL: Yes.

19 My proposed amendment would vary the first sentence of paragraph 5 of the defence. I will
20 read out the material part. There is a passage which I think isn't relevant which only allows
21 my amendment to fit in properly within that first sentence in paragraph 5.

22 So, my proposed amendment reads as follows: paragraph 3 of the claim form is admitted
23 save that the decision to suspend was taken by Network Rail after a recommendation was
24 made by the defendant. A decision to suspend is in practice taken by the defendant and
25 Network Rail together. The legal entitlement remains with Network Rail.

26 THE PRESIDENT: Yes. I'm a bit surprised that this point is taken so late because certainly all
27 the correspondence I think about the suspension, in which solicitors were involved I think,
28 was with your client, including, from recollection, the decision to suspend. Is that not right?
29 It didn't say Network Rail have decided to suspend after consulting this. In fact, looking at
30 the decision letter of 17th May signed by Tracey Troth on behalf of NSAR, no reference to
31 Network Rail at all.

32 MR. WIGNALL: I agree.

33 THE PRESIDENT: Then the appeal, again, if it is a decision by Network Rail, handled by
34 NSAR.

1 MR. WIGNALL: I agree, sirs, it is surprising. But from my discussions this morning I
2 understand that that is the reality, and rather than the Tribunal acting under an erroneous
3 notion of what the legal reality is, it seems to me that it is much better that you have that
4 before you, sir.

5 Sir, you will not be surprised to hear that I will be submitting in reality that the whole
6 scheme is really that of Network Rail's, and you will understand, sir, that an averment of
7 this nature in the defence does change the scales rather and it would support me in that
8 submission.

9 THE PRESIDENT: Well, I can understand that it may be relevant to this preliminary issue. If it
10 weren't there wouldn't be any problem at the moment. That's why I'm concerned that it
11 comes so late, because the claim that you were faced with, and I'm looking at the claim
12 form, the very end of the claim form, which was an injunction against your client, it almost
13 came on, you will recall, as an injunction hearing, though we didn't have to decide it
14 because we proceeded instead to a rapid trial.

15 At the end of the claim form, 17.2, it is alleged the defendant in imposing the suspension is
16 purportedly acting in this charge. So the defendant in opposing the suspension. No
17 response saying "No, it wasn't us" because you are almost saying you have got the wrong
18 party. But it's a bit late to say that at the opening of the trial many months later, isn't it?
19 That's what concerns me.

20 MR. WIGNALL: Yes.

21 THE PRESIDENT: I mean, are you saying that? That this case, therefore, is brought against the
22 wrong defendant?

23 MR. WIGNALL: Well, in effect I will be saying that in any event whether or not you allow this
24 amendment, because in essence on the face of my learned friend's own pleadings the whole
25 scheme remains with Network Rail. It is really a Network Rail scheme, and we have made it
26 perfectly clear that all that happens is that we are devolved with the function of the making
27 sure that RTAS is --

28 THE PRESIDENT: Yes, but you are independent of Network Rail and that was, as I understood
29 it from the evidence, one of the whole reasons for the accreditation and auditing being
30 passed over to a third party. Because it was felt if Network Rail did it, there might be a
31 conflict of interest, and I could quite understand that, and that you are an independent body,
32 you work closely in co-operation with Network Rail because you do it, if you like, on behalf
33 of Network Rail. But it is still, and I'm looking at your strike out application -- it's not

1 saying it wasn't our decision. It was the decision of Network Rail which we just
2 implemented, no suggestion of that.

3 MR. WIGNALL: I agree.

4 THE PRESIDENT: I mean, obviously we will hear from Mr. Jones, but it is not discussed, I
5 think, in your witness statements from your client either. But there may be significant
6 cross-examination then on what was going on and why the lettings were written in the terms
7 that they were. And what was Network Rail's involvement in the appeal if it is their
8 decision, and how is that structured.

9 So, I find this very troubling that it should emerge at this stage.

10 MR. WIGNALL: I'm bound to say also, sir, that I intend to ask the Tribunal to admit a document
11 into the papers as well. Perhaps you should see that as well.

12 THE PRESIDENT: Yes. (Handed)

13 You see it is an email of 17th May which is the same date as the letter of suspension, and
14 addressed to Tracey Troth who wrote that letter. It is from someone in Network Rail.

15 MR. WIGNALL: You will have seen also there is an email which preceded that at the bottom of
16 the page.

17 THE PRESIDENT: Yes. (Pause)

18 You say:

19 "We agree with your recommendations."

20 It doesn't mean that it is our decision, our, Network Rail's, decision. They may have
21 consulted Network Rail and got the views of Network Rail, and having got those views
22 UKRS then proceeded to implement the decision. So I don't think this letter is inconsistent
23 with the pleading as it stands. But if you say that your instructions are confirmed, and we
24 have of course the in-house lawyer from Network Rail giving evidence, that this was a
25 Network Rail decision, one assumes a decision then taken at the formal review meeting, and
26 being a formal review presumably minuted, one would then of course expect to see the
27 minutes.

28 You say you were told this this morning; is that right?

29 MR. WIGNALL: We had some discussions this morning and this issue arose this morning, yes.

30 THE PRESIDENT: I don't understand how the defence could have been pleaded the way it was
31 on instructions. Clearly done on instructions and signed by Ms. Millen.

32 MR. WIGNALL: Yes.

33 THE PRESIDENT: Well, that's your position, is it?

34 MR. WIGNALL: It is my position.

1 THE PRESIDENT: Mr. Jones, what do you say about this?

2 Reply by MR. JONES

3 MR. JONES: Sir, I object. Picking up first on this email, sir, as you have just pointed out, this
4 email that has been handed up is entirely consistent with what has been said before. And,
5 indeed, sir, I should remind you that actually one of my clients' positive allegation is on
6 discrimination. And it is at paragraph 84 of our claim form, tab 2. It is not relevant for the
7 preliminary issue, but what we had said is:

8 "The fourth reason why UKRS's suspension cannot be justified is that it appears the
9 suspension may been influenced by Network Rail and/or the ongoing British
10 Transport Police investigation."

11 So, sir, the fact that there is evidence that Network Rail --

12 THE PRESIDENT: Could you help me, where is that in your --

13 MR. JONES: It is at page 20. It is in bundle 0.

14 THE PRESIDENT: Yes, in the claim form.

15 MR. JONES: In the claim form, tab 2 on page 20. So paragraph 84.

16 THE PRESIDENT: Yes. Can I just look at the defence to that paragraph?

17 MR. JONES: Sir, there isn't a defence to that paragraph because they have only pleaded a
18 defence to the question of undertaking.

19 THE PRESIDENT: Of course, yes.

20 MR. JONES: But that was one of the points we were making on why they had behaved as they
21 had. We said it was to further their commercial interests and this reference to Network Rail
22 was made in that context.

23 So the email in that sense strengthens my case and is not surprising. It doesn't say anything
24 about who has the power.

25 I should say, sir, that it is clear that at an earlier stage Network Rail was operating that
26 power because one sees, for instance, in bundle 1 at tab 4, if you go to page 218.

27 THE PRESIDENT: These are the numbers starting with 00, yes?

28 MR. JONES: Sorry, yes, 00 at the bottom.

29 THE PRESIDENT: Yes, 218. The 12th January letter, yes?

30 MR. JONES: 12th January 2016. It was never entirely clear what Network Rail's role was at that
31 stage, but one sees from this letter they did apparently take a decision that an earlier
32 suspension, so not the one at issue in these proceedings, would be lifted and that that was a
33 decision by Network Rail.

1 So if one goes back in time, indeed it is clear that Network Rail did play some sort of
2 decision-making role. But, sir, the suggestion that they carried out that role in this case is
3 contrary to the evidence, contrary to what has been pleaded and entirely unsupported by any
4 reference to legal documents.

5 Sir, could I just go through those three points very quickly.

6 On the evidence one sees the decision letter. So you already referred to it. That's page 245
7 using the same number.

8 THE PRESIDENT: Just pause a moment because I don't think my colleagues have got it yet.

9 (Pause)

10 MR. JONES: Sir, this is the Tracey Troth National Skills Academy letter. It is over the page:

11 "As a result of the findings, UKRS training will be suspended."

12 They say you have a right to appeal in seven working days.

13 If you look at the next page, you will see that my client asked how to appeal, because
14 another one of the complaints which -- I don't want to delay you too much --

15 THE PRESIDENT: We have read your pleading.

16 MR. JONES: There was a complaint about the process and that is what prompted the provision
17 actually of an appeal document which one sees earlier in the bundle.

18 So it is actually in tab 3 at page 77. Again, it is an NSAR document, and you will see over
19 the page that there is a list of dates on which it was reviewed, and it was reviewed on 18th
20 May which is the latest one.

21 DR. ELPHICK: Sorry, which tab are we?

22 MR. JONES: It is still in bundle 1, tab 3. Again, it's those little numbers which start BSQ, page
23 77. And then I was looking over the page at the list of review dates or revision dates.

24 Just to make the point, this was reviewed, one assumes, in the context of responding to
25 UKRS's request for information about the appeal. And, again, it is not entirely clear, but if
26 one looks over at page 80, 2.2 "Appeal process", it says, third paragraph down:

27 "If an assured provider, trainer or assessor is unhappy with the outcome of the
28 investigation or any sanctions and they wish to appeal, they should write to the NSAR
29 person identified in the letter sent to them advising them of their right to appeal, and
30 then they will be invited to an appeal meeting."

31 So then picking it back up in the correspondence, the appeal -- so this is back in tab 4 and
32 the page numbering is a bit different.

33 THE PRESIDENT: Just one moment.

34 Yes, this is entirely an NSAR procedure, isn't it?

1 MR. JONES: Yes.

2 THE PRESIDENT: No involvement of Network Rail, this appeal procedure. Yes.

3 MR. JONES: So then back in the correspondence, the appeal itself is at page 262.

4 MS. DALY: In tab 4?

5 MR. JONES: It tab 4. It is a small point but just to emphasise, this appeal is then sent to NSAR
6 is all I want to draw your attention to. It is an appeal to NSAR.
7 Then it is over the page, 265. Again, this is just NSAR asking for more information to
8 support the appeal. One then has the meeting notes of the appeal at page 269. No one from
9 Network Rail was there.

10 THE PRESIDENT: Yes. The appeal was heard by I think the chief executive of --

11 MR. JONES: By the chief executive of NSAR, Mr. Robertson.

12 THE PRESIDENT: Yes.

13 MR. JONES: Then we see the letter liaising with Network Rail, but then the appeal decision is
14 then at page 301. It is signed by Mr. Robertson. If you look at page 303 the heading
15 "Outcome":
16 "I have considered the further evidence. I find no evidence to support the appeal
17 application. I find that," etc, etc.
18 Again, no reference to this decision has been taken by Network Rail.
19 Sir, that's the evidence. The next point I made is contrary to what's been pleaded and, sir,
20 you have heard the application to amend the pleadings in this Tribunal. But, sir, the point is
21 worse than that because you --

22 THE PRESIDENT: Can I just interrupt you for a moment? Just pause.
23 Mr. Wignall, can you just help us on this. I understand you are saying the decision to
24 suspend was taken by Network Rail. What is your position regarding the appeal? Who
25 took the decision to dismiss the appeal?

26 MR. WIGNALL: I think I know the answer to that, but I should just check, if you don't mind,
27 behind me.

28 THE PRESIDENT: Yes.

29 MR. WIGNALL: The appeal process is distinct, as I understand it, and the decision, that is taken
30 by the defendant, by NSAR. Or that was taken by Mr. Robertson without reference to
31 Network Rail in order to secure their agreement.

32 THE PRESIDENT: I mean, that is a possible structure that one could have, that Network Rail
33 suspend, but there is an appeal to NSAR against that decision, isn't there? It is not --

34 MR. JONES: Sir, it is a possible structure.

1 Could I ask you to look next at bundle 4. And at the back of -- it is tab 10, are some
2 documents that you won't have seen that have just been added. At tab 10 there are four
3 documents A, B, C, D, and I just want to start with tab B.

4 THE PRESIDENT: These were added this morning?

5 MR. JONES: They were added this morning.

6 MS. DALY: Sorry, which tab?

7 MR. JONES: Tab 10B.

8 THE PRESIDENT: B.

9 DR. ELPHICK: Yes, B. Got it.

10 THE PRESIDENT: Yes.

11 MR. JONES: Sir, the background to this is that in light of the defendant's position in these
12 proceedings my clients took what you might call protective judicial review proceedings in
13 which they were essentially saying: if you are not an undertaking, then you are subject to a
14 judicial review.

15 This is the statement of facts and grounds, and I should just show you paragraph 4 of this
16 explains, sir, what I have just explained to you.

17 Of course it is possible that they might be an undertaking and subject to judicial review.

18 They are not necessarily mutually exclusive categories. But the point we were making is
19 that if they are not an undertaking, then they are subject to judicial review (inaudible).

20 That is then expanded if you go to page 12, paragraphs 55 and 56. So UKRS contends in
21 the CAT proceedings that NSAR is an undertaking. We quoted from their skeleton
22 argument at an earlier hearing before you which, sir, I have read to be (inaudible) that we
23 should take judicial review proceedings instead or rather that that would be the correct
24 forum. And what one then has in the next tab is the response to this which is dated the end
25 of September, which my solicitors received a couple of days ago, sir. But if one looks
26 firstly at paragraph 7 --

27 THE PRESIDENT: That's 28th September.

28 MR. JONES: 28th September this year. It is an extraordinary document for several reasons.

29 Firstly, to this particular point, paragraph 7:

30 "The applicant was suspended by the respondent."

31 Sir, what is then said is essentially that it comes under a judicial review because it is a
32 commercial contractual context.

33 If you look forward to paragraph 13:

1 "It is submitted that the resolution of such issues of fact in the commercial contractual
2 context ..."

3 They are talking there about the relationship between NSAR and my client, which here they
4 are saying is not subject to competition law because it is not commercial:

5 "... in the commercial contractual context within which they arise is not something
6 that can or should properly be dealt with as an application for judicial review when
7 there is the potential availability of such an alternative remedy."

8 The remedy they are talking about is a contract claim.

9 If you look at paragraph 16:

10 "It is submitted the nature of the real complaint is an allegation of a breach of contract
11 and should be treated as such."

12 MS. DALY: Sorry, which paragraph?

13 MR. JONES: 16.

14 THE PRESIDENT: Yes.

15 MR. JONES: Now, we have asked to see that contract because that of course would be relevant
16 to the issue before you, if there's a contract --

17 THE PRESIDENT: Aren't you a member?

18 MR. JONES: We are a member.

19 THE PRESIDENT: You pay a fee, don't you?

20 MR. JONES: Sir, there are two separate things. We are a member of the company. So one is
21 subject to that. Now, membership of the scheme, no, that's different. You don't have to be a
22 member of the company to participate in the scheme. One does have to pay fees and so on.
23 My client hasn't been able to identify any contract. We have asked, having seen this, for the
24 alleged contract and it has not been provided.

25 Now --

26 THE PRESIDENT: That is a separate point.

27 MR. JONES: It is a separate point, but it is related, sir, in this sense because Mr. Wignall's
28 proposed amendment, as I understand it, is not simply that Network Rail -- and this is, as it
29 were, my third point -- was consulted, but as he put it in the amendment, it had the legal
30 right to suspend. And the obvious question is: where is that legal right written down? Is it
31 in the contract with my client? We haven't seen that contract. Is it in the relationship
32 between NSAR and Network Rail? It would appear not because NSAR's case is that that's
33 all governed now by the MOU, the memorandum of understanding, which they say is not
34 legally binding and doesn't address this point.

1 So quite apart from the evidential volte face, quite apart from what their pleadings say, even
2 on its own terms a late amendment like this without the most straightforward of supporting
3 evidence showing where is this legal power, should not, sir, be permitted in my submission.

4 THE PRESIDENT: On any view the decision to affirm the suspension or to dismiss the appeal
5 was the defendant's decision. That's accepted.

6 MR. JONES: Yes.

7 THE PRESIDENT: And that's part of your complaint.

8 MR. JONES: Yes, sir.

9 THE PRESIDENT: Can I see the text of your proposed amendment, please?

10 MR. WIGNALL: Of course. Sir, since we have been speaking, I have added a further sentence.
11 I will just read it out before I hand it up to my learned friend here:
12 "The final decision in respect of the claimant's suspension was taken after an appeal
13 process was concluded, and that decision was taken by Mr. Robertson of the
14 defendant."

15 THE PRESIDENT: Yes.

16 MR. WIGNALL: Which I hope would recommend itself to the Tribunal. Because of course
17 although the amendment is late, it explains the witness statement of Mr. Wilmhurst-Smith.
18 (Document handed)

19 THE PRESIDENT: Who do you say enforces this suspension?

20 MR. WIGNALL: As I understand it, what happens is that a decision is taken, and the way in
21 which that is enforced, so to speak, is through some process, an electronic process, which
22 makes it impossible for --

23 THE PRESIDENT: That's how it is implemented.

24 MR. WIGNALL: Yes.

25 THE PRESIDENT: But the enforcement is done on the instructions of the defendant, isn't it?
26 The instructions of UKRS, not on the instructions of Network Rail?

27 MR. WIGNALL: You mean NSAR?

28 THE PRESIDENT: Yes, the defendant, NSAR. Sorry, not NSAR -- yes, NSAR. NSAR are the
29 people who carry out the suspension, it may be done by an electronic process.

30 MR. WIGNALL: It is how I understand it operates.

31 THE PRESIDENT: It is not Network Rail who do the suspension, it is NSAR who do it.

32 MR. WIGNALL: I suspect Network Rail have a facility, but NSAR actually carry it out and
33 effect the change electronically.

34 MS. DALY: The suspension of the Sentinel cards?

1 MR. WIGNALL: Yes.

2 DR. ELPHICK: You are saying NSAR makes a recommendation to Network Rail in regard to
3 suspension, but it is no more than a recommendation, are you? And then that is decided
4 upon by Network Rail?

5 MR. WIGNALL: Yes, but in practice, in these regular meetings, Network Rail would be told
6 what is happening and Network Rail may say "We will say yes, that is quite right, that is
7 appropriate, there will be discussions --

8 THE PRESIDENT: But who takes the decision?

9 MR. WIGNALL: The decision will be taken -- the legal entitlement is held by Network Rail, but
10 in practice I suspect the evidence will be that Network Rail very rarely if at all decline the
11 recommendation by NSAR.

12 THE PRESIDENT: Well, that I can understand, but my question about who actually takes the
13 decision, it may be they follow a recommendation rather like the Lord Chancellor
14 appointing a judge. The recommendation comes from the Judicial Appointments
15 Commission, it is the Lord Chancellor's decision to appoint. What she now gets is a
16 recommendation, but it is her decision and her appointment. So, I'm just trying to be clear.
17 Who takes the decision to suspend or not suspend?

18 MR. WIGNALL: There would be no suspension unless Network Rail had been asked and said
19 "Yes, suspend". So in that sense, Network Rail makes the decision.

20 THE PRESIDENT: Because what I don't understand is, in light of this -- just a moment (Pause).
21 It is NSAR who can lift the suspension. They have the power to delay the suspension even
22 if it is Network Rail's decision?

23 MR. WIGNALL: I understand that in this case the amendment is directed at what happened in
24 this case. And I understand that in this case the legal decision remained with Network Rail,
25 but it was taken very quickly after recommendation of NSAR. My understanding is this is
26 why Mr. Wilmhurst-Smith says in his witness statement:
27 "Only Network Rail can decide to take away a Sentinel card. Only Network Rail can
28 take the decision to prohibit the use of the card and thereby prevent anyone from
29 making use of it to work on its infrastructure."
30 So that amendment --

31 THE PRESIDENT: To prohibit these cards. But having taken that decision, then, UKRS can
32 override it on an appeal.

33 MR. WIGNALL: It looks like it, yes.

34 THE PRESIDENT: I keep saying UKRS. NSAR can override it.

1 MR. WIGNALL: I would think that there is bound, again, to be some discussion between
2 Network Rail and NSAR, but Network Rail, when it comes to the appeal process, they let
3 NSAR take the final decision. But there would be some discussion with Network Rail.

4 MR. JONES: Sorry, I hesitate to interrupt, but just on one small factual point, I think there is a
5 danger of mixing up suspension from RTAS with the Sentinel cards. The cards which are
6 in the pockets of anyone who needs to go on the tracks. No dispute but that Network Rail
7 manages all of that, and if there were an issue with a particular worker they would be
8 responsible for the decisions relating to that.

9 It may also be, I suppose, that if a training provider is suspended, then Network Rail might
10 decide to lift their Sentinel cards because it might decide the trainer should no longer have
11 access theoretically. But they are distinct decisions and distinct schemes.

12 MS. DALY: Thank you. That was the point I was thinking about. Sentinel cards are for
13 individual employees who have access to the network, but there is a facility -- excuse me, I
14 remember reading about it but I don't remember the exact language -- in which UKRS are
15 denied access into a network that allows them to upload someone. And what is that called
16 and who turns off that facility?

17 MR. JONES: That I would need to take instructions on. Could I just do that?

18 I'm told NSAR turns that off. What is it called? That's just the Sentinel scheme.

19 MS. DALY: So it is UKRS's access to the Sentinel scheme that allows the training provider to
20 upload newly accredited information on an individual, and it is NSAR who cuts that off
21 once someone has been suspended?

22 MR. JONES: That is my understanding, although could I just add this point, which is regardless
23 of whether or not they were excluded from the Sentinel software, the suspension, in my
24 submission, would anyway be a separate thing. If they had been suspended, even let's
25 assume NSAR forgets to turn the system off or Network Rail, or whoever does it, they
26 would still be suspended under the scheme albeit that they might inadvertently still have
27 that facility.

28 MS. DALY: Thank you.

29 DR. ELPHICK: May I just clarify my understanding of what's being said. I think what's being
30 said is your case is that a recommendation is made by NSAR to Network Rail in regard to a
31 suspension, but the decision is taken by Network Rail. It is very likely that the relevant
32 organisation will then appeal, given the importance of that decision, and then the decision in
33 regards to the appeal is taken by NSAR on its own with no reference to Network Rail. Is
34 that a fair summary of what you are saying?

1 MR. WIGNALL: That is a fair summary. Whether or not there is always an appeal, I couldn't
2 say. But that is an accurate summary, sir, as I understand it. (Pause)

3 THE PRESIDENT: The appeal I think also varied the terms of the suspension because it delayed
4 the start of the suspension and would have been for three months, I think, from the date of
5 17th May. That was the --

6 MR. WIGNALL: Page 305 is the final decision on the appeal.

7 THE PRESIDENT: Yes. Looking back to the suspension letter, the suspension letter says that it
8 would start on 23rd May to 22 August. That was the decision appealed against. It wasn't
9 simply appeal dismissed. The suspension period was changed to start from 21st June. That
10 was a UKRS decision.

11 MR. WIGNALL: The answer to that is yes, sir. I hope you won't mind my mentioning it, but the
12 acronyms are getting a bit switched around.

13 THE PRESIDENT: I keep getting mixed up. That is an NSAR decision, isn't it?

14 MR. WIGNALL: Yes.

15 THE PRESIDENT: So the actual suspension decision, the final suspension decision, which is on
16 the final page of the appeal, is actually the decision of NSAR, isn't it?

17 MR. WIGNALL: It is. On the appeal.

18 THE PRESIDENT: It might be following an appeal, but the decision therefore that's challenged
19 is the suspension from 21st June to 20th September. That was the active decision which is
20 on page 305. And that is a decision of NSAR?

21 MR. WIGNALL: Would you give me one moment, sir, sorry? (Pause)

22 Yes, indeed, in the claim form at paragraph 3 --

23 THE PRESIDENT: I know it says "NSAR decided" in the first sentence.

24 MR. WIGNALL: It then goes on:

25 "The suspension was stayed pending UKRS's appeal. NSAR rejected the appeal on
26 17th June and the three-month suspension started on 21st June 2016."

27 THE PRESIDENT: But that's because NSAR, in rejecting the appeal, they did not just say
28 "appeal dismissed" so that the original suspension decision remained valid. They varied it
29 to start the suspension on 21st June. As stated in very clear terms in Mr. Robertson's letter:
30 "UKRS will be suspended from 21st June until 20th September."

31 MR. WIGNALL: Sir, I'm very anxious to make sure I get this correct, I'm sorry.

32 THE PRESIDENT: You should. I will let you take instructions.

33 (Pause)

1 MR. WIGNALL: I'm glad that you allowed me that moment, sir, because my instructions are that
2 on the appeal Mr. Robertson took the decision. But you will see that there is a short gap
3 after the 17th. Mr. Robertson tells me he took the decision himself but then he telephoned
4 Network Rail, and my understanding is that it was open to Network Rail to say "No, that
5 isn't a right outcome".

6 So in practice the decision here was taken by NSAR, but there was a process, again, of
7 checking it with Network Rail.

8 THE PRESIDENT: Well, I think it does seem to me that that is the decision that is really being
9 challenged. It is part of a process that started on 17th May, but the suspension that's being
10 challenged is that from 21st June and that is a UKRS(sic) decision. Whether Network Rail
11 were involved in it or not and how is something that might be now explored.

12 Give me just a moment then. (Pause)

13 It seems to us, Mr. Wignall and Mr. Jones, that the proper course is not to rule on your
14 application now. We would like you to first of all go away and reflect on the outcome of
15 these exchanges, and in particular to reflect the fact that you have told us on express
16 instructions: (a) that the appeal decision was a decision of NSAR, albeit after consulting
17 Network Rail; and that the suspension therefore ordered from 21st June to 20th September
18 was a decision of NSAR; that should be included in the proposed amendment and if you
19 produce a typed draft for us tomorrow and supply it this evening to Mr. Jones, we can deal
20 with this tomorrow; and that we should proceed with our hearing on the basis that it is the
21 decision to suspend from 21st June to 20th September that is being challenged and that is
22 accepted to be a decision of NSAR.

23 Rather than ruling on it in this form which doesn't, I think, reflect the totality of the decision
24 as you have explained it in answer to our questions.

25 So that is how we would propose, subject to anything either of you say, to deal with the
26 amendment.

27 There is a second point which is I don't know whether there has been disclosure of any
28 documents relating to the process as you have explained it, in particular the formal review
29 meeting of 16th May conducted by Network Rail referred to in the email and any note of
30 the telephone call, if that's what it was, between Mr. Robertson and the relevant person at
31 Network Rail preceding his decision.

32 Speaking for myself, I think there should be such disclosure. If it is disclosure from
33 Network Rail so be it, we have power to order that. And I would like you to take

1 instructions as to what documents there are because I think in the light of what's been said
2 this morning we would like to see them.

3 MR. WIGNALL: I'm grateful, thank you.

4 THE PRESIDENT: Can I just first of all ask Mr. Jones on the first point, namely that we won't
5 rule on the amendment, we will proceed on the basis that the decision as set out in the letter
6 from Mr. Robertson was the effective suspension and that is accepted to be a decision by
7 this defendant, we can then continue.

8 MR. JONES: Yes, I'm grateful.

9 THE PRESIDENT: Are you content with that course?

10 MR. JONES: Yes.

11 THE PRESIDENT: Then, Mr. Wignall, could you investigate the question of any documentation.

12 MR. WIGNALL: Of course.

13 THE PRESIDENT: I think what we will do, because it might bear on some of the -- it may or
14 may not, it of course depends what there is -- might it be relevant to any questions, that's
15 what I would like to know.

16 MR. JONES: Yes, it won't be relevant to my opening but it could be relevant to questions, so it
17 might be convenient --

18 THE PRESIDENT: In that case, I think what we will do is -- we have lost a lot of time -- we will
19 take our short break. We will then have our openings and that can be investigated over
20 lunch.

21 MR. JONES: Yes. I'm grateful, sir.

22 THE PRESIDENT: We will have just a five-minute break now.

23 (A short break between 11.51 to 11.58)

24 Opening submissions by MR. JONES

25 THE PRESIDENT: Yes, Mr. Jones.

26 MR. JONES: Sir, can I start with the diagram on page 5 of my skeleton argument. If I could ask
27 you to turn to that, please. This is where I have tried to map out the general framework, and
28 it might be helpful to take that out if it is in a bundle and just keep it to hand because I will
29 be referring to it through my opening submissions.

30 The only statutory body shown in this diagram is the Office of Rail and Road, the ORR, the
31 statutory regulator in the rail sector. And of course it regulates, among other things, but in
32 particular Network Rail, which is essentially the monopoly manager of rail infrastructure.
33 Network Rail, as you will have seen, is a not for profit, not for dividend company, but run
34 on commercial lines. Some of the documents and, indeed, some of the witness statements

1 suggest it is a public or statutory body. Mr. Wignall will, I am sure, take us to the statute if
2 this is wrong. As far as I can see, it is not a statutory body and nor is it a public body in any
3 relevant sense. It is owned by the government and the government has various powers to
4 appoint directors and so forth. But I will take you to a case in due course which actually
5 examined Network Rail's status from the point of view of European law and makes quite
6 clear that it isn't a public body for our purposes.

7 Nor does Network Rail have any power or any duty deriving from statute to set up a scheme
8 of the sort which is depicted in this diagram. Network Rail does have, of course, very
9 onerous statutory duties relating in particular to health and safety, as all companies have
10 those duties. Network Rail, as one would expect, has particularly onerous obligations and,
11 of perhaps most relevance for our purposes, it has a duty to ensure that people working on
12 its infrastructure are properly trained and that a proper record is kept.

13 But that duty says nothing about who is to do the training or how it is to be organised.

14 Network Rail is free to decide how to discharge that statutory duty, as any company is when
15 discharging its health and safety duties.

16 THE PRESIDENT: Is that duty to ensure people working on infrastructure are properly trained,
17 is that in the licence or is it in the statute?

18 MR. JONES: The particular one I was referring to is in the --

19 THE PRESIDENT: Regulations.

20 MR. JONES: -- the regulations. And so I could take you there now if it would assist.

21 THE PRESIDENT: You don't have to. Just give me the reference. You can give it to me later if
22 you like.

23 MR. JONES: It is regulation 24 of the health and safety Railways and Other Guided Transport
24 Regulations 2006.

25 THE PRESIDENT: Yes.

26 MR. JONES: Network Rail could decide how to discharge those obligations. It could, for
27 instance, decide to arrange the training of all workers on its infrastructure itself, it could
28 decide to train them itself. What it has chosen to do is to set up this Sentinel scheme.
29 Network Rail sets the standard, of course in consultation with other bodies, but Network
30 Rail sets the standard, Sentinel standard. It then requires its contractors to ensure that their
31 workers are trained to that standard. They do that by purchasing training from training
32 providers like my client, and that, in the diagram, is shown -- one sees the relationship on
33 the right-hand side between the contractors, engineering companies and the like -- Balfour
34 Beatty is an example I've given, but Carillion -- the big companies that contract with

1 Network Rail, they then purchase training from the likes of my client who are training
2 providers in this distinct market for Sentinel training. A market created by Network Rail's
3 decision to put in place this kind of structure.

4 If one asks the question: what is the source of Network Rail's power to set up this system?
5 The answer is: its economic power in the industry. By far the most valuable market in this
6 framework is apparently that between Network Rail and its contractors. These other
7 markets are absolutely negligible compared with that, and Network Rail is essentially the
8 monopoly purchaser and it can therefore decide on the system it wants and it can require its
9 contractors to purchase their training from training providers. And it is that exercise of
10 market power which, as I say, has led to the emergence of the market on which my client
11 operates.

12 Now, having decided to establish this market system and that training will be outsourced in
13 this way, there is then another choice for Network Rail, which is how to monitor the
14 standards of these training providers. And, again, Network Rail has a choice about how to
15 do that. It could do it itself, and indeed, some of the witness evidence suggests that Network
16 Rail still considers it could take this back in-house. What it has chosen to do is to outsource
17 this as well, and it has done that by appointing a private company, currently NSAR, who
18 perform that accreditation and auditing role.

19 You will have seen that NSAR is a non-profit company. Its members are drawn from
20 industry and it was established to promote training in the rail sector. And that objective --
21 and we will go through the documents, but in a sense it is a statement of the obvious -- that
22 objective assists its members and it assists broader governmental objectives. They all have
23 a shared interest in raising standards in their own industry.

24 You will also know that this activity, auditing and accreditation activity by NSAR is one for
25 which it is remunerated.

26 Now, it is most obviously remunerated in the relationship between NSAR and the training
27 providers like my client. That's the relationship on the bottom of this diagram. And I think
28 the evidence here is largely uncontested: fees are paid by training providers to NSAR, there
29 are annual fees, and then there are technical fees related to particular audits and so on.

30 My diagram shows payment between NSAR and Network Rail on the left-hand side, and I
31 must say actually it is not entirely clear to me whether there is such a payment. So the
32 witnesses may be able to assist us on this.

33 The evidence is that the scheme is intended to be self-financing; in other words, the training
34 providers will entirely finance the scheme provided by NSAR. On the other hand, the new

1 memorandum of understanding which was entered into at the start of this year provides for
2 regular payments by Network Rail to NSAR apparently with no limitation on how NSAR
3 might use those funds, except there is a schedule of activities, and included in that schedule
4 of activities is essentially our task management.

5 And so whether my diagram is right to say payment on that relationship, one would need to
6 ask the witnesses. On further reflection it occurred to me that that might be a relationship
7 for which there isn't a particular payment. But the important relationship is the one at the
8 bottom, and as I've said there clearly is remuneration there.

9 Now, I asked the question: where does Network Rail derive its powers from? If one asks
10 the question "Where does NSAR derive its powers from" of course it has no statutory
11 powers. Its powers are derived entirely from its appointment by Network Rail, and the
12 function which NSAR is essentially performing here is acting as a gatekeeper to the market
13 for training services. Training providers like my client can't operate on that market without
14 NSAR's ongoing approval.

15 The substantive allegations need not trouble you too much at this hearing, but I should just
16 say in outline that, as you will have seen, the complaint is that NSAR has abused its
17 dominant position in the market for accreditation. And, in essence, what we say is that it
18 made various mistakes, that the fixed suspension was not within its powers and that a fixed
19 three-month suspension was disproportionate because it would lead my client to go out of
20 business.

21 So one is faced with a company, NSAR, which derives its powers ultimately from Network
22 Rail's market power, which is excluding another company, UKRS, from a market on which
23 it wishes to trade. That, in my submission, is squarely within the proper focus of
24 competition law, and I say that only so you will know that that is a consideration relevant to
25 whether or not NSAR is an undertaking. One can ask the question: is this, in broad terms,
26 the kind of conduct with which competition law should be concerned? Mr. Wignall has
27 suggested that it is not, but I say it is.

28 And of course this general situation in which one has a body in a position to regulate access
29 to a market, whether that be by setting product standards or professional standards, is a
30 central feature of competition law. And, sir, I say we are squarely within the various cases
31 which deal with that general issue.

32 THE PRESIDENT: It doesn't completely follow, does it, because, for example, the Ministry of
33 Defence might control who can supply defence equipment to the British armed forces and
34 have great power to exclude people from very valuable markets.

1 MR. JONES: Yes.

2 THE PRESIDENT: It doesn't mean it is an undertaking.

3 MR. JONES: No.

4 THE PRESIDENT: And one has lots of law authority (inaudible) so when it comes to purchasing
5 power ...

6 MR. JONES: Sir, I didn't mean to say that it completely follows and, indeed, the principal test
7 here, I would say, is not actually that test. The test I have just referred to when one asks the
8 question is this the sort of conduct about which competition law should be concerned, is
9 actually only mentioned in a couple of cases. Emphasis was put on it in particular by this
10 Tribunal in the BetterCare case.

11 But in fact the central test is there are various, but the most common is whether it could in
12 principle be carried out for profit. And then one needs to go on to ask the questions about
13 public acts of state and so on which I will come to in a moment.

14 But just by way of general context there's nothing foreign to competition law about the way
15 in which this complaint is put.

16 The question before you, though, is of course whether NSAR is an undertaking, and on that
17 question my case rests on four simple propositions. The first is that NSAR provides
18 services. Those are the accreditation services in particular provided to my client. That's
19 what I focus on. It also provides services to Network Rail.

20 The second is that NSAR is remunerated for those services. The third is that the services
21 could in principle be provided by a profit-making company. And the fourth is that NSAR is
22 not exercising state powers.

23 My submission is that those four points are sufficient to show that NSAR is an undertaking.
24 They wrap up the various discussions in the case law which we will go to tomorrow.

25 Now, there are, as I see it, three main areas of legal and factual disagreement, and the
26 evidence which you will hear today goes to these three areas. It may be helpful to have
27 open as well the skeleton argument from Mr. Wignall because he has a list of issues at the
28 start and I would like to say a couple of comments about those.

29 THE PRESIDENT: Yes.

30 MR. JONES: You will see at paragraph 1 Mr. Wignall says there are two issues. The first issue
31 in his skeleton argument is whether NSAR's public service mission in respect of skills and
32 training is or is not separable from its role of Sentinel RTAS on behalf of Network Rail.

33 Well, there are various points wrapped up in that. Public service I'm going to break out as a
34 separate issue because that seems to me to raise some slightly separate issues. The first

1 issue though is -- and on this we may have some agreement -- whether or not the services
2 which I have identified can be separated from NSAR's other activities. Because when
3 deciding whether NSAR is an undertaking you need to have in mind which function you are
4 addressing. And as I understand Mr. Wignall's case, it is that there isn't a separate function
5 of accreditation; it is wrapped up in NSAR's broader functions. He calls it a public service
6 mission, but whether it is described in that way or not, its broader functions in respect of
7 skills and training.

8 And so that first issue is one on which you will hear evidence.

9 THE PRESIDENT: By accreditation you include what is sometimes referred to as auditing --

10 MR. JONES: I'm including the full package, as it were, of what NSAR is doing in return for
11 payment from my client.

12 THE PRESIDENT: Yes.

13 MR. JONES: And that first issue, whether or not the functions can be separated, will require you
14 to consider the evidence which there is on the history of the RTAS accreditation function,
15 the contractual framework to see how it is dealt with there, the rules relevant to the RTAS
16 system to see whether you agree with me, essentially, that they are a discrete and separable
17 function and should be dealt with separately under competition law.

18 Now, the second issue again identified in Mr. Wignall's skeleton is one on which, again, we
19 can partly agree, but I can't agree with the wording of his issue. Let me just explain that.

20 He says:

21 "The second issue is whether, given the appropriate factual matrix, it can be said that
22 on applying a functional test D was active on a market for goods and services, ie
23 taking commercial risks with the potential for making a profit."

24 Now, the reason I can't agree with that is the "i.e. taking commercial risks" point appears to
25 mean -- and from the defence, as I understand it, this is what Mr. Wignall's case is -- that a
26 body is only an undertaking if it is taking commercial risks. As a matter of law I don't
27 accept that. The relevant test is whether the activity could in principle be carried out for
28 profit.

29 I think where Mr. Wignall gets this different formulation from is those cases, Wouters is
30 one such case, in which the court says the body in question is taking a commercial risk and
31 that shows it is an undertaking. But of course, all the court is saying there is if a body is
32 doing something for profit and is taking commercial risk, it obviously satisfies what is
33 actually the test, which is whether it could in principle be done for profit.

1 There are many cases, and I will take you to some of them tomorrow, which make it
2 abundantly clear that it could in principle be carried on for profit. So I don't accept that
3 characterisation of the question. I do accept that the second issue is whether the function,
4 which I have identified, the services, could in principle be carried out by a profit-driven
5 company.

6 The evidence which I described in relation to the first issue will be relevant here as well.
7 Let's look at the history in particular, which I say clearly demonstrates that this has
8 historically been done by profit-making companies.

9 You need to look at the nature of the functions. The Tribunal will need to reach a view on
10 whether they are of such a character that they couldn't be carried out by a profit-making
11 company, and you will know that NSAR's case is that the services have changed
12 significantly since they were carried out by a profit-making company and that NSAR
13 essentially does these activities better and does slightly different things to profit-making
14 companies.

15 I should just stress at the outset on that particular point that as a matter of law I don't accept
16 that it is relevant to ask whether Network Rail would prefer a non-profit making company
17 to be doing it. I don't accept it is relevant to ask whether there are advantages to having a
18 non-profit-making company doing it. The question is whether in principle it could be done
19 by a profit-making body.

20 The third issue which I would add to these two is the question regarding the extent to which
21 NSAR is performing public interest functions or functions relating to the exercise of state
22 power. Now, I have expressed this issue somewhat vaguely, but that is because it isn't
23 entirely clear to me how the point is put by Mr. Wignall. You see it isn't an issue expressly
24 highlighted in 1 and 2, but one sees through NSAR's documents references to public interest
25 functions, to state powers and so on.

26 There appear to be two different related but different points mixed up in this. It appears to
27 be said, well, this accreditation function is related to NSAR's general training function and
28 it is then said, well, that has a sort of public interest component. It is also said, well, this
29 function is related to Network Rail's safety obligations, and that has a public interest
30 element.

31 Now, as to both of those, my response is the same: Neither of those are state functions. And
32 so even if it were true that this RTAS scheme is "related to" NSAR's broad training function
33 or Network Rail's safety obligations, that wouldn't mean it wasn't an economic activity

1 because they are not state functions. We will need to go through the case law, SAT
2 Fluggesellschaft and so on, to look at what is a state function.

3 One looks at the origin of the power in particular, whether it is a statutory power. But I say
4 neither of those are state functions within the relevant line of authority. I also say, for what
5 it is worth, that even if they were, this RTAS scheme would not be closely enough
6 connected with them to benefit from their characterisation as a state function because the
7 exception, if one can call it that, for state functions is a narrow one and it has applied where
8 bodies are exercising powers given to them by the state.

9 We will go to the case law on that tomorrow, but again, I highlight that as one of the three
10 issues because there is evidence as well going to the public interest/state power issue.

11 So unless I can be of any further assistance, those are my opening submissions.

12 MS. DALY: I just have one question. So, am I correct in understanding that you are saying an
13 undertaking can have a public service, public mission, public interest function?

14 MR. JONES: Yes. And madam, we will go to some of the cases, but there are cases where non-
15 profit ambulance services are dealt with in that way. There are cases where various
16 regulatory bodies are dealt with in that way. So yes.

17 MS. DALY: Thank you.

18 THE PRESIDENT: Can I just ask you what's the significance of the status of Network Rail? If
19 Network Rail was not an undertaking, how would that affect the position regarding NSAR?
20 And conversely, if Network Rail is an undertaking, can the fact it has outsourced this
21 function mean that NSAR is not an undertaking?

22 MR. JONES: For Network Rail's status to assist my learned friend it would, in my submission,
23 need to have a statutory basis, it would need to be far removed from the facts of this case.
24 But let me outline a hypothetical scenario.

25 Let us assume that Network Rail was under a duty to regulate training providers in this
26 manner. Let us assume that it had a statutory duty to do that. And let us then assume that
27 Network Rail had appointed NSAR to perform that statutory role and Network Rail had a
28 power to appoint NSAR to do that.

29 Well, one can see there that that would be the start of an argument to the effect that this is a
30 state function, because one could at least say, look, this function is one which Parliament
31 has required to be done, and the fact that it is outsourced isn't necessarily fatal to that
32 argument.

33 There is a few cases on this, but Diego Cali is the one which springs to mind, in which anti-
34 pollution surveillance measures were essentially outsourced. There was actually a statutory

1 decree which enabled the outsourcing, but the fact that a private profit, even profit-making
2 body is undertaking a state function does not necessarily mean it is not a state function.
3 But as I say, one needs to trace back to first principles: is it a state function to start off with.
4 I say even in Network Rail's hands it is not a state function, it cannot be turned into one by
5 Network Rail's decision to appoint NSAR. That's the main point.

6 THE PRESIDENT: If Network Rail were doing it itself, in that function and activity, Network
7 Rail would still be as an undertaking?

8 MR. JONES: Yes.

9 THE PRESIDENT: And therefore it follows that if they have outsourced it, the outsourcing body
10 is also an undertaking. You can see that the converse might be arguable. If it were not an
11 undertaking in Network Rail's outsourcing, the third party --

12 MR. JONES: It could still be.

13 THE PRESIDENT: Yes, thank you.

14 Opening submissions by Mr. WIGNALL

15 THE PRESIDENT: Yes, Mr. Wignall.

16 MR. WIGNALL: Sir, members of the Tribunal, it is kind of my learned friend to deconstruct my
17 first paragraph of my introduction saying it was a list of issues. It really was only intended
18 to set out an approach which the Tribunal may like to follow when reaching the correct
19 outcome.

20 I respectfully suggest that the Tribunal needs to look at the reality, the hard realities of the
21 facts before it, where we are with Network Rail and this particular function.

22 Network Rail is the state monopoly which reports directly to government and it has a series
23 of completely onerous, highly onerous health and safety responsibilities, and these are there
24 to protect workers, passengers from being killed on the railway network. That's why the
25 Sentinel scheme exists.

26 What I do respectfully suggest that the claimant is attempting to do is to dress up what are
27 really straightforward disciplinary proceedings as though it is a competition question. I do
28 suggest that this is not a competition question. These are not competition issues for the
29 Competition Appeal Tribunal. This could be properly heard elsewhere, and I have
30 suggested it could be heard elsewhere in the ordinary civil courts. It can be heard either in
31 the Administrative Court, if the appropriate English tests are passed, but there is no reason
32 why it couldn't be heard, certainly on my learned friend's case, no reason why it can't be
33 heard in the county courts as a straightforward claim for damages.

34 There is no damages in this case --

1 THE PRESIDENT: Damages for what?

2 MR. WIGNALL: Well, if it is saying it is being suspended, exactly the same damages are being
3 sought here.

4 THE PRESIDENT: Damage is sought here for breach of competition law. We know what's the
5 cause of action in the county court.

6 MR. WIGNALL: In the county court it would be a straightforward case for unfair exercise of
7 disciplinary remedies. It is really exactly the same thing.

8 THE PRESIDENT: Unfair exercise of discipline -- is that a cause of action?

9 MR. WIGNALL: Certainly.

10 THE PRESIDENT: What, in tort?

11 MR. WIGNALL: No, it will be a contractual claim --

12 THE PRESIDENT: A contract, but what's the contract?

13 MR. WIGNALL: Well, my learned friend says that monies are paid to NSAR, as indeed they are,
14 so that people who are being accredited can carry on their accreditation, there is an
15 exchange of value there that could be mounted, and often is, the disciplinary case within the
16 civil courts.

17 THE PRESIDENT: You say there is an implied contract?

18 MR. WIGNALL: Yes.

19 THE PRESIDENT: There is no express --

20 MR. WIGNALL: There doesn't need to be.

21 THE PRESIDENT: Is there one? Heads are shaking behind you. I just want to know.

22 MR. WIGNALL: No, there's no express contract.

23 THE PRESIDENT: So it would be an implied contract?

24 MR. WIGNALL: Yes. It is just the same as the Port of Genoa case. The Port of Genoa case, and
25 the first Euro Control case has only come to the Court of Justice on the basis that Euro
26 Control or the Pollution Surveillance Organisation are not being paid by people who are
27 obliged to pay them.

28 So in the Port of Genoa case, the surveillance organisation is not paid the fees which it is
29 obliged to be paid, so it went to the local civil court to recover its fees. Exactly the same is
30 true of the SAT case.

31 So in these cases, even where these organisations are not undertaking, to say this isn't an
32 undertaking, there is still an exchange of money and it would be quite possible for the
33 claimant here to present its claim in the Inner London County Court to say it had an implied
34 term that the procedural rules and RTAS would be applied to it, they had not been applied

1 to it fairly, this has resulted in damages and it can therefore recover its damages. There is
2 no mystery or complexity about such a claim.

3 I do respectfully say that on the facts of this case, the way in which the claim is put is it is a
4 straightforward claim for damages and it could be presented on that basis within a county
5 court.

6 It has no consequences. This claim, this case has no consequences, I respectfully suggest,
7 for any market because there is no market.

8 THE PRESIDENT: Well, there is a market in the provision of training services. The claimant is
9 a business and the claimant is competing for contracts with Balfour Beatty and Carillion and
10 so on, who are employed with others who supply the same.

11 MR. WIGNALL: Yes.

12 THE PRESIDENT: So that the claimant is clearly on a market.

13 MR. WIGNALL: Yes.

14 THE PRESIDENT: That's why, as you have said, it could claim damages. And there are
15 consequences on that market if a significant player on that market, and there was some
16 evidence the claimant was one of the largest in the country, is excluded. So that there are
17 consequences for competition in that market.

18 MR. WIGNALL: Well.

19 THE PRESIDENT: I'm not sure though that's really the critical question for us. Just as in my
20 example of the Ministry of Defence, if it decides it won't purchase tanks from one
21 manufacturer, that would have great consequences on that manufacturer in competing for
22 the supply of tanks to the British armed forces, but it wouldn't turn the Ministry of Defence
23 into an undertaking.

24 So our question is a narrowing one, whether your client is or is not an undertaking.

25 MR. WIGNALL: Yes.

26 THE PRESIDENT: Whether the claimant could bring a case in the county court or not is slightly
27 by the way, isn't it?

28 MR. WIGNALL: It is slightly by the way, but I hope it is of some comfort to the Tribunal to
29 understand there is a remedy.

30 THE PRESIDENT: Yes, in other words, it is not your position that your client is not accountable
31 anyway, that's the point?

32 MR. WIGNALL: That is my point.

33 THE PRESIDENT: I understand.

1 MR. WIGNALL: Perhaps slightly more hangs on that, because I accept that clearly there can be
2 consequences on the market for training providers. I call them training providers, but they
3 are training providers and also assessors of a worker's competence, which is why the ROGS
4 are engaged.

5 I accept there are consequences on this market for what happens when NSAR, or NSAR and
6 Network Rail, or Network Rail take a decision. I accept there are consequences.

7 Now, I have called this a regulatory decision. There are many different types of regulatory
8 decisions obviously. It is perhaps rather too easy to bandy the word "regulatory" around.

9 But in this very precise, very specific area which is one about assessing training providers
10 and their competence on this safety critical work, I call that a regulatory matter. And it has
11 regulatory effects which are also economic on the market of training providers.

12 Just because there is an effect which can be characterised as economic doesn't mean that it
13 is a competition case. It doesn't mean that NSAR in this case is an undertaking. There may
14 be economic consequences, they may be put out of the market because they are out of
15 revenue for three months, but that doesn't make this a competition claim. And what I would
16 say I would characterise in this specific context as a purely regulatory matter can have
17 consequences, call them economic consequences, for a market such as a market in training
18 providers.

19 Now, when it comes to the issues, sir, I do respectfully prefer the rough formulation that my
20 learned friend gave you when he said he would address you on four particular points. I
21 have four points which I consider are very similar. The first is this. It comes under an
22 overarching heading perhaps, which is that in my submission the defendant is not engaged
23 in economic activity. I make three points under that heading.

24 It is not engaged in an economic activity for the following reasons. Firstly, I do say it is not
25 offering services to a market of training providers at all; not services as they might be
26 characterised in a competition setting.

27 Secondly, I do say it is relevant that NSAR, the defendant, doesn't take any financial risks.

28 I say that is an important indication of whether or not an entity is an undertaking.

29 Then I say that it is not --

30 THE PRESIDENT: By "an indication", do I understand what you are saying is you are not
31 suggesting it is decisive, but you say it is very significant?

32 MR. WIGNALL: Yes. I say it is very significant. I say, thirdly, it is not operating at a profit on a
33 market, and together with that the claimant cannot show that there is a potential to make a
34 profit.

1 While I'm just on that third point, the question about whether or not the defendant can
2 operate at a profit, can I add this: that the defendant's position is, again, just the same as
3 applied in Euro Control and in the Port of Genoa case, in the sense that should a training
4 provider refuse to pay the fees which are due -- I don't call them remuneration -- for the
5 accreditation which is carried out, it doesn't mean that NSAR would suddenly stop acting as
6 the accreditation organisation or the assurance provider. It would carry on.

7 I say that that is an indication in itself that the defendant is not operating at a profit. And,
8 indeed, that there is no potential to earn a profit. It could be that half the training providers,
9 75% of the training providers, suddenly got together and said "We are not paying their fees
10 anymore". It doesn't mean that --

11 THE PRESIDENT: You might have a competition case if that comes.

12 MR. WIGNALL: Yes, we might have one.

13 THE PRESIDENT: But you are saying even if they will stop paying, it would carry on?

14 MR. WIGNALL: It would carry on, which I say is very indicative that we are not engaged in an
15 economic activity, we are not embarking on a profit.

16 I would suggest that if RTAS or Achilles or some other provider under the old regimes were
17 carrying out their work and people stopped paying, they would come to a point where they
18 would say "We are not doing this anymore, we are not acting in this role". But it is
19 perfectly clear in this case that NSAR would have to carry on and would carry on its
20 auditing assurance wrong.

21 MS. DALY: Following that through, who would underwrite the cost of that activity then in that
22 scenario?

23 MR. WIGNALL: Indirectly, all of us would be paying for that because you will have seen that
24 NSAR doesn't make a profit at all, it currently makes a significant loss, and it is supported
25 by government. It is only in existence because the government makes a loan of, we believe,
26 £1 million at the moment. Even that is a rather floating figure. So the organisation is
27 supported by this government loan. That's what keeps it going.

28 It also receives money to keep it going by way of the new Sentinel payments which come in
29 every year, which Network Rail have forced on people who own Sentinel cards.

30 MS. DALY: This is the £7?

31 MR. WIGNALL: That is right. It amounts to about £600,000 a year.

32 Then there is some small consultancy work -- set aside, split off the consultancy work, I
33 respectfully suggest. I would accept that in those circumstances should they appear in front
34 of the Tribunal then in that particular circumstance NSAR might be an undertaking.

1 THE PRESIDENT: That's on a functional approach. That part of its activity, being a consultant,
2 would be an undertaking. But you say if one looks at it functionally this is quite a different
3 activity?

4 MR. WIGNALL: Yes, I do.

5 Then I make a fourth point which is perhaps not under the first set of points. I do say that
6 the activities about which the claimant complains are indeed typically those undertaken on
7 behalf of a public authority for the benefit of the public.

8 When my learned friend says you have to isolate a particular public power, a particular state
9 obligation under legislation, I say that is wrong. We say that is misguided. And the
10 authorities don't take us that far although there are some *obiter* indications that would like to
11 do that.

12 I say that that is the question of whether or not we are carrying out activities which are
13 typical of a public authority has been put in different ways. We will look at those later, but
14 some of the authorities I respectfully suggest are not even concerned with the nature of a
15 state duty at all.

16 Indeed, if one goes back and is looking for a form of consistency between the way in which
17 member states are regulated in a competition sense, then I would respectfully suggest that
18 this is why a functional approach is adopted. And the nature of the entity in question, again
19 this might be an indication, but it is not paramount for the question of whether or not we are
20 carrying out a matter which is typical of a public authority.

21 I do say what really could be more typical of a state in the public authority than one which
22 is told to make sure that people don't die on the railway lines? Which is why there is a raft
23 of legislation, albeit, it may be said, health and safety legislation, there is an overriding
24 regulator, the Office of Road and Rail, there is the Rail Standard Safety Board. I say when
25 one looks at this context what one is trying to do which cannot be carried out for profit, I do
26 say we are carrying out activities which are typical of a state --

27 THE PRESIDENT: Leave aside the question of whether it can or cannot be carried out for profit.

28 I wonder if that doesn't go a bit far. I mean, there may be a number of areas where there are
29 activities that are safety critical. Think, say, of a commercial airline. British Airways I
30 think needs a licence to operate commercial passenger flights. That's one from the CAA.

31 It is no doubt subject to obligations to make sure that planes are flown by properly qualified
32 pilots, that it carries out safety maintenance on the planes. If it fails in those respects the
33 consequences could be disastrous. In carrying out those functions of checking pilots have
34 proper licences, planes are properly maintained, British Airways is clearly an undertaking,

1 isn't it? I know it operates for profit and so on, but the fact that it has functions which are
2 safety critical and of great public importance doesn't stop it being an undertaking.

3 MR. WIGNALL: If I may respectfully say so, sir, you are not looking there specifically at the
4 functions under consideration. It may be, of course, if British Airways have certain
5 provisions which, say, they must check if a pilot has passed his pilot's licence and his
6 eyesight is all right, it may be on that -- which I suspect those behind me may call a "tick
7 box exercise", then yes, it may accept that British Airways isn't an undertaking.

8 But if you are looking specifically at this function --

9 THE PRESIDENT: In those respects it is not an undertaking?

10 MR. WIGNALL: That is right, yes, if one looks specifically at what it is doing as an auditor
11 assurer, which means going along to see what training providers are up to. But also they are
12 crucially reporting back to Network Rail about the way in which the whole system is
13 operating and is organised, whether there are problems in the systems, with a whole raft of
14 rules, where the occupational standards, the competence standards, RTAS, the Sentinal
15 rules, Network Rail's safety tests, all of these items, the feedback coming back to Network
16 Rail from NSAR and its function and its wider functions I respectfully suggest do mean that
17 it is carrying out activities which typically are those of a member state.

18 I do say in the context of those activities one should first of all put the activities together.
19 And the best source for understanding and seeing those is in the memorandum of
20 understanding.

21 THE PRESIDENT: Yes.

22 MR. WIGNALL: I daresay that --

23 THE PRESIDENT: Do you want us to look at that now?

24 MR. WIGNALL: Why don't we have a quick look at the memorandum of understanding. There
25 is one in the pleadings which I'm afraid I have been working from.

26 THE PRESIDENT: Do some have appendix A and some miss it out?

27 MR. WIGNALL: If you don't have it in annex 1 to the defence then I can find it elsewhere.

28 (Pause)

29 At page 87 the memorandum of understanding begins, and it is annex 3. You will also find
30 it as one of the exhibits to the witness statement of Mr. Smith.

31 THE PRESIDENT: I think it is annex 3 to the defence, 3 or 4. Not annex 1. But it is page 87 in
32 that bundle. Yes.

1 MR. WIGNALL: My learned friend has from time to time suggested that it is appropriate to look
2 and see how these activities have been regulated in the past, but his complaint is about the
3 suspension in May or June this year.

4 I do say the historical background is of no interest whatsoever because the witness evidence
5 tells us that they were entirely different functions that were being carried out by RTAS and
6 then by Achilles.

7 You should set them aside as of no account, save to show that the working relationship with
8 Network Rail has ratcheted up and the standards to be imposed have got higher and higher.
9 There is a closer working relationship based on trust and on confidence.

10 So what we are looking at, the best document, one might say the only document which
11 notes the relationship between Network Rail and NSAR is this memorandum of
12 understanding. In this document you will find very little by way of a prescriptive accounts
13 of what NSAR has to do, in fact clearly there is none.

14 You will see that at the top it sets out the understanding between Network Rail
15 Infrastructure Limited and the National Skills Academy for Rail in relation to the use of the
16 rail membership of the Sentinel card scheme.

17 You will see it sets out the purposes at 1.1 and 1.2, and you will see while we are here, sir,
18 at 1.2, those large grants which are set up when NSAR was made. That money has come to
19 an end and there is a general pot. It is not just for auditing assurance. When my learned
20 friend says this is remuneration for auditing and assurance, I respectfully suggest it is not a
21 remuneration for auditing and assurance, it is a general pot of money made available by
22 those who hold Sentinel cards and it is to cover payment for all the activities that Network
23 Rail expects from it as the main provider of services on the railway.

24 1.2 tells us about the Sentinel scheme.

25 THE PRESIDENT: I think to be fair you would say the remuneration is what UKRS pays to
26 NSAR, not the £7 per card user. And I thought that was also the basis of you saying there is
27 an implied contract?

28 MR. WIGNALL: The implied contract arises out of the fees which are paid.

29 THE PRESIDENT: Yes.

30 MR. WIGNALL: I don't like to call them remuneration. They are fees which are paid. The
31 implied contract comes out of the fees that are paid for the privilege of being accredited and
32 assured by NSAR, because it has accepted that role from Network Rail and Network Rail
33 has delegated or entrusted that role.

1 This is a document which says to NSAR they will get £7 per Sentinel card user per year. It
2 sets out roughly what that amount will be at the top of 3. It tells us at 3.2 that NSAR is to
3 carry out in essence all the items carried out in annex 1. This is all on a non-contractual
4 basis.

5 When one turns to annex 1, one can see that first of all there is industry workforce planning,
6 which is strategic demand planning at the top, page 91. It describes what that is.

7 Then it refers to a representation in (b). Then (ii) is about developing an industry academy,
8 training qualifications, national training academy for traction and rolling stock, row(?)
9 engineering and training facilities, apprenticeship developments. Then over the page a
10 substantial amount in respect of what's described as the education sector:

11 "As the principal conduit for engagement with the education sector working to
12 promote the ...(Reading to the words)... to be conducted."

13 There are examples.

14 Then:

15 "Policy and governance. Liaison with bis and other government departments
16 ...(Reading to the words)... insurance standards."

17 Which is the area we are concerned with:

18 "(d) Delivery of a rail training assurance scheme."

19 Which is specifically what we're with dealing with.

20 Then:

21 "Assistance schemes to develop short, medium and long-term strategies and a plan
22 that identifies ways ...(Reading to the words)... people."

23 Then:

24 "(f) Equality and inclusion. Develop a strategy to attract more women, BAME and
25 disabled workers ... industry at grass roots ...(Reading to the words)... levels."

26 We can see that NSAR has taken on all these activities. They are given no further detailed
27 definition. They are all with the promise, if you like, of the payment of the £7 levies. And I
28 say that in the context of the evidence you hear, those are all activities which cannot
29 sensibly be separated apart and should not be separated apart.

30 THE PRESIDENT: All the activities in annex 1, you say they cannot be separated out one from
31 the other?

32 MR. WIGNALL: I do, yes. They are all kept together. And NSAR uses its enormous knowledge
33 of what is happening across the sector to inform ultimately anything which makes matters

1 safe and safer. Its entire mission, although that is hardly said because it doesn't need saying,
2 is to make sure that people work and they work in a safe manner.

3 So when it is carrying out the auditing and the assurance system for Network Rail, it is
4 responding; it is telling Network Rail how its standards have to be drafted. It has in mind
5 the fact that government may want a higher quality of training provider which has achieved,
6 I think, standard level 4. And all of these roles, all these purposes are wrapped up in this
7 wider role of NSAR.

8 DR. ELPHICK: May I ask, the second reason you gave for NSAR not being engaged in an
9 economic activity was you said that it is taking no risks. I wonder in regard to paragraph
10 2.1 of the MoU, where it says:

11 "This agreement can be terminated without giving reasons and with no liability being
12 incurred," does that not suggest they are at risk there were they perceived to be giving
13 a poor service to Network Rail?

14 MR. WIGNALL: If they were perceived to be giving a poor service I have no doubt that Mr.
15 Robertson here would be for the chop and NSAR itself as an activity might come to an end.
16 But that's not really an economic reason. That is a failure to provide a wider skills mission.
17 If this is a government department which is failing, if it is seen in that light, it is not
18 carrying out its public service mission, then it would be removed. It wouldn't exist. What
19 wouldn't happen is that Network Rail, the government says you are not carrying out these
20 functions properly, you are now on your own in whatever market you are in. This is in
21 essence a body which reports to government bodies which has a public service mission,
22 which responds to members of a board who, for the large part, are members of public
23 services and public activities. I daresay the whole outfit would be revamped; some other
24 skills outfit would be set in place. But I do suggest that it is not taking a risk because it is
25 not an undertaking which is taking a risk in that sense.

26 THE PRESIDENT: I find that a bit puzzling because if you establish a training academy in
27 collaboration with Siemens, it may be you get an indemnity from Siemens, but if you don't,
28 that's quite an investment and if it goes wrong can lose a lot of money.

29 MR. WIGNALL: You will hear evidence about the Siemens system.

30 THE PRESIDENT: Yes.

31 MR. WIGNALL: And as I understand it, the defendant was in essence a conduit for money which
32 went to Siemens, and the activity is really an activity run by Siemens. And Siemens is the
33 company or the entity which takes the profit from it, but no profit goes to NSAR from this

1 particular activity. It has helped to set it up. It is helping Siemens I think in moving
2 forwards, but NSAR, the defendant, takes no money from this particular activity.

3 THE PRESIDENT: It's got no liabilities under the joint venture if the academy is in debt?

4 MR. WIGNALL: That is right. It is not a joint venture in an economic sense. You will hear
5 evidence, you can ask --

6 THE PRESIDENT: We have got the agreement --

7 MR. WIGNALL: There is an agreement, yes.

8 THE PRESIDENT: That's in evidence, the agreement --

9 MR. WIGNALL: It is, yes.

10 DR. ELPHICK: You say NSAR would be regarded as an undertaking in regard to its consultancy
11 activities?

12 MR. WIGNALL: Yes.

13 DR. ELPHICK: Would you regard it as an undertaking in regard to its joint venture with
14 Siemens?

15 MR. WIGNALL: I think the answer is no, but I would have to look at the evidence to make sure
16 it is not an undertaking in that sense.

17 THE PRESIDENT: But that is part of annex 1, isn't it? The joint venture with Siemens. It is
18 2(b).

19 MR. WIGNALL: I think it may be annex 2, in fact.

20 THE PRESIDENT: I haven't seen an annex 2 to this. Is there an annex 2?

21 MR. WIGNALL: There is. That's the constitution agreement with the Rail Safety and Standards
22 Board.

23 THE PRESIDENT: Sorry, I don't mean annex 2 to the defence, I mean annex 1 to the MoU on
24 page 91. You have just taken us through it.
25 On page 91, paragraph 2(b) is the joint venture with Siemens.

26 MR. WIGNALL: Yes, but we would have to ask some questions of the NSAR representatives, I
27 think, about what it was understood to mean. But as I understand it, it means help the
28 training academy up, make sure things are well trained, make sure it is successful. But
29 there are no economic risks attached to it. There is no possibility of a profit in respect of
30 this activity. It is to help it be successful, but NSAR has no benefit, no profit arising out of
31 NTAR at all.

32 THE PRESIDENT: And no liability?

33 MR. WIGNALL: And no liability.

1 Sir, I see it is 1 o'clock. I was intending to refer to my earlier points. I will say a little bit
2 about them, if I may.

3 THE PRESIDENT: Yes. I mean, we can go on for another -- how much longer would you like?

4 MR. WIGNALL: Not very long. Five or 10 minutes, I hope.

5 THE PRESIDENT: Yes, we will go on for 10 minutes but I think no longer.

6 MR. WIGNALL: So I told the Tribunal that I was going to make four points. My first three
7 points were concerned with the question of whether or not NSAR is engaged in an
8 economic activity, and you will remember, sir, that my first point was that NSAR is not
9 offering services to a market of training providers.

10 THE PRESIDENT: Yes.

11 MR. WIGNALL: You will have an opportunity to examine the various scheme rules in some
12 detail. The RTAS rules you will remember are in bundle 1. I have them at tab 3. This case
13 is after all about RTAS.

14 THE PRESIDENT: You want us to look at them now or are you just referring to them?

15 MR. WIGNALL: I think given the time I won't invite you to look at them now, but if you were
16 applying to an entity, an organisation to remunerate it for services, I would be extremely
17 surprised if I received a document of this nature. I will just give you a reference to page 24
18 and 25, which defines what RTAS is.

19 It says:

20 "The scheme operated by Network Rail to accredit suppliers of training and
21 assessment services and their staff. Its purpose is to assure that a consistent high
22 standard of training and assessment for specific safety critical skills is maintained
23 across all organisations."

24 That is in a set of definitions.

25 That is really what it is. It is a set of rules defining a scheme which will be applied to make
26 sure that safety critical work is done. So when you are a training provider like UKRS, you
27 make perhaps an appointment, you might go and see -- you would send some papers in to
28 show you have the basic material, then you would go and see them. You would discuss the
29 service you are going to carry out with them, and then if you are accepted as an accredited
30 member you get a host of rules of this sort you have to comply with.

31 They are not services. You don't get a service. If you pay a lifetime one-off membership,
32 then you have a right to take part generally in whatever NSAR provides, whatever is
33 available.

1 Indeed, NSAR, they do provide occasional forums, I think they may even be every six
2 weeks, when training providers can turn up and find out what's going on in the accreditation
3 system. But otherwise you get no benefits. NSAR is not in any market to confer benefits
4 on any training providers. It doesn't see its role as helping or assisting training providers. It
5 is there on behalf of Network Rail to regulate and look at Network Rail's own sets of rules.
6 You get no classic membership benefits that you might see, for instance, if you joined a
7 shooting club. You don't get any dates to go and shoot in different places. You don't get
8 dates or opportunities to come to musical concerts, which you might if you joined musical
9 clubs. There are no benefits or advantages, there are no services which you gain from being
10 accredited by the RTAS set of accreditation rules.

11 MS. DALY: So now I'm getting a bit confused between membership and accreditation.

12 For the membership fee, you do have the ability to come in hear these briefings. I'm a
13 member of a number of clubs in London. They let me in the door. That's different from the
14 accreditation?

15 MR. WIGNALL: Yes.

16 MS. DALY: So you do get benefits from being a member because a member can come and hear
17 these occasional briefings about what's going down in the industry, right?

18 MR. WIGNALL: I think that's right, yes. And there occasional papers, but they are nothing
19 really significant. You pay a one-off sum as well. You pay a one-off sum for life. As I
20 understand it, this year in 2016 I think three members have joined. Mr. Alexander gives
21 evidence about the numbers who have joined in the past. I believe there are currently 370
22 members. They all pay a one-off fee. They don't repay the fee every year, it is a one-off
23 fee.

24 I think it was intended as a way to get NSAR off the ground in the first place, but it doesn't
25 provide an income stream anymore. But that is separate from RTAS.

26 So where it is said you are buying services to be part of RTAS, in the broadest possible and
27 loosest sense you are getting a service in that you are allowed to call yourself accredited,
28 but that just means a piece of paper which says you are accredited. Then you still have to
29 pay money to Network Rail to download these curriculums, or curricula if you prefer, so
30 that you can learn how to work on the railway network. You are not getting any benefits.

31 I find it very difficult in any conventional sense to say that you are obtaining any benefits. I
32 do suggest it doesn't work to say, well, there is a service and that's an essential facility, so
33 therefore I'm obtaining a service because that service is only defined by your definition of
34 the thing you are apparently losing.

1 So, there are really no services in any conventional sense which are being acquired here.

2 THE PRESIDENT: You say effectively you are not getting a service, you are subjecting yourself
3 to a lot of obligations.

4 MR. WIGNALL: I do say when I saw this and when I looked through it, if you were applying for
5 membership of a club and the club agreed to have you as a member and you obtained a list
6 of things like this which said you must comply with these rules, you must comply with
7 those rules, you must comply with that rule, if you breach these rules you will be
8 suspended, if you breach other rules you'll be suspended, you mustn't be physically violent,
9 you mustn't carry out deliberate damage, you mustn't bully or harass people. All of these
10 things, these are not conventionally in any sense services. They are exactly that. You are
11 buying into a series of obligations which may be enforced against you.

12 Sir, that's my main point about services. Not in any conventional or sensible sense are any
13 training providers obtaining services. They are obtaining the right which is made available
14 by Network Rail to train then assess competencies so that workers they train and assess
15 have Sentinel cards.

16 THE PRESIDENT: You see, as regards Network Rail, NSAR is providing services, isn't it?

17 MR. WIGNALL: Yes, it is. The activities that NSAR carry out are entirely consistent with the
18 obligations you would expect from a monopoly organisation which does have to have an
19 eye to competition, because you will remember a primary reason for having NSAR at all is
20 that there is a serious conflict within Network Rail about its own activities. So let us
21 suppose that there's a storm and on a particular line there are various landslides and railways
22 are blocked, and this is a Sunday night. Then you can get endless quantities of men and
23 women, I imagine, out to come and clear all these landslips away. You have to pay for it,
24 but the risk is that if you want to get all those people out there in a hurry to make sure the
25 railway is safe the next day, you are going to compromise on safety quality, on their skills.
26 Because you might be persuaded, if somebody rang you up and said "Well, I haven't quite
27 got somebody who has really got a competence in that area, but he has the next best they
28 thing, so why don't you use him and add him to your labour or labour shortage", Network
29 Rail in its capacity as provider on the network would be tempted to say "Yes, of course, I
30 will take those, we'll take the risk".

31 So that is why RTAS was set up, so that it can robustly accredit the system and then to
32 ensure that Network Rail is being run properly.

33 MS. DALY: But insofar as that, do you accept that the accreditation is an impermeable barrier to
34 entry?

1 MR. WIGNALL: An impermeable barrier to entry. You have to be accredited. If you want to
2 use those words then yes, it is an impermeable barrier to entry. If you went to a man on the
3 number 11 bus and said "Do you think that being accredited is an impermeable barrier to
4 entry?" to some activity, I think they would wonder what you were talking about. But they
5 would use a different form of words, wouldn't they?

6 THE PRESIDENT: I have no doubt they would, but we are in a competition appeal tribunal.

7 MR. WIGNALL: But that is really my point. What is happening is in an ambit where everyone
8 is experienced in competition law, words being used that we understand, but in fact they
9 don't really apply, they only apply in the loosest possible sense.

10 THE PRESIDENT: I do not follow that at all. I do not think this goes to a question of
11 undertaking, but in the sense that if you are not accredited you cannot be a training provider
12 for -- perhaps not the rail industry, but for people working on the railway infrastructure.

13 MR. WIGNALL: I do accept that.

14 THE PRESIDENT: That's all that's being asked. Therefore, it is an absolute barrier to entry; you
15 need it otherwise you are out of business or can't get in in the first place.

16 MR. WIGNALL: I accept it is an impermeable barrier to entry.

17 Briefly, I say NSAR is not offering any services in any proper sense. I say it is not taking
18 financial risks. It is a not-for-profit organisation with no shareholders. It subsists on a loan.
19 Sir, you will find the evidence in Mr. Robertson's second witness statement.

20 THE PRESIDENT: I think the sole shareholder is the government, isn't it?

21 MR. WIGNALL: It may be, yes.

22 THE PRESIDENT: NSAR, sorry, has no shareholders.

23 MR. WIGNALL: It has no shareholders, yes. It doesn't take any financial risks. It's supported by
24 a loan and the Sentinel payments. I say it is not providing services for a profit. These are
25 paragraphs 69 to 70 of Mr. Robertson's second witness statement. But also his fifth witness
26 statement, which I daresay --

27 THE PRESIDENT: Yes, we have read that.

28 MR. WIGNALL: I do respectfully suggest it is fatal, really, to the claimant's case that the
29 claimant can't identify another provider which would be able to undertake these activities.
30 In the Achilles RTAS market where one has a lot of specified matters that must be carried
31 out one can see how one could go out. And as a matter of general knowledge one might say
32 yes, there are people who can do this because there are people like Achilles or Carillion
33 who can undertake this sort of work.

1 But in a complicated structure like this, under the memorandum of understanding, I do
2 respectfully suggest that the claimant would have to come here and say in reality there is
3 another undertaking who can do this, but there isn't. There isn't another undertaking
4 because we are a specialist undertaking, we are an academy for skills, one of 19 within the
5 academy, we have our own government connections through the academy, we provide
6 wider assistance and help with training and skills and there is simply no one in that market
7 who can take that burden on and can pick up the phone to Network Rail and say "You have
8 a problem with your scheme, it is not working in such-and-such a basis because
9 competencies can't all be uploaded at the right time, you need to change that", there is no
10 one who can carry out the same role.

11 No private company would be willing to do that, and if there were such a company then I
12 would respectfully suggest the claimant has to come here and tell us who it is and provide
13 us some evidence about it.

14 DR. ELPHICK: You have made the case that we ought to consider it functionally, in other words
15 we are saying that NSAR is an undertaking for some functions but not for others. Should
16 we not then consider this question of the availability of alternative suppliers by function
17 rather than in the round?

18 MR. WIGNALL: But if all the functions have to be considered together, and they do have to be
19 considered in the round, then you have to find a replacement supplier which would be able
20 to undertake all those functions in the round.

21 I say that --

22 DR. ELPHICK: They choose to do that, presumably. Network Rail choose that to be the case.

23 MR. WIGNALL: It wouldn't, I suggest, be a coherent evidential way forward to say: here are six
24 different functions, if you divided them up one by one then there are different suppliers who
25 could undertake these different functions. And if that were what is being said, then I do
26 respectfully suggest the claimant would have to come here with some evidence to say you
27 could divide this up.

28 I say it can't be divided up. I say that no undertaking could do what is expected under the
29 memorandum of undertaking.

30 MS. DALY: So without competition and there never could be, that's what you are saying?

31 MR. WIGNALL: There never could be.

32 MS. DALY: A wholly unique organisation never to be challenged.

33 MR. WIGNALL: That's exactly what this is. Skills academies in the different areas are exactly
34 that. They are absolutely unique entities, and we can see from the evidence that Network

1 Rail has tried and tested this over the years. I hate to use the word synergy, but they appear
2 to have reached a sort of synergy here and there is no way, as they say themselves in their
3 evidence, that this could possibly be done with another supplier. It is such a unique
4 organisation, such a unique role, this tiny little role that there is no one else who could do it
5 and there is no one else who could do the wider set of functions as well. And to do the
6 auditing assurance role properly you really have to have the wider set of functions.
7 So there is no other entity or organisation that can do this. If there is, it has to be identified.
8 You would have to have evidence in front of you. I do respectfully suggest that in
9 something this complex the claimant cannot say well, you can just put it out in the market.
10 We would have to have some core basic evidence relating to the memorandum of
11 understanding to say this is an organisation that would do this.

12 THE PRESIDENT: Yes.

13 MR. WIGNALL: I haven't addressed you in the order I promised to address you on. I addressed
14 some things slightly out of order, but time is getting on. Lest you or your colleagues have
15 any questions, you have my main core points, I think.

16 MS. DALY: I just have one.

17 The loan agreement. I was trying to interpret, who underwrites the loan?

18 MR. WIGNALL: The best evidence of that I'm afraid is witness evidence without a copy of the
19 document. Can I just put this in front of you, sir?

20 THE PRESIDENT: Yes. If you can just answer the question?

21 MR. WIGNALL: Yes. Mr. Robertson says simply:

22 "These operating expenses are paid for by a loan from the Department of Transport. I
23 would say the deficit covered by the loan is currently about £1 million."

24 Paragraph 19 of his witness statement:

25 "The current turnover of NSAR is £2 million. Its membership revenue is 1.2 million."

26 So on the face of it, that leaves a gap of £800,000.

27 THE PRESIDENT: That's which witness statement?

28 MR. WIGNALL: It is Mr. Robertson's witness statement number 2. It is in binder 2 and it is the
29 end of paragraph 18 and then in 19.

30 THE PRESIDENT: Thank you.

31 Very well. We will say 2.15 pm.

32 (The short adjournment)

33 THE PRESIDENT: Yes, Mr. Wignall.

34 MR. WIGNALL: Sir, I propose to invite Mr. Robertson.

1 THE PRESIDENT: Before that, have you ascertained the position on the disclosure that we
2 requested?

3 MR. WIGNALL: I'm told there are no documents.

4 THE PRESIDENT: But you were saying in the email which says there was a formal review on
5 Monday, 16th May, at which, as I understood your submissions, the decision was taken,
6 which is then communicated on 17th May by NSAR. So is it Network Rail's position that a
7 decision to suspend someone was not documented? Is that your instructions?

8 MR. WIGNALL: I have discussed it and those were my instructions. I must say the fault might
9 be on me because I had understood that you were anticipating we would come back
10 tomorrow with any documents that might exist.

11 THE PRESIDENT: Perhaps there is a misunderstanding, I thought you were going to check over
12 lunch. I said come back tomorrow with a typed-out draft amendment. But I thought you
13 would be taking instructions, because it is something we might want to know before
14 witnesses give evidence, although it may be because of the set-back as regards this morning,
15 that the two witnesses from Network Rail will not now give evidence until tomorrow. I
16 don't know. But I would like to see those before -- is it the two Mr. Smiths who are from
17 Network Rail?

18 MR. WIGNALL: Yes.

19 THE PRESIDENT: Before they give evidence.

20 MR. WIGNALL: Well, they have heard this exchange and I would think some steps could be
21 taken immediately.

22 THE PRESIDENT: Yes. I mean, someone obviously produced this email and Mr. Brady, if it is
23 he, can be contacted, but -- I mean, maybe that is the position. I find it quite astonishing, I
24 have to say, but maybe that's the case.

25 MR. WIGNALL: My instructing solicitor is behind me and Mr. Richard Smith is in the
26 courtroom, and I am sure between them now they can have a proper discussion to make sure
27 that there is nothing available. Some phone calls were made during the short adjournment, I
28 know, sir. I apologise for misunderstanding what you had sensibly suggested. I had had
29 some discussions, as I said, but there is time, I would think, for --

30 THE PRESIDENT: Yes, as I say it may be that at least one of them -- and I see that there is
31 allowance in the timetable for the possible overrun of evidence, so let's see how we get on.

32 MR. WIGNALL: I'm grateful, thank you.

33 THE PRESIDENT: So you are calling?

34 MR. WIGNALL: Mr. Robertson.

1 Mr. NEIL ROBERTSON, Sworn

2 Examination-in-chief by Mr. WIGNALL

3 THE PRESIDENT: Please sit down, Mr. Robertson.

4 MR. WIGNALL: Now, Mr. Robertson, you are chief executive of the defendant NSAR, are you
5 not?

6 A. Yes.

7 Q. It is addressed at 11 Carteret Street, London. I think that is right?

8 A. Yes.

9 Q. First of all I'm just going to invite you to locate various bundles so that we know where we
10 are.

11 THE PRESIDENT: Is there someone who can help Mr. Robertson perhaps from your solicitors
12 just to get the bundles? Thank you.

13 MR. WIGNALL: Your first statement, I think, is in the first bundle.

14 THE PRESIDENT: I think it is in bundle 2, isn't it?

15 MR. WIGNALL: Yes, I think there has been a revision.

16 THE PRESIDENT: Yes, I think it is bundle 2.

17 MR. WIGNALL: Thank you very much. Yes, bundle 2.

18 If you go to tab 0, that I think is your first witness statement. Are the contents true?

19 A. Yes.

20 Q. And then --

21 THE PRESIDENT: That is right. And that's your signature, is it, at the end, after paragraph 26?

22 A. Yes.

23 THE PRESIDENT: Yes, thank you.

24 MR. WIGNALL: In the bundle I have certainly, 2.1, that should be your second witness
25 statement and you should find your signature on page 20 at the end.

26 A. Yes.

27 Q. Then if you go to the next tab you will see what's described as your fifth witness statement,
28 which I think is there because it clarifies matters in your second witness statement. And I
29 think that if you go to the second page, again you will find your signature?

30 A. Yes.

31 Q. Are the contents of that true?

32 A. Yes.

33 THE PRESIDENT: I think your second witness statement has been corrected, you say it is true,
34 by -- is it your third witness statement? Isn't that right, Mr. Wignall? In bundle 3.

1 MR. WIGNALL: Which should be in bundle 3.

2 THE PRESIDENT: In bundle 3 at tab 2.

3 MR. WIGNALL: Yes. You remember you made your second witness statement and there were
4 some hiccups, I think, with the exhibits mainly and you made this third witness statement to
5 correct some errors, in particular in relation to the exhibits?
6 So, at bundle 3 in tab 2 there should be your third witness statement, your signature on page
7 3.

8 A. Yes.

9 Q. Are the contents of that true?

10 A. Yes.

11 THE PRESIDENT: Your second witness statement as corrected by your third witness statement
12 is I think what you are saying is correct?

13 A. Yes.

14 THE PRESIDENT: Is that right?

15 A. Yes.

16 THE PRESIDENT: So there's no doubt about this, if you go back to your witness statement -- I'm
17 sorry they are in different bundles. That's because we tried not to make everyone produce a
18 new set of bundles. But if you go back to your second witness statement which is in bundle
19 2, tab 1, have you got that?

20 A. Yes.

21 THE PRESIDENT: On page 2, paragraph 6 -- I think this is not picked up in your third witness
22 statement -- in paragraph 6, the second sentence:
23 "It is important the Tribunal should understand the nature of the claimant, its purpose
24 and its functions in relation to government policy. This is entirely ..."
25 I think you mean the defendant, don't you?

26 A. I do.

27 THE PRESIDENT: So that should be "the defendant".
28 I think on page 13, paragraph 61:
29 "Network Rail delegated the overseeing of the training and assessment undertaken by
30 private providers to the claimant."
31 Again, you mean the defendant, don't you?

32 A. Yes.

33 THE PRESIDENT: That is "the defendant". I see you are nodding, Mr. Robertson. There is a
34 tape; it doesn't pick up the nod so you need to say "yes".

1 A. Yes.

2 THE PRESIDENT: Yes, thank you.

3 MR. WIGNALL: I'm very grateful to you, sir, for picking up those matters.

4 There is one more statement I think you will find in bundle 5. I hope it will be at tab 1. If
5 we turn to page 6, the last page, your signature appears again. Do I take it the contents of
6 this statement are true?

7 A. Yes.

8 MR. WIGNALL: Sir, I have asked my learned friend whether he would mind whether I asked
9 one or two supplementary questions.

10 THE PRESIDENT: Yes.

11 MR. WIGNALL: Now, I wonder whether I can invite you to look at your second statement,
12 which is in bundle 2. Now, it would probably be helpful as well, if you have access to it, to
13 have a look at the skeleton argument prepared by the claimant. I wonder if that is available?

14 THE PRESIDENT: I think it is not in a bundle, but no doubt there are various copies around. I
15 think a copy is coming up.

16 MR. WIGNALL: Thank you very much.

17 Now, if you look at the skeleton argument, if you turn to page 11 you will see at paragraph
18 51.7 Mr. Jones referred to fees charged to training providers to include a modest fee
19 charged for downloading the NSAR quality standards from its website. Your evidence I
20 think is in paragraph 45 of your second witness statement.

21 If you go to page 9, paragraph 45, you see your evidence in the second sentence says:

22 "The nuts and bolts details are contained in documents understandably described as
23 curriculums by Network Rail. When a training undertaking has signed up to the
24 defendant's quality standards, then for a modest fee the undertaking can download
25 them from a Network Rail website."

26 What is the "them" in that context? Is that the fee for downloading NSAR quality standards
27 or the curriculums?

28 A. It is the curriculums.

29 Q. Then if we turn to your witness statement -- you can leave the skeleton argument now thank
30 you. If you turn to your witness statement, your evidence, at page 17 in paragraph 79, you
31 see your evidence is that:

32 "Auditing of the training assessment process by primary providers is a stand-alone
33 function of the defendant. Those members of staff who work within NSAR who are
34 responsible for this area of its activities are separate from the members of skill centred

1 staff who deal with the task to which reference is made in the previous section. We
2 maintain a Chinese wall in the organisation regarding the insurance work."

3 You go on:

4 "Of course in the broadest sense there may be said to be some overlap with NSAR's
5 wider functions since the provision of a well trained, skilled workforce necessitates a
6 competently trained workforce in which the public and fellow workers can have
7 trust."

8 So when you refer to a Chinese wall in this context, what do you mean? What did you
9 mean here?

10 A. Chinese wall is a fairly standard term in organisations like ours to describe a separation at
11 operational level which then meets again, if you like, at chief executive and board level.
12 So it was particularly important in this case because we required transparency for the fee
13 collection, because it is cost recovery, so only those costs related to the support of the
14 auditing and assurance functions were eligible. So we had to keep a transparency around
15 them and a separation.

16 It is also considered good practice to free up auditors from day-to-day wider financial
17 considerations and other operational considerations so that they can focus on their work.
18 But I think what's important for the panel to understand is that the primary governance, both
19 for the audited process through me and for the whole organisation, is through the board. So
20 the single board looks after both areas, and actually it is the single board that gives the
21 credibility and authority to the statements made because the board is made up by very, very
22 senior people in the industry who would never allow money to be put before safety and
23 whose track records speak for themselves. And they would never allow themselves to be
24 compromised on what is essentially such a minor matter.

25 So actually, crudely, if I was to allow any impropriety in the auditing function it is very
26 clear to Network Rail that my tenure would be ended quite quickly.

27 Q. When you say "Chinese wall", did you mean a completely full brick wall which separated
28 one function from another?

29 A. No, it is perhaps an unhelpful term, although I say it is one we use, perhaps unhelpfully. It
30 is intended to describe as reasonably a separate function as is possible within a small
31 organisation.

32 But it definitely would imply that wider issues are kept actually from the auditors, but the
33 auditors would be consulted on issues such as the wider standards development activity and

1 where other people asked for advice on quality assurance issues such as ORR or perhaps
2 another company.

3 THE PRESIDENT: Can I just ask, you say those members of staff who work within NSAR who
4 are responsible for this area. How many people are we talking about approximately?

5 A. There's four auditors, and Kim Millen-Stirling, who will be speaking to you later, looks
6 after that function.

7 DR. ELPHICK: I think I recall reading that the four auditors share an office with other NSAR
8 staff, and that was described as a real benefit in terms of the integrated nature of NSAR. I
9 just wonder how the integrated nature of it all is compatible with the Chinese wall.

10 A. It is a good question sir. The auditors aren't in the office much because they tend to be out
11 on the road or are home-based, so I would say there are only one or two days a week that
12 they would be in the office, at most. They share an office most closely with the people
13 responsible for the standards element of our work, which is the bit where we support the
14 industry to derive occupational standards and assessments. So they share the office with the
15 bit of the organisation that's perhaps most directly relevant to them.

16 They don't share an office, for example, with any of the managers who would be perhaps
17 exposed to the wider considerations of the organisation.

18 DR. ELPHICK: Thank you.

19 MR. WIGNALL: Mr. Robertson, I want to ask you a few questions which arise from the witness
20 evidence of Mr. Alexander. And if it would be possible to hand up bundle 3 that would be a
21 great help.

22 (Handed)

23 So you will find Mr. Alexander's witness statement at tab 3. I'm going to ask you to turn to
24 page 22.

25 Now, you will see at paragraph 109 he says:

26 "Initially, there were five significant income streams for NSARE."

27 I suppose while we are here you might explain the E on the end?

28 A. When originally constituted, it was the National Skills Academy for Rail Engineering. Last
29 year this was changed through at the AGM to be the National Skills Academy for Rail
30 because it was accepted by the board that the scope of operations should include the
31 operations of the industry, which would include the trains which we would regularly use.
32 One reason for that is that of the principal skills shortage facing the rail industry, most
33 pressing is of traction and rolling stock engineers. Those are the people who service and

1 maintain the trains who will typically work for or with the train operating companies and
2 not Network Rail.

3 THE PRESIDENT: To be clear -- sorry to interrupt you -- the accreditation, auditing of trainers
4 of those carrying out the training would include people who are training not for work with
5 Network Rail, but for work with the train operators; is that right?

6 A. Primarily not. Primarily the RTAS function is associated with the infrastructure, which is
7 those who need access to the track.

8 Now, you can imagine that in some extreme cases people associated with operations
9 required access to the track, but it is primarily the engineers that work on the track. But
10 rolling stock engineers, were they to visit a broken-down train they would still have to have
11 the card, but it is not the primary reason for the change.

12 THE PRESIDENT: But forecasting skills shortage, when looking at skills requirements, is that
13 something you carry out now also for the train operators?

14 A. Very much so. It has been a big change and people have welcomed that change. You can
15 imagine the topic of drivers particularly is in the public interest.

16 THE PRESIDENT: Absolutely.

17 MR. WIGNALL: So paragraph 109 refers to the five different income streams, and you will see
18 at 110 Mr. Alexander says:

19 "Membership fees for NSAR are a one-off fee. At April 2011 there were 14
20 members, original NSAR board members. Membership grew."

21 Then he gives us some more figures.

22 Then he says in paragraph 111:

23 "There were 88 members of the scheme as noted by our baseline inspection report
24 issued in September 2012."

25 2016, how many new members have joined so far this year?

26 A. Only three members in the last 12 months that I'm aware of. We do due diligence on our
27 members, so the number does fluctuate because we check company records etc. So
28 sometimes companies move out of membership as well as in, so the net number can go up
29 or down.

30 Q. I'm going to ask you now about the next income stream which is skills passport fees to
31 which you refer us in paragraph 112.

32 If you look at paragraph 112, he tells us that:

33 "The skills passport was a scheme that had been promoted by Gil Howarth as a major
34 benefit to the rail industry."

1 He goes on at the end:

2 "The enthusiasm for the skills passport was lukewarm and Network Rail, as the
3 infrastructure controller industry leader, failed to give the scheme their full support.

4 As a result, the projected income from skills passport failed to materialise."

5 How has the income been from this? How has it affected your income in 2016, this
6 particular revenue stream?

7 A. It is economically not good. We still continue to run the service because we are committed
8 to run it. We have a very low income stream for it compared to the cost, so we make a
9 significant loss on this scheme. And you can read something into our relationship with
10 Network Rail because Gil Howarth was my predecessor and didn't always enjoy a good
11 relationship with Network Rail, which is why perhaps he went ahead of Network Rail in
12 commissioning this programme rather than working more closely with them.

13 MS. DALY: Sorry, for my own clarification, so the skills passport programme is not redundant
14 or backs up the Sentinel card. What's the relationship there?

15 A. It is an interesting question. In some way it complements the Sentinel card because the
16 Sentinel card captures competencies from the compliance perspective, whereas this is
17 intended to be slightly more of an HR function to it which allows us to capture personal
18 development.

19 It is good practice in competence management, but it is not a compliance scheme and I
20 believe there has been some learning in this for the next iterations for Sentinel card.

21 MS. DALY: Thank you.

22 DR. ELPHICK: On the skills passport, you said there is a significant loss at present which doesn't
23 sound sustainable in the medium term.

24 A. No.

25 DR. ELPHICK: So is that significant loss offset by surpluses elsewhere, or will you in due course
26 have Network Rail, for want of a better word, bail you out?

27 A. Hopefully more positive than that, sir, because Network Rail -- and you can probably ask
28 Mr. Wilmhurst-Smith about this because he is in charge of this scheme. But I know he is
29 looking at a revision to Sentinel, the next iteration, which will have some of the
30 functionality of skills ideas, we call the skills passport scheme, contained within it. And
31 therefore, thankfully, I will be able to drop it, yes.

32 MS. DALY: Sort of combining the two?

33 A. Combine the data so the data won't be lost, but it will be effectively superseded by Sentinel
34 2.

1 MR. WIGNALL: To whom is the skills passport mainly directed and what kind of
2 worker/employee?

3 A. It was intended to be for everybody, but in practice it is used slightly more by the white
4 collar section of the industry, if I can oversimplify; whereas the Sentinel card might be
5 thought of to be more focused on the blue-collar element.

6 We don't really like those distinctions, they are slightly tabloid. But we hope they give a
7 feel for it.

8 Q. Then at paragraph 115 Mr. Alexander tells us about the further education sector. He tells us
9 about a further education network, and at the end he says:

10 "Very few of the FE providers committed to this fee, and effectively the ...(Reading to
11 the words)... of £100,000 per annum failed to materialise."

12 Could you just tell us what this scheme is or was and how you benefit from any revenue in
13 2016?

14 A. The second part first. We benefit from very little revenue from this just now. There's only
15 three, I think, college members that pay this, for this service. It is an additional service over
16 and above membership, if you like, and it was intended to provide support for colleges to
17 enter into the rail market because there was a shortage of capacity in the rail market.
18 In practice it failed and we could speculate there is a number of reasons for that, but there
19 was earlier a reference in the conversations about NTAR. One of the reasons that NTAR,
20 the partnership with Siemens, was established because we were unable to persuade new
21 entrants into the training market here.

22 This is primarily the wider training market, not that just associated with assessments for
23 Sentinel. It would include apprenticeships, it would also include rail engineering HNDs,
24 what you might call higher education-type approaches as well, which remain a market
25 failure but the government have encouraged us to act in this space. So, we now have NTAR
26 and we also have the forthcoming National College for High Speed Rail.

27 Q. I see Mr. Alexander's evidence is that the annual fee of £5,000 is what was applied to every
28 provider. Does that mean the amount that NSAR receive is £15,000 per year?

29 A. Yes, for that particular programme.

30 Q. Now, NSAR is a number of skills academies. I wonder if you would just like the
31 opportunity to tell the Tribunal what the skills academies are and how you benefit from
32 that?

33 MR. JONES: Sir, I hesitate to interrupt, but we are rather behind schedule. I discussed with Mr.
34 Wignall, I understood five minutes of re-examination. It has now been half an hour. We

1 are behind schedule because of points raised by Mr. Wignall. These points so far really go
2 to nothing that I was proposing to cross-examine on. Skills academies have been described,
3 Mr. Robertson has put in five witness statements. This one which he has just been asked
4 questions about was put in on 2nd September.

5 Sir, I'm in your hands.

6 THE PRESIDENT: I take your point. I do think, Mr. Wignall, that -- I mean, to have an
7 elaboration of what skills academies are, we are not unfamiliar with them and there's
8 enough about them here. So, I think we do need to move on. It's very important we don't
9 cut into your time for submissions tomorrow because that is a rather important part of this
10 case, is the law, which we haven't gone into.

11 MR. WIGNALL: I was intending to explore the question who took the decision to suspend. It
12 may be that you would rather pursue that yourself or leave it for the time being.

13 THE PRESIDENT: Well, we haven't had a statement about this. You have told us what the
14 position is. We wait to see your amendment. I was not going to in the circumstance ask
15 about that because that will open up, it seems to me, a lot of issues. I mean, we are really
16 concerned with the nature of NSAR and what it does for the purposes of the undertaking
17 question.

18 MR. WIGNALL: I have no other questions. Thank you very much, sir.

19 Cross-examination by Mr. JONES

20 THE PRESIDENT: Yes, Mr. Jones.

21 MR. JONES: Mr. Robertson, good afternoon.

22 Could I just pick up on one of your answers to Mr. Wignall a moment ago. You were asked
23 about the Chinese wall and you very helpfully explained that it was -- I'm paraphrasing, but
24 as far as I took a note it was as far as a separation as one could have reasonably in a small
25 organisation. And that is why, as I understand it, you say a couple of times in your witness
26 statement that the auditing function is a separate and distinct function.

27 A. Yes.

28 Q. Thank you.

29 Could I ask you to turn, please, to the Articles of Association of NSAR. They are in bundle
30 2 at tab 3, at page 24 is where it starts. But I wanted you to turn, in fact, to page 29 to see
31 the objects of the company.

32 This is still the right document, is it? One sees the company's objects are the advancement
33 of education and training primarily for the benefit of the members without prejudice to the

1 generality of the foregoing in the railway sector by increasing the level of skill and training
2 of its workforce. That's still the object?

3 A. Correct.

4 Q. If one then looks at the powers of the company, paragraph 5:

5 "In furtherance of the above objects but not further or for any other purpose, the
6 company shall have the following powers."

7 And that's still right, these powers are for the furtherance of those objects that we have seen;
8 is that right?

9 A. Yes.

10 Q. If I could then ask you to just look a couple of pages on to paragraph 6 at "Benefits to
11 members":

12 "The income and property of the company shall be applied solely towards the
13 promotion of the objects. None of the income or property of the company may be paid
14 or transferred directly or indirectly by way of dividend."

15 And so on.

16 That's still right as well, is it?

17 A. Yes.

18 Q. And you will know as chief executive that the directors are lawfully obliged to act within
19 these powers that we see in the Articles of Association. Are you aware of that legal
20 obligation that falls on them as directors?

21 A. Yes.

22 Q. So we can assume, can we, that they do that?

23 A. Yes.

24 Q. As for who the members are, if you turn to page 104 in this bundle -- I assume this isn't
25 entirely up-to-date. It was 18th April 2016, but just to get the general feel of this, your
26 members, we can see, are a variety of organisations, mainly limited companies although
27 there are others which operate, broadly speaking, in the rail industry; is that right?

28 A. Yes.

29 Q. And for completeness, I'm not sure that anything turns on this but just for the Tribunal's
30 work, one sees Network Rail is a member. That's number 220 on this list, and at 348 UKRS
31 is also a member?

32 A. Yes.

33 Q. Now, I just want to explore this theme a bit further about how NSAR is benefiting its
34 members as it is required to by its object.

1 If you pick up, please, bundle 3 at tab 5, page 182, I'm going to a slide pack. The numbers
2 that I'm using start at the bottom of this page. They have lots of zeros in front of them.
3 That is the common pagination.

4 Page 182 is the landscape page, the slideshow starts there. This is a slideshow that was
5 given by NSAR when it was first founded, and you will see, just to show you the
6 background, page 183:

7 "Today's programme is divided into various sections."

8 The first bit "Structure and objectives", "Why we chose to change", and so on.

9 I want to start on "Structure and objectives". That is over the page at 185:

10 "A highly competent and motivated workforce is essential to delivering value for
11 money."

12 In a nutshell, that is why, or one of the reasons why, high standards in training benefits the
13 industry; is that right?

14 A. Correct.

15 Q. If you then look on to page 191, the business model, a "robust financial model". They had a
16 grant and some sponsorship.

17 Then "Corporate structure", one sees:

18 "Not-for-profit company, limited by guarantees, wholly owned by industry members.
19 Small self-standing start-up company in private sector."

20 You are nodding.

21 Is that still how NSAR broadly speaking sees itself? I am sure it has grown since then, but
22 that was the basis on which it's founded?

23 A. My predecessor had a number of views of the world that I am sure have influenced this
24 presentation that I wouldn't have gone along with. I was working in the government at the
25 time of setting up the national skills academies, so I'm aware of the vision for them, which
26 is they would be owned by industry so that the necessary structure for that would be private,
27 but these would be not for profit without shareholders. And so you could use the word
28 "private" accurately, but we would very rarely use that without saying "not for profit" and
29 "industry-owned".

30 And the indications being there that we act for the benefits of industry, rather than for
31 shareholders because we don't have them.

32 Q. Yes. You are describing there the government's approach, but would you agree with this:
33 essentially, when this was set up there was a convergence of interests between industry --
34 you are nodding -- and the government? And the government's objective -- it is in various

1 documents. We will go to it if we need to, but the government's objective was the economy
2 in general.

3 Sorry?

4 A. Correct.

5 Q. And industry's objectives, as we have seen, is value for money.

6 If you look over at 192 there is the board. One sees that the board, as in fact you say at
7 paragraph 15 of your second statement, was drawn from across industry. Is that right?

8 A. Correct.

9 Q. Page 198 looks at training content and accreditation in a bit more detail, and one sees -- this
10 comes out of a working group -- there had been three main requests: single industry
11 accreditation; standardised training; more generalised training courses. And again, one sees
12 at the bottom there -- this is why industry was interested -- potential for huge cost savings
13 by industry. Is that right?

14 A. Deriving from those and other activities. I think the business case versus cost savings is
15 much broader and in fact principally rests not on training fees but on wage inflation. And
16 the reason skills academies were partly set up was because of a market failure in training
17 which was costing the government a lot of money.

18 Q. Well, I was asking -- so not to disagree with you because as I say there were government
19 interests, but from the industry point of view that wage inflation, they wouldn't express it as
20 costing government money but costing industry money?

21 A. In that case yes, but as government are the principal customer of the, for example, Network
22 Rail, they buy the rail services, so it is -- both are true, sir.

23 Q. Another benefit, if you go forward to page 205, please, which is addressing the audit system
24 in particular, there are a list of problems here highlighted with the existing scheme. Some
25 of those are problems faced by industry, and in particular, if one looks at the fourth bullet
26 point:

27 "Lack of added value to training providers."

28 One sees there that that was another motivating factor, was it not?

29 A. I can't be in the mind of the person that put this slide together, so I don't know what they
30 meant on that occasion. I would have -- I would guess that training providers, as they
31 would often argue, look to reduce bureaucracy which is a reasonable thing to want to do,
32 and I would always encourage that up to the point that bureaucracy should always add value
33 to whichever purpose it is trying to serve, in this case safety.

1 Q. I think there are two things there. There is reducing bureaucracy and you also said add
2 value. Could I just pick up on that and ask you to turn to 236 because this, as I understand
3 it, is explaining how value might be added. Because one sees here that the new system is
4 intended to help business, in particular one assumes training providers, to improve and to
5 have business-focused and realistic targets for improvement.

6 A. I think we could probably separate out when you talk about business. I think there are two
7 parts to that. There is that bit of business represented by the training providers and that bit
8 of business represented by the training providers' customers. But with that caveat, yes, I
9 suppose that's true.

10 Q. And so just to be clear about what you say in your statement, you refer on several occasions
11 to NSAR's public service mission and I think on one occasion you say it has an exclusively
12 public service mission?

13 A. Yes.

14 Q. Now, it may be that NSAR's objects and its obligations to further the interests of its
15 members coincide with government policy and with public policy, but when you say it has
16 an exclusively public service mission you are not trying to detract from what is in fact its
17 object of assisting its members; is that right?

18 A. No, but I think what I would say, though, is if you look at the purposes for which we were
19 set up, which is to work through industry members to achieve improvements in skills and
20 training, which are primarily around safety, and reducing wage inflation through increased
21 training levels and the supply of competent staff, both of those are in industry's and in
22 government's interests. And the fact that government intervened regularly to support those I
23 would suggest implies that they remained in both parties' interests.

24 Q. Yes, in both parties' interests, and that's all I'm putting to you.

25 A. Yes.

26 Q. In your second statement at paragraph 69 -- that, I think, is in the second bundle at tab 1 --
27 just picking up on a question which was canvassed by the Tribunal earlier today.

28 You, at paragraph 69, explain that:

29 "In order to be able to provide Sentinel training as a result of which providers are
30 bound to observe RTAS and protocol ...(Reading to the words)... In addition
31 individual trainers are required to pay a fee. A provider company may pay this on an
32 individual's behalf."

33 Then you say this:

34 "On the other hand a provider -- sorry, this is not the relevant point.

1 But:

2 "On the other hand, a provider may recoup fees."

3 Then this is the important point:

4 "The fees paid allow providers access to regular meetings. When we update those
5 who choose to attend ...(Reading to the words)... and also provides access to
6 occasional advice from experts and briefings.

7 "This is by way of assistance to help them understand how they should train and
8 assess competence ...(Reading to the words)... auditing process it is to allow them to
9 understand what is expected of them."

10 Now, those services, as I understand what you are saying in this paragraph, those are
11 available to training providers who pay the fee to take part in the RTAS system; is that
12 right?

13 A. Correct.

14 Q. I now want to go, please, to your fourth statement. It is in bundle 5 at tab 1. Paragraph 17,
15 please.

16 You say there:

17 "NSAR is much more heavily influenced by public law bodies than by private
18 industry. Network Rail, TfL and HS2 are the main participants through the board
19 ...(Reading to the words)... set up by statute."

20 You have already explained that the board was -- it is in your earlier statement and you have
21 confirmed in your answers today -- intended to be representative of industry.

22 It may help to look at the current board. If you leave this open and look at bundle 3, tab 2,
23 page 323.

24 A. Bundle 3, tab 2?

25 Q. Yes.

26 A. Tab 2 is my third witness statement.

27 Q. Behind that, or at least I have it behind that, at page 323.

28 A. No.

29 Q. If you remain in tab 2, unless it is somewhere else.

30 MS. DALY: Yes, it is there.

31 A. I do have the list of board members.

32 MR. JONES: One can see just looking down that list that it is still broadly representative of
33 industry, is it not?

34 A. We try. We try to be representative.

1 Q. This in a sense is a legal point more than anything else, but since it is in your statement I
2 should just put to you that of the four bodies that you have said in paragraph 17 are set up
3 by statute, in fact only one of them is. That is TFL.

4 I put that to you just because you have addressed it. Do you have anything that you want to
5 say on that issue?

6 A. I apologise for perhaps loose legal language, but in my understanding that Network Rail,
7 TfL and HS2 are primarily public sector entities, so I may have misunderstood that. But if
8 it is, it is because it is a legal perspective.

9 What the panel should understand is that whilst they seem like a minority of the board, in
10 fact they are by far the most influential members on the board. And we discussed earlier
11 NSAR's income and the panel heard a figure of 1.2 million membership described. In fact,
12 that 1.2 million is subscription fees from those public sector bodies, primarily though not
13 exclusively.

14 So that is how it works in practice. I apologise if I have used the word "statute" incorrectly.

15 Q. Could I pick up one last point, which is staying in your fourth witness statement so you can
16 put that board paper back. That's bundle 3. You do not need that.

17 MS. DALY: Sorry, can I just ask a point of clarification for what you just said for my
18 understanding, of these 17 board members, four of them underwrite NSAR the most. Is that
19 what you are saying?

20 A. Effectively, yes.

21 MR. JONES: Paragraph 22.

22 DR. ELPHICK: Sorry, which bundle is this?

23 MR. JONES: Bundle 5, tab 1.

24 MS. DALY: We are in statement number 4?

25 MR. JONES: Statement number 4.

26 THE PRESIDENT: Paragraph 22, is it?

27 MR. JONES: Paragraph 22.

28 DR. ELPHICK: Thank you.

29 MR. JONES: You are talking there about the memorandum of understanding which has been in
30 place since January 2016, and you say:

31 "In my view this is really important and unique in the assurance training world. This
32 gives us a great deal of freedom to make suggestions and changes as and when
33 necessary. It also allows us to pick up the phone to Network Rail to respond to

1 discussions instigated by Network Rail outside our regular meetings. This is the ...

2 (Reading to the words) ... I do not consider that it could operate in the private sector."

3 Can I just clarify, I see what you mean there is in the for-profits sector, because you are in
4 the private sector, are you not?

5 A. Yes.

6 Q. So it couldn't operate in the for-profit sector. You will be aware, I assume, that in the for-
7 profit sector there are all sorts of collaborative arrangements between entities?

8 A. Yes.

9 Q. You will also be aware that for-profit companies can have detailed contracts of course.
10 That's one route which I know has been criticised in these proceedings. But whatever is in
11 the contract, they may well wish to impress the person with whom they have contracted so
12 that they get the contract the next time round. You are aware of that?

13 A. Correct, yes.

14 Q. And you will also be aware, I would have thought, that there are all sorts of ways of
15 managing fee structures to make sure that they incentivise particular arrangements even
16 when there are for-profit companies involved?

17 A. Correct.

18 MR. JONES: Thank you. I have no further questions.

19 Questions by THE TRIBUNAL

20 MS. DALY: I just have two simple questions for you.

21 We looked at the list of members and I think I heard you say that three new members came
22 in 2016. From which industries did those folks --

23 A. Very, very small bodies quite far down the supply chain. The notion of membership is
24 slightly misleading here.

25 We have a few very large members and lots of smaller members who might be in the
26 training provider community, might be in the wider service commission community. We
27 encourage this because the government would like us to have a reach down into all parts of
28 the industry. But from a board perspective it is very much driven through the larger
29 subscribers who of course are members, but everybody had to be a member or else the skills
30 academy couldn't start.

31 MS. DALY: Right. And the three that joined, were they training providers or --

32 A. From memory, one was a training provider and two provided detailed services, I think,
33 small bits of equipment. SMEs I think you would call them.

1 MS. DALY: My second question is just in a large kind of magnitude, last year, 2015, how much
2 did your organisation earn from consultancy fees?

3 A. Less than 10%, so about £200,000.

4 MS. DALY: Thank you.

5 THE PRESIDENT: I just wanted to ask one thing, which is if you go to bundle 2 at tab 3, which
6 is the same bundle where you were taken to the memorandum, if you go to page 102 I think
7 there is an extract from your website printed out, it seems, in July of this year:

8 "NSAR has been established by industry employers to meet the growing demand, in
9 terms of quality and quantity, for railway engineering skills across the UK."

10 Then the last paragraph:

11 "NSAR supports all types of employers, large and small, from the infrastructure client
12 organisations, their contractors, to traction and rolling stock companies ..."

13 I think you referred to them:

14 "... and their supply chains."

15 That is still a fair summary of what you do?

16 A. Yes.

17 THE PRESIDENT: Yes. Thank you.

18 DR. ELPHICK: If I can ask a rather broader question. I wonder if you are aware of what was
19 called ISO standards which apply across industry?

20 A. Yes.

21 DR. ELPHICK: You will know that companies have to be accredited in order to gain such
22 standards?

23 A. Yes.

24 DR. ELPHICK: I wonder how similar you think that accreditation process, the ISO, is to the
25 accreditation that you provide to training providers?

26 A. We have actually discussed that question, sir. My understanding of the ISO-type
27 arrangements are perhaps closer to what obtained before in that they describe -- they
28 describe processes and they are designed for people often who have repeat processes to get
29 good standards, and we are fully supportive of those.

30 I think there are two differences I will draw your attention to. One is that these standards --
31 the RTAS arrangements, as has been noted, are developing over time. So generally those,
32 ISO, BSI etc, might take a while to catch up with -- they tend to operate in a more settled
33 environment where processes have been running for a number of years.

1 Also, I think, the nature of the audits is somewhat different. They are slightly more about
2 systems, and again, I think you will hear more from Mr. Wilmhurst-Smith on this which is
3 that a system-type approach has had limitations in this situation and that an approach that's
4 perhaps less tightly specified, more able to follow and make judgments, rather than "is that
5 there or not", "to what extent is this true". You know, we can make judgments about things.
6 So it is a slightly more -- it allows for a higher level subjectivity and expertise and allows a
7 slightly richer context.

8 DR. ELPHICK: But nevertheless there are fairly strong similarities between the two.

9 A. If forced to put a percentage on it I would say there would be a 40% or 50% overlap in
10 practice, having been a recipient of both.

11 DR. ELPHICK: I would be right in thinking that in general ISO accreditation is done by people
12 for profit in the private sector?

13 A. Yes, that's true. Whereas the kind of assessment of competence is typically for, for
14 example, apprentices, it has a different system, again run by, in some cases, for profit
15 through a regulator called Ofqual, where there is also a system of delegated authorities.
16 And in our case, our system is probably closer to that that you would find in Ofqual than in
17 the ISO scenario.

18 DR. ELPHICK: Right, thank you.

19 THE PRESIDENT: Any re-examination?

20 MR. WIGNALL: No, thank you very much, sir.

21 THE PRESIDENT: Thank you very much, Mr. Robertson. You are released.

22 (The witness withdrew)

23 MR. WIGNALL: Sir, I hope it wouldn't inconvenience the Tribunal or Mr. Jones, but Mr.
24 Richard Smith is here from Network Rail and I think he would have some difficulty in
25 coming tomorrow. I was going to ask whether you would hear him now, but the answer is
26 probably not, thinking about it, in view of the --

27 THE PRESIDENT: Well, just a moment.

28 MR. WIGNALL: Sir, I needn't trouble you, I'm so sorry. I had thought Mr. Smith would find it
29 impossible to come tomorrow. He can come tomorrow, but in those circumstances would it
30 be possible for him to leave today?

31 THE PRESIDENT: Yes, of course. He is not being called. I think that would be preferable.

32 MR. WIGNALL: In those circumstances, sir, I'm going to invite Kim Millen to step forwards.

33 Ms. KIM MILLEN, Affirmed

34 Examination-in-chief by Mr. WIGNALL

1 THE PRESIDENT: Do sit down, Ms. Millen.

2 MR. WIGNALL: If we could have bundle 5, please. Now, I'm going to invite you to turn to tab 2
3 in that bundle.

4 Now, you are Kim Millen-Stirling and you are a chief operating officer of the defendants at
5 11 Carteret Street. May I ask, how do you prefer to be addressed?

6 A. 11 Carteret Street, sorry?

7 Q. How do you prefer to be addressed: Mrs, Miss, Ms?

8 A. Anything. Kim is fine.

9 Q. So it is. If we go to your last page of your witness statement, your signature appears there
10 at the top of page 11, doesn't it?

11 A. Yes.

12 Q. Are the contents of your statement true?

13 A. Yes.

14 MR. WIGNALL: Thank you, sir.

15 Cross-examination by Mr. JONES

16 THE PRESIDENT: Yes, Mr. Jones.

17 MR. JONES: Good afternoon, Ms. Millen-Stirling. Could I just clarify at the outset whether you
18 have experience of working for a profit-making or profit-driven auditing or accreditation
19 body?

20 A. No.

21 Q. So when you make various comments in your statement of opinion about what a
22 commercial provider could do, that's your perception as someone who has only done this
23 from a non-profit organisation?

24 A. Yes, but I have worked for a very large commercial organisation.

25 Q. But not, as I understand it, in an auditing or an accrediting function?

26 A. No.

27 Q. Could I look at the contract with Network Rail first, please. That's bundle 4, tab 1. This is
28 going back I think to September 2011. So the first contract.

29 THE PRESIDENT: Bundle 4, page?

30 MR. JONES: Tab 1.

31 THE PRESIDENT: You said this is from when, sorry?

32 MR. JONES: September 2011. So it was the first appointment between Network Rail and
33 NSAR.

1 Ms. Millen-Stirling, just to put this in context, what I want to do is go through the
2 development of the contract and the functions which you were performing over time. So, I
3 will start at the beginning, if I may, with this contract.

4 You will see it says on the front page:

5 "Network Rail conditions of contract for the purchase --

6 THE PRESIDENT: This is 2011. That's, of course, before (inaudible) joined NSAR.

7 MR. JONES: Yes, that is right, sir. And it is before Mr. Robertson joined as well, I think. Since
8 they both describe the development of the services and the case, as I understand it, against
9 me is that the services developed significantly, I need to unfortunately take one of them
10 back through the history.

11 THE PRESIDENT: Yes, I understand.

12 MR. JONES: Could I ask you first just to look at -- unfortunately this isn't paginated except in
13 certain places. If you jump in about two-thirds of the way through, there are page numbers.
14 I want to go to page 11 of 21 is what it says at the bottom. If you find yourself in any page
15 number of 21, if you can go to page 11.

16 Do you have that?

17 A. Yes.

18 Q. Madam, the document at the start says "version 2.12" at the bottom of it.

19 MS. DALY: Yes.

20 MR. JONES: If one carries on until the pages no longer say 2.12, you then find page 1 of 21, and
21 I'm on page 11 of 21.

22 MS. DALY: Thank you, I will get there. Okay. Thank you.

23 MR. JONES: All that effort for what is a minor point, I am afraid.

24 I just wanted to flag that what one sees on this page is that there was a contractual provision
25 for these regular review meetings between the parties. Do you see that at the top of page 11
26 of 21?

27 A. Yes.

28 Q. So a contractual provision was made for that. Then in annex 6 -- this is page 20 of 21 --
29 there are fees set in the contract. So these are the fees which training providers will pay
30 NSAR. Do you see that?

31 A. Yes.

32 Q. And do you see under the fees, there is a list of things, if I can put it neutrally, which NSAR
33 will do to assist training providers? It is said that fees include those things. Do you see
34 that?

1 A. Yes.

2 Q. So those are at least some of the benefits which training providers are getting under this
3 contract in return for their payment of fees; is that right?

4 A. Yes.

5 Q. Now, the inspection framework itself starts over on the next page, page 1 of 31. You will
6 see on the front it says "prepared by Bill Alexander", and of course Mr. Alexander has a
7 witness statement which he has not been cross-examined on where he explains how he put
8 this together.

9 This, as I understand it, is what is sometimes referred to as the Ofsted-style framework.
10 Does that sound right to you? If you look through it, on the next page it's got these broad
11 headings: capacity to improve, learner outcomes. This was that framework?

12 A. Yes.

13 Q. Is that right?

14 A. I don't know if it was the framework but I can read it, and yes.

15 Q. As far as you are aware?

16 A. Yes.

17 Q. We will come back to this document. I'm sorry, there's going to be a little bit of jumping
18 around in my questions.

19 A. Which document?

20 Q. Because I want to go next to the 2014 variation of that contract, which is in the next tab. So
21 tab 2 of bundle 4.

22 This was a letter from Network Rail to Gil Howarth. You will see the second main
23 paragraph:

24 "In line with clause 7, please accept this letter as confirmation of Network Rail's wish
25 to vary the contract."

26 It then says:

27 "All other services shall be performed in accordance with the requirements specified
28 in the original agreement."

29 I don't know how much you can help with this. My understanding from your evidence is
30 that you say there was a change in 2014 which I think was this. Is your understanding that
31 this added certain requirements to the contract but didn't take anything away? One can see
32 that:

33 "Other services shall be performed in accordance with the contract."

34 A. Yes, my understanding is that it was to be more robust.

- 1 Q. More robust. And it added the various obligations we see then in schedule 1 if you turn
2 forward a few pages.
- 3 A. Yes.
- 4 Q. If one looks at this schedule, the scope of this project -- I'm on schedule 1, the first page of
5 schedule 1, just after the letter. Do you have that? There is a heading which says "Scope".
- 6 A. Yes.
- 7 Q. Do you want to look at what the scope is?
8 Scope is:
9 "(a) work with Network Rail-nominated subject matter experts to consistently review
10 and revise the RTAS framework to ensure that it remains fit for purpose for the
11 industry."
12 Pausing there. There is no principled reason why a profit-making company couldn't do that,
13 take on that obligation, is there?
- 14 A. I can't comment on the basis that I have already identified, that I didn't work for a profit-
15 making auditing organisation.
- 16 Q. So you --
- 17 A. So that is what you asked me earlier: did I work for a profit-making auditing organisation.
18 So I don't know what the difference would be.
- 19 Q. Yes, so you don't know whether these things could have been done by a profit-making
20 body?
- 21 A. I don't believe the current regime could be, no.
- 22 Q. Well, in light of that let's work through this regime and I will see how far you are willing to
23 offer opinion on these.
24 This point in (a) "work with subject matter experts", you can't say, I think is your evidence,
25 whether that could be done by a profit-making body.
26 What about (b):
27 "Raise matters of concern and review any areas of complaints or comments"?
28 Do you have any view on that?
- 29 A. Within the current regime that could not be done by a profit-making organisation in the way
30 in which we work.
- 31 Q. We will come on to precisely how you work, but just looking at the actual obligation "raise
32 matters of concern".
- 33 A. That would be normal in any organisation.
- 34 Q. That would be normal in any organisation, precisely.

1 Ms. Millen-Stirling, in light of what you have said -- I won't labour this point because I hear
2 your answer to my questions going back to 2014 -- could I just put to you this broad point:
3 there's nothing in this document which couldn't be done by a profit-making organisation?

4 A. As I have said, the way in which we work at the moment, could not be done -- a profit-
5 making organisation would not do it. And I have worked for a profit-making organisation
6 and I'm now in a non-profit making organisation, and as a commercial profit-making
7 organisation they would not embrace what is required under the obligations of the MoU.

8 Q. We will come onto the MoU in a moment.

9 Am I right to understand that NSAR has input into a wide range of training qualifications
10 and so forth in the industry?

11 A. Yes.

12 Q. Even though you don't accredit all of them?

13 A. No, we don't accredit all of them, we accredit some of them.

14 Q. You don't audit all of them?

15 A. No, we don't audit all of them, but we audit some of them.

16 Q. Even if you are not accrediting and auditing, you can provide that broad input into the
17 framework; that is right?

18 A. Generally yes.

19 Q. Could I look at the audits actually undertaken by NSAR in this case. It is bundle 1, please,
20 at tab 4. I want to start at page 87, please, and this is the page numbering at the bottom right
21 of these pages which starts "BSQ".

22 THE PRESIDENT: Can I just stop you a moment. We need to take a short break at some point.

23 If you are going to work through the audit, would that be a sensible moment?

24 MR. JONES: That would be a sensible moment.

25 THE PRESIDENT: We will take just five minutes.

26 (A short break between 3.31 p.m. and 3.40 p.m.)

27 MR. JONES: Ms. Millen-Stirling, I was in bundle 1 at tab 4, page 87. I don't propose to go
28 through these in detail, just really to get an overview of what was done in this case.

29 This was the May 2015 audit, you see at the top, and this is an audit which has been
30 described as the Ofsted-style audit.. It's got the good, outstanding ranks, and if one flicks
31 through it you will see capacity to improve learner outcomes etc. Is that right, this is what
32 is called the Ofsted-style approach?

33 A. Yes.

1 Q. And this is really in accordance with that framework in the 2011 contracts that I took you
2 to?

3 A. Yes.

4 Q. The same is true I think of the audit which starts at page 107 in this bundle, which just
5 follows the same format, and it is September 2015. It is a lot shorter.

6 MS. DALY: Where is the second, I'm sorry?

7 MR. JONES: 107.

8 Is that right, Ms. Millen Sterling, or have I got this wrong?

9 A. Well, I have to say that I'm surprised that there were two audits in one year. So I find that --
10 two Ofsted-style audits in one year.

11 Q. So that is surprising. If we may focus on the first one. If we go back to page 90, that's
12 picking it up in the main findings.

13 A. Sorry, at 107, am I right, through to 110 there is a four-page audit?

14 Q. Yes.

15 A. I have never seen a four-page audit before, so I can't explain why there would be a four-
16 page audit.

17 Q. Let's focus on the first one and, as I say, just jump in at page 90.
18 Now, this is, as we said, the Ofsted-style audit. One can see here that there is an exercise of
19 judgment being exercised by the auditors looking at a range of evidence and reaching a
20 judgment. Is that a fair summary?

21 A. Yes.

22 Q. Now, this audit, I have been calling it an Ofsted audit, but I think in your statement you
23 refer to these as educational audits?

24 A. That is right.

25 Q. This educational audit was carried out by Tribal. Are you aware of that?

26 A. That's right. Yes.

27 Q. And Tribal is the company which, until the end of 2015, NSAR had subcontracted to carry
28 out these audits; is that right?

29 A. Yes.

30 Q. And it is a private profit-making -- maybe it is a loss-making -- but a private company
31 which at least wants to make a profit; is that right?

32 A. Yes.

33 Q. Could I then look at the audits which were carried out by NSAR's own staff, and those are
34 the ones I think you call rail audits. Have I got that terminology right? Or railway audits.

1 You are nodding, but yes.

2 A. Yes.

3 Q. Page 113 is the first of these. Now, there are several audits of this type in the bundles and
4 I'm not going to go through them all. Again, I just want to get a feel for what's involved in
5 this audit.

6 Could you just confirm, firstly, I have understood this is the rail audit or railway audit that
7 you have described in your statement, and that is conducted by NSAR staff?

8 A. Yes.

9 Q. If you look, for instance, at page 150 you will see the first question is:

10 "Does the provider maintain a manual which contains all of ..."

11 Then there is a list of things. Do you see that list of bullet points?

12 A. Yes.

13 Q. So what the auditor is doing there is looking at documents and making sure that they are
14 there in the manual?

15 A. Yes, and that they are being used as well during the audit.

16 THE PRESIDENT: That they are what, sorry? I didn't hear you.

17 A. Sorry, that they are being used as well. So it is not just that they have got the document: is
18 it in use?

19 MR. JONES: If one looks over the page, 116, there are some notes on this. What one sees from
20 the notes is that there are various criticisms for documents not being there. When you say
21 "is it being used", it is not clear from this that there is any further question about what use is
22 being made. Where would one get that from if they wanted to say there is a document that's
23 not being used? How would they discover that?

24 A. Doesn't it say "reflect this in your procedure"? So if you look at page 116, the comment
25 from the auditor says:

26 "Reflect this in your procedure."

27 So there would have been a conversation at the time with whoever they were talking to that
28 asked them to make sure it was reflected in their procedure, whatever that aspect of it was.

29 So it is a more in-depth audit; it is not just looking at the educational aspects of the delivery.

30 Q. Well, it isn't looking at education. I'm not fixing on that at the moment, but just looking at
31 the page, if you look for instance at the top, "Response":

32 "On Thursday morning at the start of the audit no procedures were available and they
33 had to be downloaded. On further questioning a further set of procedures was
34 available."

1 Was his other response of a similar type, essentially, the documents weren't there:

2 "Reflect this in procedure" read in that context appears simply to mean make sure that
3 they are available?

4 A. Well, they should be available. How do you run your business if you don't have the
5 management systems available to the people that are using it? How do the individuals
6 within the business know what they are doing?

7 Q. If you then look, please, at page 117, again there is a reference to some documents, "self-
8 assessment report and "quality improvement plan"?"

9 A. Yes.

10 Q. Again, essentially what is being done here is seeing whether those documents are there?

11 A. It is not just if they are there, it is if they are being used, because it talks about there's no
12 evidence of meeting notes. So within a system or a procedure, you agree what it is you are
13 going to do and then we are looking for evidence that that's being done, because that's
14 further evidence that what you say you are going to do you are doing.

15 Q. Yes. And one sees that from where it says number 2, top of the page, second line down:

16 "SAR. Please advise who has input into the SAR within the business and how often it
17 is reviewed. Please provide minutes of the meeting."

18 You are looking for minutes of the meetings or documents to see whether they have
19 reviewed as they should have done?

20 A. And whether the content of the meeting is reflected back into their document so that it is a
21 genuine history of what is happening in terms of improvements within the business.

22 Q. Then over the page, 118, this is then looking again for job descriptions. And one sees in the
23 comments there are some comments -- it is not simply, as you say, looking at whether the
24 documents exist, but there are some comments about whether or not they are adequate and
25 focus on the role?

26 A. Yes.

27 Q. At 119, it looks like just another document point: have they uploaded these certificates onto
28 the skills backbone; is that right?

29 A. Yes.

30 Q. I'm not going to go through every page, but I will just pick it up a little bit later at page 142,
31 if you could turn to that, please. This is where the audit turns to a particular course.

32 A. Yes.

33 Q. As you have explained, it is not an educational audit, but nonetheless it looks at the course.
34 And what one can see from page 143 and following is essentially a detailed look at whether

1 the paperwork for the course is in place and whether there are discrepancies and so forth
2 with the paperwork?

3 A. It is all about verifying the information. So, for example, it is verifying if Joe Bloggs is Joe
4 Bloggs to make sure that we are complying. And when I talk about "we", the industry are
5 complying with, say, borders and immigration because that is part of what we do.

6 Q. Ms. Millen-Stirling, I don't mean to suggest that this is all perfectly easy and
7 straightforward, but it is, is it not, all perfectly standard auditing activity that any well-
8 equipped private profit-making company could do?

9 A. I don't agree with that because there is a lot of work that goes between NSAR and Network
10 Rail that allows this system to be in place. We do a lot of work outside of the scheme that
11 allows the scheme to be as it is and to deliver benefits to the rail industry.

12 Q. Yes, and I understand that and that is why I asked you earlier about those kind of services
13 which you can provide to any course, any training-type organisation regardless of whether
14 you are accrediting.

15 What I just want to focus on here is the audit function. What I understand from the answer
16 you have just given is you agree with me, if one just looks at the audit function --

17 A. No, I don't agree with you because this also takes into account specific railway knowledge.
18 It is not just a standard --

19 Q. Can you explain where in this document does one see anything which is so specialist that no
20 profit-making company could have had that expertise?

21 A. Well, you would need to look at the course file because that's the way in which they use a
22 course file, to remedy or to compare. So they will have, let's say, for example, the training
23 material for that course, they will look at the course style and they will check against the
24 training material or the learning hours because there are specified learning hours. So there
25 is a whole raft of stuff that they would do.

26 MS. DALY: What is the course file?

27 A. The course file is what a training provider collates when they -- and it starts with the
28 booking form or a request for training. They are all specified documents by Network Rail
29 within the RTAS scheme and 202, which is part of the rules.
30 So within those rules it will determine what needs to be in the course file. We would then
31 go to the course file, so they would do general audit on some of the processes. They would
32 then ask for a sample course file. It might be one, it might be half a dozen. And they would
33 review that course file against training material.

34 MR. JONES: Now, that course file is held by the training provider, is it?

1 A. That is right.

2 Q. So the training provider has to understand all the rules which relate to that course file?

3 A. Yes.

4 Q. And they have to understand how to satisfy those rules and make sure --

5 A. Yes.

6 Q. And training providers are profit-making organisations?

7 A. Yes.

8 Q. And yet they can do that, they can understand the rules, they can ensure that they comply; is

9 that right?

10 A. They don't always, and that's the role that we play.

11 THE PRESIDENT: They should?

12 A. They should, but they don't always.

13 MR. JONES: Just for completeness, there are three -- Ms. Millen-Stirling, I'm not sure how

14 familiar you are with the precise details of this particular case, but there are three NSAR

15 conducted audits in this case. And we could go through them all or we could short cut it if

16 you are able to say that all three of them essentially follow this procedure. So the three

17 conducted by NSAR were railway audits which are all --

18 A. Yes, they would have been. If they were conducted from the beginning of the year.

19 Q. Yes. Could I then come to 2016 and the changes that I understand have been made in 2016.

20 Firstly, there is the new quality assurance framework?

21 A. Yes.

22 Q. Now, could you look at the letter on that. It is in bundle 2 at tab 3 and page 315. So 315 is

23 a letter from Network Rail and it is essentially announcing this new quality assurance

24 framework. And you will see in the third paragraph, it says:

25 "Collectively this will improve training standards across the industry."

26 So that is the broad purpose of the new framework; is that right?

27 A. Yes.

28 Q. And they then helpfully list what they say are the key changes:

29 "(a) delivery of assurance will be brought in-house and utilise assessors with rail

30 knowledge and skills."

31 So that, as I understand it, means you are not going to use Tribal. Is that what that is going

32 to?

1 A. We are doing the skills-based audits ourselves, which is about training delivery. Sorry, the
2 training delivery, the trainers aspect, we will use educational specialists to do that. But the
3 rail-based elements of training delivery we are doing ourselves.

4 Q. When you say "the training element", is that what we have been talking about as the
5 educational audit?

6 A. Yes.

7 Q. You are not using Tribal, but you are using other consultants, you say in your statement?

8 A. Yes, we are.

9 Q. So that's not coming in-house. So, what is coming in-house? What does this (a) mean:
10 "Delivery of assurance will be brought in-house."
11 What is coming in-house that was not previously in-house?

12 A. All of the rail elements of the training. So as we have just talked through, the courses, the
13 documentation around the courses. So the review of that and checking that the quality and
14 the content of the course is delivered correctly.

15 Q. So that was the audit we were just looking at, the NSAR audit?

16 A. Yes.

17 Q. But that was before the date of this letter, that was an audit from 2015 that we were just
18 looking at. That was something you were already doing?

19 A. That was November. Was that November?

20 Q. I need to go back to it to check the date.

21 A. It is September.

22 Q. So let me just get this right, Ms. Millen-Stirling. So when did NSAR start doing those
23 audits that we have just looked at?

24 A. Which? These ones? September.

25 Q. You started that in September 2015?

26 A. Yes.

27 Q. Who was doing those before September 2015?

28 A. They weren't done in that way. It was educational audits that were done.

29 Q. So there was educational only which was done by Tribal?

30 A. Yes.

31 Q. To be clear, the only audits done before 2015 were done by Tribal?

32 A. That's my understanding from --

33 Q. And then in September you introduced the ones that we've just looked at, looking at the
34 documents and so on?

1 A. Yes.

2 Q. And that's what's being said in (a), that that is now in-house?

3 A. Yes.

4 Q. (b):

5 "Ad hoc visits will be introduced outside any scheduled plan."

6 A. That is right.

7 Q. Any private profit-making company could do ad hoc visits; you agree with that aspect?

8 A. Yes.

9 Q. "Evaluation will be risk based and aligned to methodology used in the skills assessment

10 scheme."

11 Then one has these others which I think are related:

12 "Ethos of continuous improvement ...(Reading to the words)... more in depth."

13 Are those three wrapping up in broad terms the difference between the original QAF,

14 quality assurance framework, the Ofsted-style framework and the new QAF document

15 which came in in 2016?

16 A. This is all about the closeness of our working relationship with Network Rail and how we

17 can flex what we are doing to accommodate issues that arise on the railway.

18 Q. I'm not sure if that's right. It is about the way in which you are going to evaluate risk?

19 A. Yes, but we can't evaluate risk on the railway on our own so we evaluate risk in line with

20 Network Rail, and Network Rail changed the evaluation of risk on occasion.

21 Q. Yes, but for instance, it says:

22 "The valuation will be risk based and aligned to methodology used in the skills

23 assessment scheme."

24 Is that or is it not talking about the new quality assurance framework, I think it is called, that

25 was brought in at the start of 2016?

26 A. Yes, it is, but it is also aligned with the relationship with Network Rail because they have

27 changed their training programmes to risk based. So, we have to look at the way in which

28 they evaluate their programmes as to how we evaluate the quality assurance schemes and

29 the inputs and training providers.

30 THE PRESIDENT: Have I understood this: you are saying you changed the way you evaluate to

31 align with the changing requirements from Network Rail?

32 A. Yes, we do. And we could not do that, we were a commercial entity, because we would

33 constantly be looking at the cost of things. And the way in which we deal with it is we have

1 a discussion with Network Rail, and sometimes we do more of one thing because that's
2 appropriate at that time, and then we might do less of something else.

3 MR. JONES: Ms. Millen-Stirling, I don't want to labour this point because it is really then a
4 question of opinion, but since you have just said that when you say it couldn't be done by a
5 profit-making company, it is a little perplexing why not. Why couldn't a profit-making
6 company have a contract with Network Rail, which includes: you will ensure your
7 framework is risk based and aligned to methodologies used in this assessment scheme?

8 A. Because the flexibility required in our approach with Network Rail would not be
9 encompassed in a commercial contract.

10 DR. ELPHICK: If I could interrupt for a second. Suppose the contract between Network Rail
11 and a private sector provider was, rather unwisely from their perspective, cost plus, so the
12 more work they do, the better from the point of view of the private sector. Why would it
13 not then be possible for it to be extremely flexible and co-operative?

14 A. I am sure it could be if it was cost plus. I'm thinking about what we do with Network Rail is
15 we discuss all of the costs. For example, I have a meeting next month to share everything
16 that we have spent on the assurance scheme this year. We will then agree what's an
17 appropriate rate to charge providers for next year. That is dictated or determined by
18 Network Rail.

19 They will say "We don't agree" with that or "We agree with that". So it is completely
20 transparent. I have worked in a commercial organisation and I think you would find it,
21 unless it was a cost plus. And bearing in mind the cost and the plus goes out to the training
22 providers, I think that would be a very difficult situation to generate in a commercial
23 environment.

24 DR. ELPHICK: But we agree that if it were cost plus then it could all be provided by a private
25 sector supplier?

26 A. Yes, if it were cost plus. Yes.

27 DR. ELPHICK: Thank you.

28 MR. JONES: There is some jargon which I may not have fully understood, so apologies if that's
29 so. We were looking at (c), and it talks about skills assessment scheme, and (d) talks about
30 the scheme and (e) talks about the scheme.

31 Now, if one asks the question "What is the scheme?", as I understand it the main element of
32 this new scheme is what one finds at page 278. If you just turn to that and tell me if I have
33 got that right?

34 A. Yes. January 2016, version 2.

1 Q. Yes. It is page 278. This, then, is the new quality assurance framework which came in in
2 January 2016 and which essentially replaces the Ofsted-style one from 2011?

3 A. Yes, it does.

4 Q. And updates it. If one just has a quick look at that, one sees -- we could do a sort of page-
5 by-page comparison, but it is fairly clear by just looking, for instance, at 279, it is still the
6 same general approach in that it is still what one might call Ofsted style. It still has the same
7 --

8 A. That's one element of it. So as I have said, we look at the rail elements in a very different
9 way and we still have an educational audit.

10 Q. Yes. Just separating those out, I think we discussed the rail audit because we have looked at
11 that from September 2015, and you have explained that was the new rail audit from
12 September 2015. So just, then, going back to the educational audit, you agree, I think from
13 what you have just said, that this is really just an evolution of what Tribal was doing up
14 until the end of 2015?

15 A. On the educational audit, yes.

16 Q. On the educational side, thank you.
17 Now, another change which has been emphasised is that there was the MoU instead of a
18 contract and that, as I understand it, is linked to a new funding model which also came in
19 with the MoU?

20 A. It is not the funding of the accreditation scheme. That is for (inaudible) more widely.
21 The funding of the assurance and accreditation scheme is paid for, so it is self funding and it
22 is paid for by the training providers.

23 Q. That was what I wanted to ask. The £7 levy, £150,000 estimate per quarter, is not to fund --

24 A. Is not to fund the assurance scheme.

25 Q. So the assurance scheme remains self-financing?

26 A. Yes, and that's why we do the open audit with Network Rail to determine the following
27 year's payments or fees.

28 Q. In that case could we go straight to the MoU, which is in bundle 3, tab 2.

29 THE PRESIDENT: Isn't it here as well?

30 MR. JONES: Sir, it is in a couple of places, I apologise.

31 THE PRESIDENT: Sorry, it is where? It hasn't got the annex 1. Do you want annex 1?

32 MR. JONES: I do.

33 THE PRESIDENT: Then it is not there.

34 MR. JONES: I have it in bundle 3 at tab 2, page 324.

1 A. Yes, I have got it.

2 Q. You will see at the top it says it is an understanding and it is not intended to be legally
3 binding etc; is that right?

4 A. Yes.

5 Q. At 3.1:
6 "Network Rail will collect the £7 levy on a quarterly basis and forward the amounts to
7 NSAR."
8 And it estimates this will generate £150,000 per quarter.

9 A. That is right.

10 Q. Just to be absolutely clear, that money won't go to the RTAS assurance and accreditation
11 scheme?

12 A. That doesn't go to the RTAS accreditation scheme. The only obligation under the MoU for
13 the RTAS scheme is under policy and governance.

14 Q. Yes. If we turn to that, that's on page 329. There are two different points here.
15 At (c):
16 "Support the development of the standards."
17 A. That is right.

18 Q. I think that's one point you have been making. You have that role helping with standards.
19 Then (d), "delivery of the scheme".
20 So those two, one can see here, are separable functions, aren't they?

21 A. Yes, they are. The money from the levy does not pay for the scheme.

22 Q. Could I ask about the risks that you take, NSAR, just going back to the £150,000.
23 I appreciate this isn't part of the funding for the RTAS scheme, but nonetheless just fixing
24 on that firstly. If Network Rail decided not to pay, because this is not legally binding, you
25 wouldn't be able to sue them for the money, would you?

26 A. No, but if Network Rail refused to pay, or chose not to pay, then we would discontinue the
27 items that they have asked us to do under the MoU.

28 Q. Yes, I see. These items are things which NSAR was set up to do, but quite apart from an
29 MoU with Network Rail, the members of NSAR came together to promote training. But
30 your position is if Network Rail wasn't giving you this money you would just stop doing
31 those things?

32 A. We have other funding. Network Rail are not our only funders, and therefore we would
33 have to downscale our activities to match our funding. And in the same way as if we got
34 more funding, then we would do more.

1 Q. And you presumably have certain commitments, outgoings, staff salaries, rental of a
2 building, those sorts of things?

3 A. Yes.

4 Q. So if your Network Rail funding dried up tomorrow, you would be out of pocket?

5 A., We would just downscale our business. We would have no option but to downscale the
6 business.

7 Q. I understand that.

8 A. As any business would.

9 Q. But that would cost you money, is the point I'm putting to you, because you would still have
10 these commitments, as any organisation does. You would have staffing costs, building and
11 rental costs etc. which you would have to keep paying even though you weren't receiving
12 income from Network Rail?

13 A., We would flex our responsibilities to meet our income, which is what NSAR has done since
14 inception. There have been some times since we have enjoyed more income and sometimes
15 when we have enjoyed less.

16 Q. Maybe I can make this a little bit more real by saying this: were you at the last hearing
17 before this Tribunal when we were discussing the application for an injunction?

18 A. Yes.

19 Q. Did you come to that hearing? And do you recall that Mr. Wignall gave an example -- a
20 question came up: how could you suffer loss? Because there was a question of whether my
21 clients' application for an injunction might cause you loss. And the example which was
22 given was, well, imagine NSAR has to stop doing -- we are talking there about the RTAS
23 function, so imagine Network Rail takes it back in-house and NSAR has to stop doing it.
24 We would face, it was said, potentially redundancy costs. That was the example that was
25 given.

26 A. Yes, we would, but we would be in a situation, if that was the situation, to transfer people
27 who were running the RTAS scheme to Network Rail. Under HR law you can do that.
28 Under European law they would have the right of transfer, and therefore we would do that.
29 Clearly there would be some redundancies because there is a support function in the office,
30 but yes, we would incur costs.

31 Q. Could I turn next, please, to the relationship which NSAR has with training providers.
32 Starting at bundle 4, tab 7, this is the letter, as I understand it, which was given by NSAR.
33 It has your name at the top so I hope you are familiar with it, but it was given by NSAR as

1 an example of what is sent to training providers which wished to join the RTAS scheme; is
2 that right?

3 A. Yes.

4 Q. I see the date is July 2016.

5 A. That is right.

6 Q. Is that because that is when this example was generated by --

7 A. No, this was when this was generated, the letter. When we reviewed the letter which we
8 were sending out to people.

9 Q. Yes. Was that in response to the request by this Tribunal --

10 THE PRESIDENT: Was this the standard letter you were sending?

11 A. No, this is the standard letter.

12 MR. JONES: Then what one sees, just going to it, at (1):

13 "Your company will now receive an advisory visit from an NSAR assurance manager
14 to establish whether it can meet the criteria. The cost of this visit is £1,500 plus
15 VAT."

16 What do they get for their £1,500 plus VAT?

17 A. They get a lot of support in terms of completing documentation. There is a framework that
18 gets completed that needs to be reviewed, and all of the information that they submit needs
19 to be reviewed and they get guidance as to what they need to do should they not be clear.
20 And although that's one day on site, that could be two or three days in the office.

21 Q. Then at paragraph 2:

22 "If your company meets the criteria and demonstrates that you understand and are able
23 to comply, you still want to proceed with the registration, you will be issued with a
24 login to our secure website and allocated a password to complete an online application
25 form together with a contract that you are required to sign and return for compliance."

26 This contract seems to be a little bit mysterious --

27 A. Contract has not yet been written. What I said when -- although this was a new offer letter
28 at that time because we recognised we wanted to review it and the contract has not yet been
29 written, I think that we have been quite busy with the Tribunal.

30 MS. DALY: Sorry, I'm slightly confused now. So this is the standard literature that NSAR would
31 send out for someone interested to become a training provider?

32 A. Yes.

33 MS. DALY: That was dated July 2016 and it refers to a contract, but the contract has never been
34 drafted?

1 A. No.

2 THE PRESIDENT: Did letters like this go out?

3 A. Previously, but without that -- where it says a contract would follow on, that was not in
4 there before.

5 DR. ELPHICK: Has this letter been sent out to a real training provider?

6 A. No, not yet.

7 MS. DALY: So it is not the same letter that used to go out prior to putting in that sentence?

8 A. No.

9 MR. JONES: Nonetheless, whether a contract is sent out or not, you heard Mr. Wignall this
10 morning explain NSAR's position that there is a contract, an implied contract.
11 Could I ask you what, in your view, do training providers get in return for the payments that
12 they make to NSAR to join the RTAS scheme?

13 A. They get access to skills backbone. They get CPD. They can join a number of workshops -
14 -

15 THE PRESIDENT: Sorry to interrupt you. Access to the skills backbone? Can you just explain
16 to me what that is?

17 A. The skills backbone is a support system where we collate all of the trainer information.
18 That also -- so it will be their CPD, it will be their personal information. It's where they
19 work, who they work for, those kind of things. It also -- we also --

20 THE PRESIDENT: Of all their trainers?

21 A. Sorry? For all the trainers, yes. We also manage their CPD as part of that. We organise the
22 trainers -- trainer exams. Under the Sentinel scheme rules all trainers have to take external
23 exams, so we manage that. We also manage access into Sentinel. If they have a problem
24 with Sentinel we are the go to to get that resolved.
25 So we liaise a lot with Network Rail and their Sentinel scheme providers, their IT providers.
26 So we do that. Then there's also meetings that they can come to. So, for example, next
27 week we have got 60 training providers coming to one of our events.

28 THE PRESIDENT: That's an all-day event?

29 A. We try and make it four hours so that they don't incur additional -- they can reduce their
30 cost of travel by traveling out of hours.

31 MS. DALY: And the link between the backbone and that event, it is just that it's promoted on the
32 backbone, the portal, or is it held? Can I get there virtually?

33 A. You can get there virtually, but we write to the training providers individually inviting
34 them. We try and set up an annual schedule so we know when they are coming around, and

1 we get speakers in to talk to them. So we have got the borders and immigration, not the one
2 next week but the one after, so that we can keep them as up-to-date and current as possible
3 on the things that are going on in our environment.

4 THE PRESIDENT: How many times a year -- you said --

5 A. We do it bi-monthly, roughly six times a year.

6 THE PRESIDENT: Thank you.

7 MR. JONES: So standing back and looking at all of those benefits, essentially it is a series of
8 services to help training providers access the RTAS scheme?

9 A. I would say it is an obligation. We are not delivering services in that way. We have an
10 obligation under the scheme to make sure that the training providers are as current,
11 professional and qualified as possible.

12 Q. Just to return to my question. A training provider pays you money, you say they then have
13 a contract, my question to you is what do they get under this contract in return for their
14 money?

15 A. I have just answered that.

16 Q. And those are all, from their point of view -- I understand you would characterise it
17 differently, but from their point of view they are giving you money and what they are
18 getting is a series of services which help them access the RTAS scheme?

19 A. I disagree with that, but, you know, that's a different interpretation, isn't it?

20 Q. Well, no one would pay you just to get an obligation, would they? Why would anyone pay
21 you to have an obligation imposed on them? They are paying you to get something
22 positive, and you have described what that is, and it all really goes to helping them access
23 the RTAS scheme; is that not right?

24 A. No.

25 Q. Why does a training provider pay you for this? Why would a training provider want you to
26 impose an obligation on them?

27 A. Because they want to be part of a scheme.

28 Q. Yes.

29 A. That scheme is determined by Network Rail.

30 Q. Yes.

31 A. We don't determine the scheme. What we do is meet our obligations to Network Rail and
32 work as the conduit between the training providers and Network Rail to make sure that the
33 training providers are as qualified and as professional and deliver safety training and
34 competence to the railway.

1 Q. Another related point is this. Mr. Wignall was explaining the training provider, he says,
2 could go to the county court, and you heard him explaining what they would essentially be
3 saying is: these rules haven't been applied fairly or properly. So another benefit that they
4 are paying you for is for you to provide the rules fairly and properly; is that right?

5 A. Sorry, say that again?

6 Q. A benefit which they are getting in return for their payment is to have you apply the RTAS
7 rules fairly?

8 A. Yes.

9 Q. And they also will have these audits from you; is that right? Is that included in the fee?

10 A. Yes.

11 Q. So you will audit them to establish whether or not they meet the standards. That's part of
12 what they are paying for?

13 A. We audit on behalf of Network Rail. The audits are to ensure that the training providers are
14 training individuals when they say they are to the standard to allow Network Rail to fulfil its
15 safety obligations.

16 Q. Yes, and from the point of view of the training providers what they are getting in return for
17 their money is a fair system that you are overseeing?

18 A. Yes.

19 Q. And I understand the first decision. Let's come to suspension in a moment. Let me start
20 first with what happens when someone first applies. They apply to become part of the
21 scheme. Who decides who can join the scheme? Is that you or Network Rail?

22 A. There is a set of obligations that they need to fulfil to be part of the scheme.

23 Q. And who makes the decision?

24 THE PRESIDENT: Who checks that they have fulfilled those obligations?

25 A. Before we agree that a provider can become an authorised provider, that information is
26 shared with the Network Rail team and there is agreement. We will say we recommend that
27 this company is accepted into the scheme and they say yes. We wouldn't recommend
28 somebody if they couldn't meet the obligations of the scheme; we would try and help them
29 to meet the obligations of the scheme unless we truly felt that they wouldn't be able to meet
30 those obligations.

31 DR. ELPHICK: That process of you recommending and Network Rail approving, is that
32 documented somewhere?

33 A. No. We have a call on a Monday between Network Rail's assurance team and our team
34 where that process is discussed. But no, we don't document that generally.

1 THE PRESIDENT: If you recommend, do they say no?

2 A. In all honesty if somebody couldn't meet the obligations of the scheme we wouldn't
3 recommend them. What we would do is if we felt it was really a committed organisation,
4 then we would work with that organisation to identify the shortfalls and work with them to
5 try to meet those.

6 DR. ELPHICK: Is it the case that in reality Network Rail always agree with your
7 recommendation because they trust your judgment?

8 A. Yes, they do. They do. Yes.

9 THE PRESIDENT: When you say if they couldn't meet the obligation we would work with the
10 provider to, as it were, bring them up to standing and then they would join, and then once
11 they have joined they pay the fee; for the help you give them in working up, do they pay
12 separately or is that included in part of the fee?

13 A. They pay £1,500 for the initial visit and then they don't pay any more until they pay the full
14 year's fees, which is when they are accepted.

15 DR. ELPHICK: Are there any instances in, say, the last year where you have made a
16 recommendation which has been rejected by Network Rail?

17 A. No, not in terms of new providers.

18 THE PRESIDENT: Have there been instances where on the first visit they didn't meet the
19 standard?

20 A. Yes.

21 THE PRESIDENT: And then you work with them and then they do?

22 A. Yes, there have been instances.

23 THE PRESIDENT: And that would be covered by the fee they pay for the visit?

24 A. Yes.

25 MS. DALY: I want to go through a simple example to make sure I get it.
26 I'm a small training provider and I have four employees. I contact you, and you come out
27 for a visit and your organisation will charge my organisation £1,500 plus VAT.
28 Let's say I'm successful, then you invite me in, I would pay 2,160 plus VAT. Then let's say
29 I had one trainer because that's the easiest math, I would get charged 150 on an annual basis
30 for the event management and then another 55 all plus VAT?

31 A. Yes.

32 MS. DALY: So that's the bulk of what I would pay.

33 A. Yes.

1 MS. DALY: Aside from that 1,500, every else is annually recurring. And if I wanted to become
2 a member, I would just -- one time, lifetime fee --

3 A. One time. It would be £250.

4 MS. DALY: And if I didn't make it because you didn't invite me in for one reason or another,
5 could I have fulfilled the criteria but not be able to afford it, would you cut me a deal?
6 Have you ever cut anybody a deal?

7 A. We have never had a training provider not be able to afford it. It is quite a lucrative part of
8 the industry.

9 MS. DALY: Thank you.

10 MR. JONES: Just to distinguish between the different visits that people get, there's the £1,500 --

11 A. Sorry, which page is it?

12 Q. I'm still on the letter, but this is just a general question. The £1,500 advisory visit, that's one
13 thing and one gets assistance there.

14 A. Yes.

15 Q. Then one pays the annual membership fee if you get that far?

16 A. Yes.

17 Q. And we have discussed what you are paying that fee for. But as part of that you are audited
18 through the year.

19 A. Yes.

20 Q. And we have looked at, certainly in the educational audit context we have soon that from
21 the very start part of the purpose of that was to help training providers to improve?

22 A. That is right.

23 Q. So in a sense, I asked the question "what are you getting", a training provider. They are also
24 getting help to improve over time?

25 A. Yes.

26 Q. And then if they fail one of those audits, they need to take another audit and they pay
27 another £1,500 also for that; is that right?

28 A. That's not necessarily true if they fail an audit. If they have got minor non-conformances
29 then they are given a timeframe to complete those. They send us the documentation in and
30 we would accept that or not as the case may be.
31 If they have major non-conformances then it warrants another visit, another audit, then they
32 would pay another fee of £1,500.

1 Q. Right. Just back on this letter, July 2016, to pick up a couple of points. There's then a third
2 paragraph which talks about needing to submit a self-assessment report and quality
3 improvement plan. We have seen reference to that looking at one of the earlier documents.
4 Then 4:

5 "If your application is successful, your company will be issued with an invoice for the
6 annual assurance fees."

7 One sees the amount which will be charged there.

8 I note at the bottom that you say:

9 "We look forward to receiving your purchase order."

10 So the way this tends to be done, at least on the books, is someone makes a purchase order
11 and you issue an invoice?

12 A. Yes.

13 MR. JONES: Sir, I see the time. I only have about five or perhaps 10 more minutes.

14 THE PRESIDENT: Yes, that's no problem. Carry on. We can sit until 4.45 pm.

15 MR. JONES: Bundle 3, please, at tab 5. It is page 349, almost at the back of that tab.

16 A. Yes.

17 Q. So these are some invoices to UKRS. This first one was I think for some of these
18 exceptional audits through the year. As you say, you decided there had been some major
19 non-compliance and there was then an exceptional audit, and that I think is what this one is
20 for; is that right?

21 A. That is right.

22 Q. I note you charge VAT on all of these services. That is right as well?

23 A. We have to charge VAT.

24 Q. And then over the page at 350, one sees -- this is for a few things. It says "quantity 1", but
25 at the top of the invoice:

26 "NSAR quality assurance participation scheme 2016."

27 So this is the fees which are being paid to be a member of the scheme for that year, the year
28 2016?

29 A. That is right.

30 Q. We can see this has to be paid in 30 days. It was issued at the end of December, so it has to
31 be paid by the end of January.

32 A. That is right.

33 Q. Again, if UKRS or other providers just refuse to pay this, you could find yourselves
34 suddenly with less income than you had expected and facing losses?

1 A. No, because we would reduce our staffing if that was necessary. However, I believe that
2 Network Rail would feel the shortfall because the scheme is important to Network Rail, and
3 the obligations under the scheme for Network Rail are significant in the industry.

4 Q. Then just going down, there is an event management system.

5 A. That is right.

6 Q. That was a small cost. That's £330 for eight individual trainers. This is 330 each. So
7 perhaps this is a more significant cost for the individual trainers and assessors.

8 Then at the bottom:

9 "Online trainer assessor examinations and CPD."

10 And that's what you mentioned earlier?

11 A. Yes.

12 Q. Then finally at 391, this is another invoice:

13 "Funding for training provider investigations, seven months until 31 December 2016."

14 Now, this, as I understand it, arose because you had spent more money than you expected
15 on the RTAS function and investigations?

16 A. No, on the investigations.

17 Q. On investigations within RTAS?

18 A. Within RTAS.

19 Q. On investigations within RTAS. Because of that you issued an invoice to the training
20 providers?

21 A. In agreement with Network Rail.

22 Q. In agreement with Network Rail. Out of interest what is the legal basis for being able to do
23 this? This isn't a service you are providing. What's the basis on which you are able to levy
24 this charge?

25 A. I can't comment on the legal basis.

26 MR. JONES: Okay. Thank you, I have no further questions, sir.

27 Questions by THE TRIBUNAL

28 DR. ELPHICK: A key part of your evidence is about why it would not be possible to provide the
29 auditing and accreditation services for profit in the private sector.

30 Just help me to unpick why you believe that's the case. Is it really because your
31 organisation is just so closely integrated that it isn't possible, or if it could be separated out
32 do you then think that the auditing and accreditation services could be done by the private
33 sector? Is the essence of it the fact of the degree of integration?

1 A. I think it is that. I also think to provide it by a commercial provider there would be real
2 conflict of interest in this environment.

3 DR. ELPHICK: Do you want to elaborate on where the conflict of interest arises?

4 A. If you were a private organisation and -- sorry, you are a for-profit organisation, the people
5 that you are dealing with on the day-to-day basis are the people that are paying your bills
6 and funding you, and therefore you may not dig as deeply into the detail as perhaps you
7 would when you are not a non-profit-making organisation and not for profit.

8 MS. DALY: I have a question about that, which is: aside from one's intent or ability or skill to
9 make a profit, the training providers are paying your organisation for all these things that we
10 went through. So there is money coming from training providers to --

11 A. But we don't have the same obligation. We have an obligation to Network Rail to make
12 sure -- and principally we are working on behalf of Network Rail, to make sure the quality
13 of what we see and the way in which we report that back is what we see.
14 It is not to turn a blind eye to something that is or isn't being done because that's not what
15 we are there to do. We really do have a safety function within the training environment as
16 well.

17 THE PRESIDENT: I don't quite follow why a commercial provider with a contract with Network
18 Rail wouldn't have the same obligation to Network Rail. Their contract would provide that
19 they must do their job properly and certainly not turn a blind eye.

20 A. The contract has evolved and they used to have a private provider and it didn't work. I am
21 sure Network Rail will say more about that. But it didn't work. I was a recipient of that
22 service, and I will call it a service because I used to run a training school, so I was directly
23 responsible and we always knew when the audit was going to take place because we had
24 been given at least a month's notice. We got all of the audit protocols prior to the audit, so
25 we knew what we needed to prepare for. It was always the same auditor, always at the
26 same time and they always looked at the same --

27 DR. ELPHICK: None of them seems to be intrinsic to them being a for profit, because all of
28 those things could change, couldn't they, and you could still be a for-profit auditor? And
29 after all, the training providers have no alternative here because they are not going to be
30 able to sell their services unless they are successfully audited?

31 A. They can't sell their Sentinel services, but clearly many of our training providers do training
32 things that are not Sentinel based. So yes, they could. But the obligation that we have to
33 Network Rail and that Network Rail has to the industry I think makes a difference in terms
34 of being a for-profit organisation.

1 THE PRESIDENT: Can I just ask you something about what you say in your witness statement,
2 which we haven't seen for a little while, but it is in bundle 5, tab 2. In various places in it
3 you talk about Achilles.

4 A. Sorry, where is it?

5 THE PRESIDENT: Bundle 5, tab 2 is your statement.

6 There are a number of passages where you talk about problems with Achilles, you might
7 remember. You say at paragraph 31 on page 6:

8 "There was an additional problem with Achilles, as I understand it. That is that a
9 degree of familiarity developed with training providers."

10 You talk about the fact that Achilles would be less inclined to give a bad inspection report.

11 A. I think that's what I was just explaining when I said I was the training provider and we knew
12 how to manipulate the audits because we had so much advance warning we knew exactly
13 what they were going to look at. It was always the same auditor, and therefore there was a
14 degree of familiarity between the auditor and the team and they became quite close. And
15 therefore, it is very difficult to criticise.

16 THE PRESIDENT: Then you say, I think in paragraph 41, page 9, that Achilles never seemed to
17 have found anomalies. And in general, reading this, you get the impression that really
18 Achilles were not very thorough or sufficiently independent in the way they carried out their
19 work.

20 A. I can only talk about my personal experience, and no, I don't believe they were.

21 THE PRESIDENT: I think you are still in charge. Although you are COO, you still have
22 responsibility for training and skills overall. You say it is absorbed in, when you became
23 COO you took on additional responsibility.

24 If one then goes to bundle 1, at tab 4, in the numbering in the bottom right, page 221, this is
25 a risks audit.

26 A. Yes.

27 THE PRESIDENT: Carried out in April 2016. So since the new regime came into force, carried
28 out, and it is being done by Achilles.

29 A. There is --

30 THE PRESIDENT: I'm a bit puzzled, given how unsatisfactory you say they are, that Achilles is
31 still carrying out audits.

32 A. Risk is nothing to do with NSAR. So principally my understanding of risk is that they are
33 there for procurement purposes. So, organisations, any organisation that wants to work
34 within the railway, have to have a risks audit and they are then able -- and they will do it

1 under different product codes. So there is a product code for training, there is a product
2 code for supplying light bulbs, for example. Everybody that wants to go on to that
3 procurement list has to have a risk audit.

4 THE PRESIDENT: I see. When you say it is nothing to do with NSAR ...?

5 A. No.

6 THE PRESIDENT: So who arranges that?

7 A. The organisation arranges that with risks.

8 THE PRESIDENT: With risks? Is risks an organisation itself?

9 A. It is part of -- I think it is a division within RSSV.

10 THE PRESIDENT: And this is a requirement. Can you help us, who requires the organisation to
11 have a risks unit?

12 A. I'm sorry, I can't help you with that. I think it is part of Network Rail's responsibility.

13 DR. ELPHICK: It is part of what Network Rail requires?

14 A. Yes, Network Rail requires it.

15 DR. ELPHICK: And Achilles is one of the providers of this type of audit?

16 A. Yes. I think they are the only provider of that particular audit.

17 DR. ELPHICK: I see. But nothing to do with NSAR, you say?

18 A. No.

19 THE PRESIDENT: On page 222, over the page, when it talks about audit outcomes sent in a
20 module, that's not something you would know what that's about?

21 A. Sorry?

22 THE PRESIDENT: We were looking at the risks audit on the first page.

23 A. Which page?

24 THE PRESIDENT: Page 221.

25 A. Which tab was that?

26 THE PRESIDENT: It is in tab 4.

27 A. Thank you.

28 THE PRESIDENT: And over the page, 222, under "Audit outcome", it says in the third line:
29 "Sentinel module."

30 A. We don't have --

31 THE PRESIDENT: You do not know what that's about?

32 A. No.

33 THE PRESIDENT: Any re-examination?

34 MR. WIGNALL: I do have some re-examination. I will try and be as brief as possible.

1 THE PRESIDENT: Yes.

2 Re-examination by Mr. WIGNALL

3 MR. WIGNALL: Ms. Millen, you were asked some questions about a document in bundle 4.

4 This is the document at tab 1. This bundle is called, I think, the "Defendant's disclosure
5 bundle, disclosure served by the defendant", and this describes itself as:

6 "Network Rail conditions of contract for the purchase of services with SAR."

7 But I see it is not signed or dated. Has anyone ever been able to find a finalised version?

8 A. No.

9 Q. Can I ask you to go to page 20, please. Page 20 of 21.

10 THE PRESIDENT: When you say "finalised", you mean a signed copy, do you?

11 MR. WIGNALL: Annex 6.

12 THE PRESIDENT: I was asking, when you say they never found a finalised version, by that you
13 mean a copy that was signed?

14 MR. WIGNALL: Yes. The position is we do not know what, in fact, was agreed.

15 A. Sorry, 20?

16 Q. If you go towards the end of this document you will find we get to pages marked X out of
17 21. They go up to 21. It is about 30, 40 pages in, I would say.

18 It is a pricing schedule. You were asked some questions about a pricing schedule. Do you
19 have that?

20 A. Yes.

21 Q. You were asked questions, then, about these various fees. There are about 15-odd bullet
22 points. So fees include: attendance at briefing sessions; support and guidance on
23 completion of self-assessment report; support and guidance on completion of quality and
24 improvement plans, and so it goes on.

25 Do any of these offer more than help and assistance with the obligations that a training
26 provider needs to satisfy to keep accredited?

27 A. No.

28 Q. You were asked about Tribal doing some audits, and I think you said you were doing rail
29 educational audits from about September 2015. Did I understand that correctly?

30 A. That is right.

31 Q. So can you help the Tribunal with how Tribal came to know anything about the railways,
32 and what did they know about the railways? How successful or useful was that?

1 A. Part of the issue with Tribal was that they actually did not know very much about the
2 railway. Obviously over the -- I wasn't there when they were appointed, but obviously over
3 a period of time they certainly learnt some things.

4 The main reason for using Tribal is that the quality of the training delivery when they first
5 started was deemed to be very poor, so they weren't aware of learner outcomes, they
6 couldn't engage with the -- let's say, the poorer learners. So there was a whole raft of things.
7 They just read off of PowerPoints, you know. There was a lot on the PowerPoints. So they
8 didn't really take account, the trainers in general, not any specific.

9 So there was a real push to increase the quality of the training delivery, and actually that's
10 been very successful. You know, a lot of people were -- trainers themselves had very little
11 qualifications for training delivery. So there was a real push and that was very successful.
12 But the process has evolved. It was sort of fix the most difficult part in the first place and
13 then move on to some of the other things that needed addressing.

14 Q. To what extent was it more successful that your own railway specialists could benefit from
15 NSAR when they were doing a role that Tribal had been doing? How much did they benefit
16 from NSAR's expertise?

17 A. Sorry, I don't understand.

18 Q. Your four railway educational --

19 A. Well, they are not doing the educational part. We now use an educational specialist and a
20 rail specialist. So the joining of the two is hugely beneficial. Hugely beneficial.

21 Q. This may sound a stupid question --

22 THE PRESIDENT: Sorry, you now use an educational -- that you contract out, don't you, the
23 educational specialists?

24 A. What we have done is we have held onto educational specialists, but that is not the principal
25 thing we do. That's almost a supplementary to the rail elements.

26 So now we are really focusing on the rail training, the content, the quality of that, and we
27 look at the educational aspects.

28 THE PRESIDENT: Don't you still contract out some of the educational --

29 A. We have one educational specialist on our team. We have another one joining in January,
30 and we outsource one in Scotland. So we use somebody in the north that we --

31 MR. WIGNALL: To what extent do your railway assessors from 2015 benefit from the internal
32 workings and knowledge of NSAR?

33 A. It is hugely important because they get up-to-date information, they are involved in what's
34 going on in the industry so that they fully appreciate and understand what NSAR is trying to

1 achieve in terms of upskilling, the requirements of the government, and they -- you know,
2 they get the whole picture. It is hugely important.

3 Q. You were asked about a cost plus contract. Explain to me what a cost plus contract is,
4 please?

5 A. Well, it would add cost, I have to say that. A cost plus would be all of the costs that we
6 incur at the moment and then we would say add 10% because we would say that would be
7 our profit element.

8 At the moment what the industry get is they get it at cost. So if it costs 1, they pay 1. If it
9 costs 1,000, they pay 1,000. On a cost plus contract they would pay 1 plus whatever margin
10 we tried to put on there, and we don't do that. Our costs are completely transparent to
11 Network Rail.

12 Q. Has anybody ever invited to you speculate about the use of a cost plus contract in any
13 circumstances --

14 A. No. And I think the training providers themselves would feel quite aggrieved at that.

15 Q. Why would they feel aggrieved?

16 A. Because it adds cost to their business.

17 Q. Now, the evidence is that Network Rail agreed what NSAR can charge for investigations
18 and auditing. That process happens once a year?

19 A. Yes.

20 Q. My recollection is that the evidence is there is a discussion between NSAR and Network
21 Rail about what you are allowed to charge?

22 A. Yes, we put forward costs for the year and we have to give full explanation for those. We
23 then suggest what the following year will be. For example, last year we asked for some
24 elements and they were refused. So Network Rail did not want the cost of the auditing in
25 particular to go up. So we didn't even manage to get a cost of living uplift on that particular
26 element.

27 Q. Can you speculate about how that would work in a cost plus contract? How would that
28 operate?

29 A. Well, it would be the cost of whatever it is we were delivering plus 10%, for example.

30 Q. Supposing the cost plus private provider went to Network Rail and said "This is what we
31 want to charge" and Network Rail said "No, we don't agree with that". Is that a likely
32 scenario in your knowledge of the industry?

33 A. I think that -- I don't really think it is, Gordon. I don't think that an organisation would
34 deliver the service that we are delivering for 10%, because principally that's what you are

1 saying. If you consider that we have to collect the money on behalf of Network Rail, you
2 know, you can end up with your debtor days going up etc.

3 A commercial organisation would not do that for 10%. Therefore, any additional cost that
4 Network Rail agreed to would be passed on to the training providers.

5 Q. Can we have a look at the memorandum of understanding, please. Now, I believe it is in
6 bundle 3 at tab 2. I use bundle 0, page 324. You were asked some questions about what
7 appears in annex 1, on the second page of the annex under 3, "Policy and governance". You
8 were asked about (c) and (d).

9 A. Yes.

10 Q. (c) is:

11 "Rail training and assurance standards. Support the development of the ...(Reading to
12 the words)... RTAS standards."

13 And (d) is:

14 "Delivery of a rail ...(Reading to the words)... develop and deliver a rail training
15 assurance scheme that drives up the quality of the training and the trainers."

16 To what extent are these different and which of these, or do both apply to RTAS?

17 A. For example, at the moment we are reviewing the RTAS scheme to see if it continues to be
18 fit for purpose. So we don't have the authority to make changes, but we are in a position
19 where we are able to offer changes and suggest changes, and we will have a discussion with
20 Network Rail around that. So that's part of what we would do, but we would do that --

21 Q. Is that (c) or (d)?

22 A. That's (c).

23 Q. Is that entirely separate from (d) or are the two linked? What does (d) entail? Is that the
24 auditing and assurance?

25 A. I think they are very similar and they could be combined.

26 MS. DALY: Sorry, I have a question because earlier I thought you said that they were separate,
27 separate functions, and I thought your answer was yes.

28 A. Okay. The delivery of a rail training assurance scheme is separate.

29 MS. DALY: So say what that is in different language.

30 A. Okay, let me think about that. (Pause)

31 We deliver the rail training assurance scheme to encourage people to improve what they
32 deliver. So we do do that.

33 DR. ELPHICK: Is that RTAS, forgive me?

1 A. That's RTAS, yes. We don't have the authority to make changes to that so they could be
2 joined together, but we don't have the authority to make any changes to --

3 MR. WIGNALL: Is this your evidence, that (d) is about the delivery of RTAS and acting as the
4 accreditation organisation, but (c) is about proposals to making changes to it?

5 A. Yes.

6 THE PRESIDENT: Which are proposals you make to Network Rail?

7 A. Yes.

8 MS. DALY: So (c) is about curriculum per se?

9 A. Yes.

10 MS. DALY: And (d) is if I saw somebody delivering, what activity would they be doing?

11 A. We would be visiting providers, we would be encouraging them through the process.

12 MR. WIGNALL: Is (c) about what the contents of RTAS is and the other Sentinel documents?

13 A. Yes.

14 Q. Can you help me with that. If you are assisting Network Rail with (c), what's in RTAS?
15 Are you able to help them because of what you have done in connection with (d), or --

16 A. Absolutely. We take all the learning from the audits, the engagement with training
17 providers and see how that improves what we are doing, so they are not in isolation of each
18 other.

19 MR. WIGNALL: Now, the lady member of the Tribunal asked you about curriculums.
20 Curriculums is a specific thing, isn't it, from Network Rail? That's what people download
21 when they are going to do a course?

22 A. Yes, it is, because we can -- for example, there are things called guided learning hours
23 which are part of the rules, and we can -- from information that we get from the training
24 providers we can influence those or at least try and influence those.

25 Q. You were invited to speculate at one point about what would happen if Network Rail
26 decided not to honour its obligations to ensure that people paid Sentinel. Have you ever had
27 any discussions to that effect at board level at NSAR about Network Rail not wanting to
28 pay? Can you help with that? Any discussions?

29 A. No, Network Rail are very committed to NSAR and the support it gives to the industry. It is
30 not just about them paying us to deliver a scheme, because they don't pay for the scheme,
31 the training providers pay for the scheme.

32 Q. You were invited to speculate -- indeed, you made suggestions about what NSAR would do
33 if Network Rail didn't make sure that the provider assessors paid their contributions, and
34 you speculated that there were other funders, staff might have to go, some muscles would

1 be flexed. Are these realistic discussions you have ever had with anybody? Why do you
2 make --

3 A. We have never needed to because training providers accept generally and want to be part of
4 the scheme because of the benefits that they get --

5 Q. The suggestion wasn't that the training provider had stopped paying, the suggestion was that
6 Network Rail would resile from the memorandum of understanding and presumably instruct
7 the Sentinel cardholders not to pay you any more money.

8 In those circumstances, have there ever been any discussions to that effect? Is that realistic?

9 A. Never. In fact, completely the opposite. They get real value out of the scheme and they get
10 real value out of the work that we do with them.

11 Q. Whose function would it be at NSAR to have discussions about what would happen if
12 Network Rail said "We are going to tell all the training providers not to pay you any more"?
13 Is that part of your function?

14 A. I think that would be Neil Robertson's function.

15 MR. JONES: Sir, if it helps I think there is a misunderstanding. I certainly didn't mean to suggest
16 Network Rail would tell training providers -- I was making a different point about what if
17 they don't pay under the contract, that is true. But this line of speculation isn't one I have
18 opened up --

19 MR. WIGNALL: Mr. Jones will have to forgive me then, because I think the question was this is
20 a document with no contractual obligations, what would happen if Network Rail resiled
21 from its obligations. The only obligation it has is to make the Sentinel cardholders pay
22 money. So, it would necessarily follow they would have to write to the Sentinel
23 cardholders and say "You don't need to pay a levy anymore", which is why I was asking this
24 question. But I take it I don't need to. I'm grateful for that.

25 THE PRESIDENT: People say it is not legally binding, bits of it expressly are legally binding.

26 MR. WIGNALL: Yes, they are.

27 THE PRESIDENT: Even have a choice of law clause.

28 MS. DALY: Sorry, the point about the memorandum is that if that chunk of money fell away,
29 hypothetically what would they have to do?

30 MR. JONES: That is right, madam, and my understanding, and I do apologise if I have got this
31 wrong, but my reading of the memorandum was that Network Rail collects the levy and
32 then pays the money to NSAR. So my question -- I agree it is not speculation, but the
33 question was about what if Network Rail doesn't pay that money onto NSAR, it wasn't
34 taking it a stage further and not collecting the levy in the first place.

1 MR. WIGNALL: Just so we are clear about that, the evidence is, as I remember it, that although
2 this is money Network Rail demands, the collection is actually done by NSAR. Mr.
3 Robertson says that in his fifth witness statement. Because Network Rail don't have the
4 capability of collecting --

5 THE PRESIDENT: NSAR collected on behalf of Network Rail. So it is Network Rail's money.

6 MR. WIGNALL: Yes, it is.

7 THE PRESIDENT: They are under a duty to account to them unless Network Rail says "You can
8 keep it".

9 MR. WIGNALL: Yes.

10 Is there a training provider who has not paid fees? Are you aware of that?

11 A. No.

12 MS. DALY: Can I ask a question about that. So is now clear that the £7 per Sentinel card is
13 collected by you on behalf of Network Rail. Is there a secondary transaction where money
14 actually is transferred to Network Rail or is it cross-accounting based on what they fund
15 you?

16 A. No.

17 THE PRESIDENT: You should not take instructions from anyone over there. Is that something
18 you know how it's done financially?

19 A. Yes, it is something I know. I'm responsible for the financial management in the business.

20 THE PRESIDENT: If you collected on behalf of Network Rail, do you report to them how much
21 has been collected?

22 A. In terms of the training? Yes.

23 MS. DALY: The Sentinel cards not the training.

24 A. We don't collect the Sentinel card.

25 THE PRESIDENT: You don't collect the £7?

26 A. No, we don't.

27 THE PRESIDENT: So it is collected by Network Rail?

28 A. It is collected by Network Rail --

29 THE PRESIDENT: Then it is forwarded to you.

30 A. We have a purchase order once a year that we are able to draw down on once a quarter for
31 that funding.

32 MS. DALY: It goes from the cardholder or whoever pays it on the rehab(?) to Network Rail and
33 then you draw down?

34 THE PRESIDENT: And you draw down quarterly, do you?

1 A. Yes, we draw down quarterly.

2 THE PRESIDENT: So it is, in fact, as correctly set out in paragraph 3.1?

3 A. Correct.

4 THE PRESIDENT: Mr. Wignall, how much longer?

5 MR. WIGNALL: Very brief, if anything.

6 THE PRESIDENT: Because I think our transcribers have now been going quite a long time
7 without a break. So if it is going to be more than five minutes we have to stop.

8 MR. WIGNALL: It is not going to be more than five minutes.
9 You were asked what providers get for payment to join NSAR. Did you understand that
10 question to relate to the one-off membership fees or to --

11 A. I think I understood it to mean the annual fees.

12 Q. The accreditation fees?

13 A. The accreditation fees.

14 Q. So you mentioned a skills backbone, CPD and joint workshops. Do these confer any
15 benefits or any services other than what you might need to be accredited?

16 A. They are generally updates in terms of the workshops and the events. They -- I also --

17 Q. Are all these needed for RTAS?

18 A. Yes.

19 THE PRESIDENT: Under RTAS is there an express obligation to attend workshops?

20 A. No, there isn't an express obligation, but there is an obligation to keep people up-to-date and
21 they are CPD relevant.

22 THE PRESIDENT: This is a convenient way for them, and if you get a good speaker they will do
23 it better, and if your speaker is not so good it won't help them as much.

24 A. We try to always make it relevant and --

25 THE PRESIDENT: Yes, you put on as good workshops as you can.

26 MR. WIGNALL: You were asked questions by the Tribunal about why a private company on a
27 market couldn't do what NSAR does for profit. One of the things you said is there might be
28 a conflict of interest for a private organisation because, for instance, they might not go
29 sufficiently into detail when they are doing the auditing.
30 What is it in your experience that leads you to think that that might be the case, that there
31 might be this sort of conflict of interest because of a profit motive.

32 A. If you are paying an organisation for something, you want to continue having a reasonable
33 relationship with that organisation. You wouldn't want to highlight difficulties, or if you

1 did you might have a quiet word in their ear. But you would not necessarily do it in a
2 formal way to get those issues out onto the table and get them resolved.

3 I think it is far more difficult if you are relying on the profit from something to be impartial.

4 DR. ELPHICK: I think that would apply in a competitive market because if you're not happy
5 with your financial auditing you can go to a different one. But in this case it is sort of rather
6 naturally monopolistic because you have no more choice but to get your accreditation from
7 NSAR, even if they are in the private sector.

8 So I'm not sure that argument is as strong as it would be if we were talking about a financial
9 audit.

10 THE PRESIDENT: Perhaps that's something for submissions.

11 I think I have understood your evidence.

12 MR. WIGNALL: Do you personally know of any entity or organisation in your experience that
13 could possibly fulfil the role of NSAR?

14 A. No, I don't. Particularly with the wider skills roles that we play and the way in which that
15 gets fed into this scheme.

16 Q. RISQS, is that related to health safety or specific areas? Does it have anything to do with --

17 A. I believe it is principally procurement.

18 MR. WIGNALL: I hope that was just within the five minutes. I'm grateful, thank you.

19 THE PRESIDENT: Thank you.

20 MR. JONES: Sir, could I raise one short point which I should have raised earlier, which is Mr.

21 Wignall and myself have agreed that my two witnesses do not need to be called --

22 THE PRESIDENT: We knew that.

23 MR. JONES: -- because he doesn't intend to cross-examine. I rather was, therefore, proceeding
24 on the basis that the Tribunal also had no questions for them, but I should, sir, have checked
25 that.

26 THE PRESIDENT: We are content. We would have let you know.

27 10.30 am tomorrow. You will be ascertaining the position regarding our request for
28 documents. Could they be supplied, if any are found, to the Tribunal by 10 o'clock, please,
29 and of course to Mr. Jones as soon as possible?

30 MR. WIGNALL: Of course, yes.

31 THE PRESIDENT: Very well, 10.30 am tomorrow. And you are released, Ms. Millen. Thank
32 you very much.

33 (5.15 pm)

34 (The court was adjourned until 10.30 am on Friday, 7th October 2016)