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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1418/5/7/21

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10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

Wednesday 4 May 2022

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15 Before:
16 The Honourable Lord Ericht
17 Peter Anderson
18 Andrew Young QC
19 (Sitting as a Tribunal in Scotland)
20

21
22 **BETWEEN:**

23
24 Blue Planet Holdings Ltd
25 **Pursuer**

26
27 v

28
29 Orkney Islands Council
30 Orkney Ferries Limited
31 Sinclair Haulage Limited
32 **Defenders**
33
34

35 **A P P E A R A N C E S**

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37 Kenneth Murray (On behalf of Blue Planet)
38 Daniel Byrne and (On behalf of Orkney Islands Council and Others)
39 Charlotte O’Kane (on behalf of JBT Distribution and Menzies Distribution)
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45 Digital Transcription by Epiq Europe Ltd
46 Lower Ground 20 Furnival Street London EC4A 1JS
47 Tel No: 020 7404 1400 Fax No: 020 7404 1424
48 Email: ukclient@epiqglobal.co.uk
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(2.00 pm)

Disclosure hearing

THE CHAIRMAN: Good afternoon, everyone. I am Lord Ericht, and I am the chair of the Tribunal.

There is an introductory matter which I just have to raise, which is that these proceedings are taking place on the Microsoft Teams network, and so I must start with the customary warning:

These are proceedings in open court as much as if they were being heard before the Tribunal physically in its Salisbury Square premises in London or in a physical venue in Scotland.

An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

Now, the other members of the panel are Mr Young and Mr Anderson. Can I just ask the parties appearing, either personally or by legal representatives, just to introduce themselves.

I can see Mr Murray.

MR MURRAY: Yes.

THE CHAIRMAN: And I can see Mr Byrne, who appears for the first and second defenders.

Is Mr Neil here?

MR NEIL: Yes, I am here, my Lord.

THE CHAIRMAN: Thank you.

1 And do we have representation for JBT Distribution and Menzies?

2 **MS O'KANE:** Yes, my Lord, Charlotte O'Kane, appearing for JBT and Menzies.

3 **THE CHAIRMAN:** Thank you very much.

4 I propose first of all just to indicate an agenda of the order we'll deal with things in
5 today. We are going to start with Mr Murray's letter of 8 April, which is
6 a motion asking for certain things from JBT Distribution and other things from
7 the first and second defenders. The reason we are doing that is that it may
8 be, Ms O'Kane, that you will then be able to leave us, if you wish, and you
9 won't have to detain yourself while we deal with the other matters.

10 Then after that we'll deal with Mr Byrne's motion to vary the previous order. Then
11 after that we can just have a general discussion about the strike-out hearing
12 which is coming up. Obviously we won't be having a substantive discussion
13 but we will just be checking that everything is in order and if there is anything
14 we have to know about in advance of that.

15 If we start, then, with Mr Murray's motion of 8 April. I am going to take it in two
16 stages. I am going to take first of all the documents he is asking for from
17 JBT Distribution and Menzies Distribution. I will hear you, Mr Murray and
18 Ms O'Kane, on that. Then it may be that the panel breaks and considers that,
19 and then we'll come back before we move on to the next matter.

20 Mr Murray.

21 **MR MURRAY:** My Lord, I have agreed with Ms O'Kane not to pursue this for the
22 moment, and possibly not at all, until at least after the hearing to consider the
23 strike-out.

24 **THE CHAIRMAN:** Thank you.

25 Yes, Ms O'Kane.

26 **MS O'KANE:** Yes, my Lord. After some initial searches that were carried out by my

1 client, the information that Mr Murray was looking for I don't think is in the
2 format that he envisaged it was in. I think it will be a much more complicated
3 operation to get any of these documents, even if they are available. So after
4 some discussion with Mr Murray, he agreed to drop this element of his motion
5 that related to seeking documents from JBT and Menzies and potentially
6 revisit it at a later date.

7 I have agreed that we'll -- my clients are still looking to see what the documentation
8 is, so if it does come back to us we will have a clearer picture of what's
9 available and what isn't available. But for the current time I think that element
10 of the motion has been dropped, and therefore my opposition to that element
11 of the motion has been dropped as well.

12 **THE CHAIRMAN:** Thank you very much.

13 Mr Murray, you were kind enough to give us advance warning of this. Just one thing
14 I want to clarify: in your email giving us advance warning, you indicated that
15 you had agreed to the dropping of this part on the basis that JBT and Menzies
16 would use their best endeavours to recover and produce the email of Andrew
17 Blake.

18 Now, I just wanted to be clear on that, and I will ask Ms O'Kane: is that an
19 undertaking which you are giving to the Tribunal, or is it an undertaking that
20 you are giving to Mr Murray, or is it something I need not be concerned about
21 at all and all I need to do is allow the motion to be dropped?

22 **MS O'KANE:** Certainly, my Lord, from my prospective this is a request that
23 Mr Murray sent to us. My clients have done some initial searches to see if
24 they have that document. At the moment it looks as if there might be an issue
25 with getting hold of emails that are that old from the server. They might not
26 actually be available. But they have said they will look it out, and then we can

1 confirm to him whether we are able to provide it or not.

2 I don't know what's in the email, so I don't know if there is anything that would cause
3 an issue with us to voluntarily disclose it to him or not. But once we've found
4 this email I have undertaken that I'll engage with him. Obviously if there is
5 a need to come back to the court to seek recovery of it under a formal
6 process, we can do that.

7 **THE CHAIRMAN:** Thank you.

8 Mr Murray, are you quite content to proceed on that basis?

9 **MR MURRAY:** Yes, I am, my Lord.

10 **THE CHAIRMAN:** Thank you very much.

11 In that case I don't think we need to adjourn to consider it. We shall allow the motion
12 in the letter of 8 April to be amended by deleting the request for production of
13 documents from JBT and Menzies.

14 **MR MURRAY:** Thank you.

15 **MS O'KANE:** Thank you, my Lord.

16 **THE CHAIRMAN:** Ms O'Kane, you are welcome to stay, but you may withdraw if
17 you would like to.

18 **MS O'KANE:** I'm obliged, my Lord.

19 **THE CHAIRMAN:** Thank you.

20 Now then, moving on to the second matter in the letter of 8 April, which is the
21 request from Mr Murray for the court to order the first and second defenders
22 to produce three things: one is contracts, et cetera, between the second
23 defender and various parties; the second is copies of additional specification
24 sets et cetera; and the first is a copy of a reply to Mr Neil's email.

25 Mr Murray, would you like to address us on these?

26 **MR MURRAY:** Yes, my Lord.

1 I received some documents from the other side last night, which unfortunately I have
2 not had time to go through, which contain a number of agreements. I would
3 be inclined to concede on point one and accept that they have provided what
4 has been required.

5 As I said, I have not, unfortunately, because of work commitments, had time to go
6 through them, but I am happy to concede on that point.

7 **THE CHAIRMAN:** Yes.

8 **MR MURRAY:** Shall I carry on, my Lord --

9 **THE CHAIRMAN:** Yes, please do.

10 **MR MURRAY:** -- and make my position on points two and three.

11 As regards points two and three, I would like those documents. I think they are very
12 important. I mean, I am sure the court can see why they are important. So
13 I would like to insist on those if I may.

14 **THE CHAIRMAN:** Thank you.

15 Mr Byrne.

16 **MR BYRNE:** I am obliged, my Lord.

17 I am treating the pursuer's comments regarding paragraph 1 as an intimation that he
18 is no longer insisting on that part of the motion.

19 Taking the remaining parts of the motion, if I can go to part 3, the reason that's
20 opposed is because in the defender's submissions the order could not
21 practicably be complied with. That's foreshadowed in the first and second
22 defenders' communication to the Tribunal, which indicates that the response
23 to that email has been searched for, and it's not been found. Furthermore, the
24 archived emails and sent items have been searched for, and the email has
25 not been found.

26 So the first and second defenders have conducted extensive and reasonable

1 searches and have been unable to produce the email which is sought to be
2 obtained at paragraph 3.

3 Now, in respect of paragraph 2, the first and second defender oppose this,
4 essentially on two grounds. The first is that it is excessively broad,
5 excessively vague and is unrestricted in time. Secondly, if one is to give it
6 a more specific and focused reading, then what the pursuer is really looking
7 for is the contractual documents which disclose the terms on which
8 JBT Distribution and Streamline were appointed, and those contractual
9 documents have already been searched for, found and disclosed.

10 Now, that opposition is made in the context of a strike-out and summary judgment
11 application soon to be heard by the Tribunal on 26 and 27 of this month, just
12 a little bit more than three weeks away.

13 In answering the question, as the Tribunal must, whether it is just and necessary to
14 order disclosure in terms of paragraph 2, in the light of the context of the
15 strike-out and summary judgment motion, it's not necessary and it would not
16 be just to make an order in those terms.

17 The reason that that submission is made is because an obvious purpose of
18 a summary judgment application and a strike-out motion is to provide
19 a speedy and efficient remedy to a defender to avoid what may yet be seen to
20 be unnecessary, costly and time-consuming investigations which one would
21 ordinarily associate with a full, substantive hearing.

22 So for those reasons, part 1 has been dropped, because the defender has complied
23 with that by producing the contract. Part 2 is opposed, for the reasons given.
24 And part 3 is opposed because the defenders couldn't practicably temper
25 such an order, having already conducted extensive and reasonable searches.

26 **THE CHAIRMAN:** Yes. Can I just ask you some more about point two.

1 One of the objections you have is in relation to that it does not specify a time. Now,
2 that objection could be cured, no doubt, if an acceptable time frame was
3 proposed by Mr Murray.

4 Do you have anything that you might add on what you think an acceptable
5 time frame would be?

6 **MR MURRAY:** Sorry, I beg your pardon.

7 **THE CHAIRMAN:** Sorry, no, Mr Murray --

8 **MR MURRAY:** I wasn't sure, my Lord, if you were addressing Mr Byrne or myself.

9 **THE CHAIRMAN:** No, well, I will just raise this with Mr Byrne and then after that
10 I am going to invite you.

11 Yes, Mr Byrne, do you have anything to say on what would cure that problem?

12 **MR BYRNE:** My Lord, I am racking my brains to come up with a period which would
13 be of assistance to the Tribunal. The difficulty I have in doing so is that that
14 objection is linked to the lack of specification in the application, because it
15 may be that some of this material is sought because it spans a lengthy period
16 of time from the point at which the contracts were entered into --

17 **THE CHAIRMAN:** Yes.

18 **MR BYRNE:** -- going forward. So I am afraid it's a cumulative point that goes hand
19 in hand with the lack of specification, my Lord. But obviously if there was
20 a way of limiting and focusing the application it would be more straightforward
21 to comply with. But the objection is concerning the context that we have
22 a strike-out and summary judgment application coming round the corner, and
23 in my submission one alternative would be to refuse the motion in hoc statu
24 and to revisit them if so advised after the strike-out summary judgment
25 hearing.

26 **THE CHAIRMAN:** Yes. Well, thank you. I have your point on the impending

1 summary judgment. I am just really trying to explore the other points at the
2 moment.

3 **MR BYRNE:** Of course.

4 **THE CHAIRMAN:** You also say it's vague. What is vague about providing copies of
5 written instructions?

6 **MR BYRNE:** Well, what is meant by an instruction? Is this an instruction in respect
7 of the terms in which the contract is entered into? Or are these instructions
8 perhaps in respect of operational matters? It strikes the defenders, who have
9 been consulted in respect of this application, to be excessively broad and
10 wide. They are a public authority. Producing the documents to date has
11 been, I have been told, an extremely laborious and time-consuming exercise.
12 Now, of course in no way does the defender suggest that that was improper, but
13 simply for the Tribunal to be aware of the size of the exercise which is
14 presented to the defenders going forward.

15 **THE CHAIRMAN:** Indeed. So it sounds as if it may be possible to give more
16 specification of what is meant by written instructions, to answer your point.
17 Then specification sets. Well, I have a certain amount of sympathy with you on that
18 because I am not sure I understand what a specification set is.

19 **MR BYRNE:** My Lord, it's a term of art of which unfortunately I am embarrassingly
20 ignorant, but it does not jump out, to my mind, as to what it might be.

21 **THE CHAIRMAN:** Good. Thank you.

22 What I will do now is to ask Mr Murray to respond. And then after his response I will
23 invite other members of the panel to ask either of you any questions.

24 Mr Murray.

25 **MR MURRAY:** Thank you, my Lord.

26 If I could throw some light on the term "specification sets", it doesn't derive from me,

1 it derives from the contract between JBT and the second defender. So
2 I simply lifted the term directly from their contract, the one which Mr Byrne
3 referred to earlier.

4 So it's part of that contract. They are entitled to give written instructions to JBT or
5 Streamline, whoever. They refer to them in the contract as specification sets.
6 So I have simply replicated those words.

7 I would just like to see those instructions if they do exist.

8 **THE CHAIRMAN:** If I have understood you correctly, what you are looking for is
9 specification sets or written instructions in either case relative to the contract?

10 **MR MURRAY:** Yes, that's correct, my Lord.

11 **THE CHAIRMAN:** You are not looking for anything wider than that.

12 **MR MURRAY:** Nothing wider than that. Simply relating to the management of the
13 centre the freight centre.

14 **THE CHAIRMAN:** Yes. Thank you. What about timing?

15 **MR MURRAY:** Well, if it would be helpful, could I suggest a period 2010 to 2020?
16 I can't imagine that there would be that many written instructions given out per
17 year.

18 **THE CHAIRMAN:** Thank you.

19 And what about the general point that this is coming too close to the strike-out and
20 should be dealt with after the strike-out? Do you have anything to say
21 about that?

22 **MR MURRAY:** I am happy to be guided by the Tribunal on the matter. I mean,
23 I don't have very much experience of these matters, how they are normally
24 dealt with. I don't suppose it makes a great deal of difference to me whether
25 it's dealt with before or after the matter. So I would be happy to vest that
26 decision with the Tribunal.

1 **THE CHAIRMAN:** And then point three, which is the reply to Mr Neil's email. Do
2 you have anything to respond in relation to that?

3 **MR MURRAY:** Yes, my Lord. I'm afraid my view on these things is coloured by past
4 experience. I have requested a lot of documents in a very straightforward
5 way and I have not got them, and I have then subsequently found out that
6 either the documents existed or I was given what could be, at best,
7 disinformation.

8 So this is clearly a very important email. Now it's gone missing, apparently, or
9 whatever. We'll wait and see. It would just be reassuring from my point of
10 view to have the burden placed on the other side to either say, "Well, we can't
11 find it", which is fine, in response to an order. And again, I am assuming that
12 the formality of an order is a great deal more than the informality of being
13 outside an order. I may be mistaken in that respect. But as I said, in the past
14 I have had so many experiences, now, of requesting information and being
15 given disinformation or completely false answers and then subsequently
16 finding out that the document existed.

17 **THE CHAIRMAN:** Yes.

18 **MR MURRAY:** So that, my Lord, and the panel, is why I specifically asked for that
19 email.

20 **THE CHAIRMAN:** Thank you.

21 Yes. Now, I am not asking you to respond, Mr Neil, purely because these are just
22 issues between Mr Murray and Mr Byrne, because Mr Murray is asking
23 Mr Byrne's clients for these things and not you.

24 Now, I am just going to invite the other members of the panel to address any
25 questions to either Mr Murray or Mr Byrne.

26 **MR YOUNG:** I wonder if I could just start.

1 Mr Murray, the question I really have for you is in relation to (ii). You explained to us
2 that it's really the written instructions relating to the management of the freight
3 centre you are after. I just wonder, could you give us a little bit more focus on
4 the type of instructions that you want Mr Byrne's clients to look out for,
5 because no doubt the management of the freight centre would include lots of
6 instructions that are really of no interest to you.

7 I just wonder whether you can help us focus that a little bit more. Are you only
8 interested, for example, in the goods that end up going to Sanday? Or are
9 you wanting going to other islands, for example?

10 **MR MURRAY:** Yes, well, I think that is a very good point.

11 I think the other islands as well. I mean the Outer Isles, Westray, Stronsay. One
12 obvious thing would be instructions about who these goods should be
13 consigned to, what particular hauliers they should be given to, et cetera.

14 I am not interested in, for example, if there were instructions about how -- I don't
15 suppose there are -- canteen facilities or whatever are managed or that. It's
16 simply ones that relate to the transportation of goods through that centre, how
17 they are to be handled.

18 **MR YOUNG:** Okay. And just again so I am clear, if that was restricted to
19 instructions showing how goods are to be made available to particular
20 hauliers, are you then saying for all of the islands or just Sanday?

21 **MR MURRAY:** For the three I mentioned, Mr Young. Essentially Sanday, Stronsay
22 and Westray.

23 **MR YOUNG:** Okay. Thank you. That is the only question I have for you. Thank
24 you very much.

25 **MR MURRAY:** Thank you very much.

26 **MR ANDERSON:** Thank you, my Lord.

1 Mr Murray, a question for you, firstly, which may become then a question also for
2 Mr Byrne.

3 As I noted what you said to us initially in advancing your position so far as part (ii) is
4 concerned, I think I noted you as saying that the documents were
5 self-evidently required in anticipation of the strike-out hearing. But then a few
6 moments ago it appeared to be suggested that perhaps they weren't required
7 for that.

8 I would like to be clear: do you consider that you do require these documents as
9 called for in advance of the strike-out hearing? And could you give me an
10 indication of why?

11 **MR MURRAY:** Is that a question to me, Mr Anderson?

12 **THE CHAIRMAN:** Yes, it is, Mr Murray. I'm sorry.

13 **MR MURRAY:** I beg your pardon.

14 No, well, I hope I didn't say that. I don't believe I did. I said I think I am quite
15 indifferent as to whether these documents are provided before or after the
16 strike-out hearing, and that I was happy, because I simply have no experience
17 of these things, to allow the Tribunal to decide whether they would be
18 produced or afterwards. I don't think it makes much difference to me.

19 **MR ANDERSON:** If I can again just try to be quite clear what you are saying about
20 this. To say you are indifferent would suggest to me you are not expecting to
21 be relying on these documents in responding to the strike-out hearing
22 application that is being made for the defenders. Is that the position?

23 **MR MURRAY:** I am sorry, I have picked up the legal gist of that now. I think it
24 escaped me immediately. I believe that the case that has already been set
25 out by yourselves is, I hope, substantive enough to go through and survive the
26 strike-out hearing.

1 This additional information, well, I suppose it would be helpful -- I beg your pardon. It
2 would be helpful to have it ahead of that meeting just in case, because
3 I guess it's a very important hearing.

4 **MR ANDERSON:** Yes, the hearing is important, and what I am trying to understand
5 from you is whether you need this material to prepare for and to advance
6 argument at that strike-out hearing in order to defend your position or not.
7 What I am getting from you at the minute is that you are not necessarily
8 requiring it. Obviously you don't know what exists, but you are not necessarily
9 requiring it and think you already have a sufficient answer.

10 **MR MURRAY:** I think I do have a sufficiently good answer. But of course this
11 information could turn out to be very important and it could well have
12 a bearing on how the Tribunal sees things. So I guess, if I put my own
13 interests first, then to have it would be better than not to have it.

14 **MR ANDERSON:** All right. I am not sure where that quite takes us, but never mind.
15 Mr Byrne, can I ask you pretty well the same question, which you didn't advance as
16 a reason for refusing the material, but do you see it as necessary for the
17 strike-out hearing?

18 **MR BYRNE:** No, my Lord.

19 **MR ANDERSON:** You consider it has potential relevance to the strike-out hearing?

20 **MR BYRNE:** No, sir, for two reasons. Firstly, two principles which I will advance in
21 respect of the nature and character of strike-out and summary judgment.

22 The first principle is that when this Tribunal is hearing and determining the strike-out
23 and summary judgment application it will be mindful that at that point not all
24 the evidence will be available to it summarily as opposed to after a lengthy
25 trial. So this issue essentially will be -- any deficit in the evidence will be
26 corrected by taking that into account at a summary hearing.

1 Secondly, what the pursuer seeks is or ought to be evidence to establish a position
2 averred in his pleadings -- although I accept that his affidavits are effectively
3 taken in his pleadings. So it will be a question of relevancy, which ought not
4 to be affected by the availability of evidence. And insofar as there is a lack of
5 availability of evidence, the court will take that into account at a summary
6 hearing or a strike-out hearing.

7 Now, having made those two points, if I can make a third point in respect of the
8 character and nature of strike-out and summary judgment hearings. Whilst
9 they are not predominantly to determine the evidence, as I understand this
10 Tribunal's rule it conducts an assessment of the case, which also assesses
11 the substance of the factual assertions. So it's not a pure relevancy debate.
12 But, equally, the court recognises we are not involve in a full-blown trial or
13 proof.

14 So in my submission it's not necessary that the pursuer has all the evidence at that
15 summary hearing and that this, in my submission, militates towards refusing
16 the application in hoc statu, to be revisited after the court has heard the
17 summary applications.

18 **MR ANDERSON:** Thank you.

19 Thank you very much. That's all I have.

20 **THE CHAIRMAN:** Thank you.

21 Just one practical question I just would like to get your views on. The strike-out
22 hearing is imminent. It's only a couple of weeks away. If we were to order
23 something in the wording of (ii), or a slightly tighter worded version of that,
24 what I would be interested in is thinking about whether we would have to
25 postpone the strike-out hearing until after that was received or whether it
26 could all be done and received and you would have a chance to think about it,

1 Mr Murray, prior to the strike-out.

2 **MR MURRAY:** Is that a question to me, my Lord?

3 Well, yes, it's always helpful to have some time. We are all very busy men, and I am
4 busy too. As well as doing this I have my job. And it's not that far between
5 now and the strike-out hearing. So if I received this in ten days' time or
6 something it would be useful to have a short period to consider it in.

7 **THE CHAIRMAN:** Yes.

8 Mr Byrne, if we were to order this, what would be the timescale for production of it?

9 **MR BYRNE:** My Lord, if essentially (ii) were ordered, the defender would seek as
10 substantial indulgence in time as the parties were prepared to (short audio
11 distortion), but it would be after, in reality -- practically, it would be after 26 and
12 27 May, in my submission.

13 **THE CHAIRMAN:** The defender has had this letter since about 8 April so it's had
14 almost a month to start to prepare on the basis that it may be ordered to
15 produce these. I would have hoped it would have a very clear idea of what it
16 would require to produce and how long it would take and had laid the
17 groundwork.

18 **MR BYRNE:** My Lord, I entirely hear the court's comments in that respect, but the
19 defenders' response inevitably is that we refer to our submissions on
20 specification in terms of what really is sought and over what timescale.

21 So that would be the defenders' response to that criticism.

22 **THE CHAIRMAN:** Good. Thank you.

23 Unless the panel have any more questions, we propose now to adjourn. We'll go
24 into a different online room and you will be notified when we are ready to
25 come back on this matter.

26 **MR MURRAY:** Thank you very much.

1 (2.34 pm)

2 (A short break)

3 (2.40 pm)

4 **THE CHAIRMAN:** We have considered this, and what we are going to do is as
5 follows:

6 We will allow Mr Murray to drop point one. In relation to point two, we are going to
7 briefly defer a decision on that until we have heard on the variation of the
8 previous order motion, which we are about to hear, so that we can look at the
9 timing issues in the round.

10 In relation to three, we are going to order production of Mr Blake's reply within seven
11 days from today. And so within seven days from today the first and second
12 defenders will either have to produce that email or a disclosure statement,
13 signed by a suitably ranking qualified officer of the first and second defenders,
14 specifying in detail what steps have been taken to find the email and why it
15 has not been found. And then we will have a signed record of that situation if
16 that is required in the future.

17 We'll now move on to the motion to vary, which is the motion to vary the original
18 order of 23 March.

19 That is your motion, Mr Byrne. But just before I invite you to explain the reasons for
20 that motion, can I just say that the Tribunal is extremely concerned that this
21 motion for a variation has been brought before it. It's a motion to vary an
22 order that was made by the Tribunal, and the first and second defenders have
23 not obeyed that order. The motion to vary was only lodged a very short time
24 before the deadline expired, and so for all practical purposes it was not
25 possible for this to be dealt with prior to the first and second defenders being
26 in a position where they were disobeying an order of the Tribunal.

1 So that's one issue. If there are practical difficulties with a Tribunal order, then that
2 should be brought back before the Tribunal at the earliest possible opportunity
3 and should be dealt with before a party is in breach, not after a party is
4 in breach.

5 The second difficulty the Tribunal has, Mr Byrne, is that the original order was
6 granted after extensive discussion at a previous hearing, and there was
7 detailed consideration given by the Tribunal to the reasons why the first and
8 second defenders did not want the order to be granted. And the Tribunal took
9 the view that it should be granted. And the Tribunal is extremely concerned
10 that, having lost an argument, the party has now come back, having refused
11 to obtemper a Tribunal order which has been issued to implement that lost
12 argument.

13 So Mr Byrne, with that introduction, I will pass over to you.

14 **MR BYRNE:** My Lord, well, obviously we hear all of those criticisms. And firstly we
15 obviously come to the court and apologise that we are making this application
16 and that we are making it now. And we take on board all those points and
17 see force in each of them. So really all I can do is explain the factual
18 circumstances that lead to the first and second defender coming to the court
19 with this application for a variation.

20 Now, the relevant power which the first and second defender makes this application
21 under is under the broad power that this Tribunal enjoys under rule 60.2(b).

22 Now, I am not proposing that the Tribunal turn it up, because I can read it. It's very
23 short.

24 "At a subsequent case management conference the Tribunal shall decide, having
25 regard to the governing principles and the need to limit disclosure to that
26 which is necessary to deal with the case justly, what orders to make in relation

1 to disclosure."

2 **THE CHAIRMAN:** Now, if this was a Court of Session or a Sheriff Court application,
3 once the court had granted the order it would be final, unless -- and you could
4 only come back if there had been a change of circumstance.

5 **MR BYRNE:** Yes, my Lord.

6 **THE CHAIRMAN:** Are you saying there has been -- would that also apply in relation
7 to the Tribunal?

8 **MR BYRNE:** In generality -- because I am going to say something that hopefully is
9 going to be more sophisticated than we've not complied with the order -- but in
10 generality the interpretation I propose in respect of 2(a) is that the Tribunal
11 enjoys very wide powers, as one might expect of a Tribunal. Tribunal
12 structures are generally intended to be more flexible than the ordinary court
13 procedures.

14 **THE CHAIRMAN:** Yes.

15 **MR BYRNE:** In order to achieve the overriding objectives, which are generally
16 objectives of justice, and that's a matter for the good judgment of this Tribunal,
17 in my submission 2(b) is consistent with the flexibility and broad powers and
18 discretionary powers to do what is just and support the governing principles.
19 So the Tribunal could make a new order.

20 If the Tribunal were satisfied -- and this is jumping ahead a bit -- if I am not able to
21 satisfy the court that we have not failed to temper(?) the order, then there is
22 provision under rule 57 to address the consequences of failure to comply with
23 the direction, and there is a suite of powers that this Tribunal enjoys in respect
24 of how to deal with those sorts of failures to comply. Those include, under
25 57.1(a), the requirement of the direction to be waived. Then (b), the failure to
26 be remedied. And (c), such party be debarred from taking any further part in

1 the proceedings without permission of the Tribunal. And (d), such party or its
2 representative be subject to an order for any costs the Tribunal sees fit.

3 So I simply flag up all those powers. Mr Murray is a party litigant so he's unlikely to
4 bring these rules to the Tribunal's attention.

5 Now, going to the substance of the application, my Lord is of course right in
6 identifying that there were extensive submissions in support and against the
7 application to make an order, which took the form of 5(b), and that order is for
8 a list of all hauliers that received discounted fares on the Kirkwall to Sanday to
9 Kirkwall routes in the last 10 years and, in the case of each haulier, the
10 amount of those discounts broken down on a year-by-year basis.

11 So that is the terms of the order from the Tribunal.

12 Now, it was, as I understand it, the express position of the Tribunal -- and in my
13 submission the correct position of the Tribunal -- that the power the Tribunal
14 enjoys to order disclosure is a power -- and I read this by my reading of
15 rule 60 -- is a power to order the disclosure of documents, not a power to
16 order analysis and production of information.

17 **THE CHAIRMAN:** If I stop you there.

18 **MR BYRNE:** Yes.

19 **THE CHAIRMAN:** If we were to amend the order not to say a list saying the amount
20 but just to order that you produce all the original documents within seven
21 days, what would your response to that be?

22 **MR BYRNE:** Well, my Lord, if I can just explain a little bit. My response would be
23 that that would be within the Tribunal's powers, and obviously what I was
24 about to say is, in support of or in defence of the council's -- if it may be said
25 they've not complied with that order, and the response to that is, if that order
26 is consistent with the powers of the Tribunal as have I describe them, to

1 produce documentation as opposed to information, the council has conducted
2 a search, and no list to that effect or close to that effect has been found or
3 exists.

4 Now, that is not necessarily a satisfactory answer, because clearly what the pursuer
5 wants really is documentation which would give him the information.

6 **THE CHAIRMAN:** I mean, are we dancing on pins here as to whether this is the
7 court ordering disclosure of documents or whether this is a court, as part of its
8 case management powers, ordering you to produce a list?

9 You are saying it was incompetent for us to grant the order we did. But if instead we
10 had said, "We order you to produce a note specifying these matters", would
11 that have been incompetent?

12 **MR BYRNE:** I am not submitting by any means that the order is incompetent. My
13 submission is that the order is to produce a list, and on the basis that that
14 document exists, and my submission is that that document doesn't exist.

15 Now, it may be that what's required to be produced is the underlying documentation.
16 Now, I consulted with agents last night to try to work out what it would be that
17 the Tribunal would need to order to get the underlying information. And
18 having sent my agents away to conduct repeated searches and
19 communications with clients, and they have very diligently and repeatedly
20 been contacting the clients to find this information, they've tracked down the
21 ferry manager, who I think has -- my impression is that he is not always in the
22 office and has quite an operational role. And their position is that the
23 underlying documentation is invoices and direct debit physical documents.

24 **THE CHAIRMAN:** Yes.

25 **MR BYRNE:** So what we actually -- and this is why, if I am wrong about the strict
26 reading of the order, it's for a list, a document which is a list. And we don't

1 have that list. If the Tribunal are to say, "No, no, no, you are wrong, Mr Byrne;
2 what you were ordered to produce was something else, was an analysis of
3 information", then my response to that is, the volume of data that would
4 require to be analysed, sorted and recovered is in the region of 170,000 trips,
5 because as I understand it they are not broken down to the particular island
6 journeys that the pursuer is looking for. So it would be an exercise that would
7 take an individual, working there or thereabouts full time, around a couple of
8 months to work through. And --

9 **THE CHAIRMAN:** My reaction to that is, leaving aside the timing problem, if it's
10 going to be a couple of months, so what? This information is relevant to
11 a case before a Tribunal. Why doesn't a party to the Tribunal just get stuck in
12 and produce it?

13 **MR BYRNE:** Well, indeed, my Lord. The answer to this, the logical answer -- and
14 I will ask whether this something the Tribunal or indeed Mr Murray want to
15 actually obtain at the end of the day -- the logical answer is that the defenders
16 produce the documentation, which will be the physical direct debits and
17 receipts.

18 Now, having set enquiries running since last night, certainly the agents and myself,
19 reading between the lines of the various responses we've had from the
20 council, had formed the clear impression that it was the hard manual -- it was
21 a manual search that was required of manual receipts and documentation.
22 And it has been confirmed just before the Tribunal convened this afternoon
23 that we would "need to go through every invoice and direct debit ordered to
24 ascertain the specific numbers".

25 Now, what that would mean is, we would disclose to the pursuer every invoice and
26 direct debit, and then obviously he would conduct the analysis himself. In my

1 submission, that is -- strictly speaking in terms of the Tribunal's powers to
2 order documentation and strictly speaking in terms of Mr Murray conducting
3 the analysis on the back of the documentation -- that would be the best way of
4 resolving the issue.

5 **THE CHAIRMAN:** Can I just say that I am astonished and disappointed that your
6 clients were only looking at this last night. It's a considerable period of time
7 since they were originally supposed to comply with it and a considerable
8 period of time since 1 April when you sought a variation of the order.

9 **MR BYRNE:** No, my Lord, that's my fault, I have not fairly represented their position.

10 They weren't just looking at this last night. They've been looking at this for
11 some period of time. And this was obviously brought to the Tribunal's
12 attention on 1 April. Solicitors instructing me have been involved in trying to
13 work out what this sort of analysis would look like. Then I was obviously
14 instructed in respect of this hearing, I think during the middle or end of last
15 week, whilst I was in a proof.

16 I consulted with solicitors last night, and my proposal was that it's not good enough
17 to come to the Tribunal and say, "We cannot produce a list". My proposal
18 was that we would need to obviously find out what the underlying data looked
19 like so that that could be disclosed to Mr Murray. And it's that latter
20 clarification which has been worked out between consulting with agents last
21 night and this morning and early this afternoon.

22 So they have been looking at this. They have tried to locate the information. They
23 have conducted an estimate of how much time would it take and so forth
24 since the order was made. And I wouldn't want the court to be under the
25 impression that there's been any last minute attempt to get out of this order.
26 They've responsibly looked at what it would involve and brought it to the

1 Tribunal's attention. And I am offering what I propose to be an alternative way
2 of Mr Murray getting the documentation. And it's that latter aspect that I have
3 clarified in the last few hours.

4 **THE CHAIRMAN:** Thank you. I see you looking at your screen there, Mr Byrne.
5 Shall I give you a minute to get a message or shall I ask you another
6 question?

7 **MR BYRNE:** That's very prescient, my Lord. Please, my Lord, ask another
8 question, if that is what --

9 **THE CHAIRMAN:** Yes. Just so I am absolutely clear, can you just summarise for
10 me what your alternative suggestion is, just so we know exactly what we are
11 talking about.

12 **MR BYRNE:** Yes, my Lord.

13 It would be to compile and to make available the underlying documents to
14 Mr Murray, either for him to come and view at the council offices or for them to
15 be made accessible to him in some suitable way so that he could review the
16 underlying material.

17 **THE CHAIRMAN:** And what would be the time factors for this? Would you make all
18 that available within seven days, for example?

19 **MR BYRNE:** We would obviously do everything within our power to compile this
20 information as soon as possible. We are talking about a ten-year period of
21 consistent journeys amongst the islands. Mr Murray makes I think what is the
22 natural and obvious point that, no, no, no, he is only looking for the journeys
23 between specific islands, which would cut down the exercise considerably.
24 Regrettably, I am told that that sort of compartmentalised amalgamation of
25 information has not been conducted. And it's the whole data set between all
26 the islands that would have to be reviewed, because all of the hauliers are

1 given a proposed discount in respect of any of the journeys. So it's not a case
2 of going into a small sub-data set. It's the whole data set which would have to
3 be disclosed.

4 **THE CHAIRMAN:** So how long would it take for your clients to get all this material in
5 a state where they could disclose it?

6 **MR BYRNE:** If my Lord bears with me, I would simply be -- if my Lord would bear
7 with me, hopefully the agents can give me an indication in the usual way.

8 **THE CHAIRMAN:** While they are working on that, I will give you a supplementary
9 which they can also think about, which is, in this alternative proposal how
10 precisely do you intend to make this available to Mr Murray?

11 I mean, are your agents going to give him paper copies? Are they going to email it
12 to him? Are they going to say, "It's all here in our offices. Here is a room full
13 of big boxes of papers. Go through them"? Or what are they proposing to
14 do?

15 **MR BYRNE:** No doubt they've heard that. What I can say to my Lord and to the
16 Tribunal is that when I consulted with agents last night and it became
17 apparent that what they were endeavouring to do was to provide information
18 rather than documentation, and they simply couldn't provide that sort of
19 analysis in the time frame because of the 170,000 journeys and so forth, then
20 I asked, well, what is the underlying data from which this analysis would
21 arise? What is that data? Is it hard data? Is it receipts? Is it books? Are we
22 talking cupboards full of paper? What are we talking about?

23 And it's taken until around -- I will give the court the date myself and agents received
24 the information, the email. We received an email around ten to two, which
25 confirmed that -- my Lord, bear with me. I read it out a moment ago, my Lord,
26 and now it's disappeared.

1 **THE CHAIRMAN:** Don't worry. That's the difficulty of these online meetings. Take
2 your time.

3 **MR BYRNE:** We've gone back to the defenders to ask what that underlying
4 information looks like. Is it tickets? Is it a ledger? What "form" is the
5 underlying data in? That is the question we've asked to the defenders. The
6 question we've asked, again, is it tickets or a ledger of all journeys?
7 Effectively what can we provide to Mr Murray so he can carry out his
8 analysis?

9 And that was from yesterday. The answer has come back:

10 "We'd need to go through every invoice and direct debit order in order to ascertain
11 specific numbers."

12 So that is the information that --

13 **THE CHAIRMAN:** So would it be fair to say to you that the alternative that you are
14 offering you are only offering it in principle at the moment, because you don't
15 actually know how long it's going to take to get this together or how it's going
16 to be conveyed?

17 **MR BYRNE:** Precisely, my Lord.

18 **THE CHAIRMAN:** Yes. Well, it may be we will come back to that. Do you have
19 a senior representative of the council at this Tribunal, listening in?

20 **MR BYRNE:** My Lord, I'm afraid, as I understand it, we do not, but --

21 **THE CHAIRMAN:** Because I may be asking you to take urgent instructions on this,
22 which I would expect you to do, in a short adjournment of a matter of minutes
23 rather than anything else. So I am just warning you that that might need to be
24 done soon. And I don't know who you have here but you will need to have
25 someone suitably senior to take instructions from, perhaps, depending how it
26 works out.

1 Yes. Now, we have your alternative proposal. Is there anything else you wish to say
2 at the moment?

3 **MR BYRNE:** Really just to summarise, my Lord, that the defenders' position is that
4 the order is for a document which is a list which, having conducted a search,
5 we do not hold. Looking more substantively at what Mr Murray actually
6 wants, I have made my proposal in principle. So my headline submission is,
7 we've not failed to comply with the order. The list doesn't exist. But we
8 realise that what Mr Murray wants is a solution. He wants an answer to his
9 question. And I have made a proposal in principle as to how that could be
10 best addressed.

11 **THE CHAIRMAN:** Thank you.

12 I am going to come to you in a minute, Mr Murray.

13 But there's one other thing that's puzzling me. As I understand it, your position is
14 that you didn't have a list showing the amount of the discounts, so we had
15 ordered you to produce a list, not to create a list. The parts which you've not
16 objected to -- you were ordered to produce a list of all hauliers that received
17 discounted fares.

18 Now, on your logic you should not have created such a list, you should not have
19 produced it, unless it was already existing as a document. Was that the
20 case? Or did you or your clients create that list?

21 **MR BYRNE:** Yes, my Lord, the list was created. So the defenders' position is, we
22 want -- obviously the defender wants to help if we can, and go further than
23 what the Tribunal may have ordered, ie the production of a pre-existing
24 document. So where we can go further, we can make a list. Where we can't
25 make a list, we've come back to the Tribunal to explain why.

26 **THE CHAIRMAN:** Thank you. That clarifies that.

1 Yes, Mr Murray.

2 **MR MURRAY:** Sorry, I beg your pardon, the mic was switched off.

3 My Lord, this is being dressed up as though it's much more complicated than it is. If

4 I can cut to the chase, there was only one company that received discounted
5 fares up until 2019 in that period, and it was Sinclair Haulage. No one else
6 received them. After 2019, the Sanday Community Shop, which had been
7 denied them up until that period, received them when the rules were
8 amended. So we are not talking about a diverse list of people.

9 You will have read my submission that I sent in about this matter. Some of the
10 companies, for example the one that delivers to Westray, will not deliver to
11 Sanday. There are well-defined markets that these people have been
12 allocated. So we are only talking about Sinclair Haulage up until 2019.
13 Thereafter, the Sanday Community Shop became eligible for discounted
14 fares. So we are talking about one company.

15 Now, that one company, it is my understanding from Sanday Community Shop and
16 others, they buy tickets in books of 50. Now, they don't turn up and pay cash
17 for books of 50 tickets. I am pretty sure, in this day and age, I am fairly sure,
18 that Sinclair Haulage pay probably by bank transfer or whatever. But this
19 really could not be simpler.

20 The other side are choosing to dress this up as some monumental task involving
21 armies of accountants. Now, it's not. There's one company. So all they need
22 to do is look in their bank statements for payments from that one company.

23 As I said in my letter, if it received 50,000 or paid 50,000 in fares in any one given
24 year, and it received 50 per cent discount, then the value of the subsidy is
25 easily calculated.

26 So it's not correct for them to dress it up as some vast 170,000 journeys to be

1 analysed. That's just not correct. It's very simple. It's one route, one haulier,
2 one set of payments from that haulier into the bank accounts of
3 Orkney Ferries.

4 I am not sure either that I understand why on earth I am to be invited to the offices of
5 Orkney Council to do some minor piece of accounting, looking at payments
6 into their bank account. Surely they have accountants who can add up a few
7 payments and simply provide it to the court and say, "In 2018 we received
8 payments of £25,000 from Sinclair Haulage for tickets".

9 It's a very simple accounting exercise. I just make that point. I mean, it is being
10 dressed up to the Tribunal as though it's a vastly complicated exercise. It
11 simply isn't. There's one company involved in a set of payments to one
12 identifiable company from one identifiable company.

13 **THE CHAIRMAN:** Thank you, Mr Murray. We have that point. We have read your
14 submission. Is there anything else you wish to say?

15 **MR MURRAY:** Nothing that isn't on that submission, my Lord. I mean, the
16 information that was provided as well was again not what was asked for.
17 Essentially the order is in two parts. There's the first part: who received
18 discounted fares. The reason I asked for that is because the list is a long one:
19 of one. Sinclair Haulage. Only them. Nobody else got it until 2019, and then
20 the Sanday Community Shop started getting them.

21 The second one is, what was the value of those? How much were those discounts,
22 subsidies, call them what you want, worth to that company?

23 Now, that has an important bearing because, as I have mentioned in some of the
24 other documents I put in to the Tribunal, notably the one on the reply to the
25 skeleton arguments it affects the profitability of businesses. If you are trying
26 to compete with somebody and they have a lower cost base than you

1 because of an unfair subsidy, it leaves you unable to compete with them. And
2 they can drive you out of business, by using their increased profit margins to
3 do so.

4 So it is important from the point of view of the Act and the information is very simple.

5 The other side are seeking to dress it up and say it's complicated. And it's not. It's
6 very simple.

7 **THE CHAIRMAN:** Thank you very much, Mr Murray.

8 Just before I invite the other members of the panel to ask any questions, Mr Byrne,
9 do you have any response to make to Mr Murray?

10 **MR BYRNE:** No, my Lord. Thank you.

11 **THE CHAIRMAN:** Thank you.

12 Mr Anderson, is there anything you would like to ask?

13 **MR ANDERSON:** Yes, I would like to ask Mr Byrne, that although you have not
14 responded to Mr Murray, his position is that the council are making this far
15 more difficult than they need to, and that there is a simple exercise that could
16 have been done that would not involve scrutiny of 170,000 pieces of paper, if
17 that is what is said to exist, and that all that would be needed is to look at the
18 payments made through bank records, which -- I am not sure about this, but
19 I would suspect would be susceptible to a computer-based search.

20 Has that been thought about and tried on your side? And if not, why not?

21 **MR BYRNE:** Sir, I think there are perhaps two parts to that question. The first part
22 is that Mr Murray says that it's a simple exercise. And the reason he says that
23 is because he starts from the conclusion. And the conclusion in his
24 submission is that it was only Sinclair Haulage who provided any services.
25 And that's obviously the underlying case theory that he advances before the
26 Tribunal.

1 The order does not require us to start from that conclusion. It requires us to start
2 from the open position of narrating every haulier. So --

3 **MR ANDERSON:** Well, only every haulier who received discounted fares on the
4 Kirkwall to Sanday route.

5 **MR BYRNE:** Yes, understood, sir. I think the difficulty is, the way that that
6 information is held would require the defender to go through all of the data, all
7 of the underlying data in respect of all of these journeys.

8 Now, the second part of the question is -- sir, my ears pricked up a little bit as well
9 when Mr Murray raised a question about conducting an analysis of the bank
10 transfers. I am simply not in a position to say whether that would be fruitful,
11 but it sounds potentially quite promising as an alternative line of enquiry as to
12 whether we could disclose bank statements.

13 They would presumably have to be redacted in respect of any other information that
14 would show direct debit payments. I simply can't say much more than to
15 observe that that might be a fruitful line of enquiry.

16 I think the last leg of sir's question is, why has that not been done to date? If that
17 has not been done, it's perhaps because a disclosure of bank statements
18 wasn't sought by Mr Murray.

19 **MR ANDERSON:** Well, no, but the order is, perhaps, now -- as we always
20 experience with the benefit of hindsight -- perhaps in rather broader terms
21 than might have been considered. But all the order asks for is the amount of
22 discounts paid to hauliers who received discounted fares on that specific
23 route.

24 Mr Murray's criticism/challenge to your position is that you have made this far more
25 difficult than it needs to be, because, first of all, you can identify who those
26 hauliers are, and then all you need to do is identify what are the discounts, the

1 amounts of the discounts they received.

2 **MR BYRNE:** Yes.

3 **MR ANDERSON:** Anyway, you have given me an answer to my question, so thank
4 you.

5 I have nothing more, sir. Thank you very much.

6 **THE CHAIRMAN:** Thank you.

7 Mr Young.

8 **MR YOUNG:** Yes. Mr Byrne, the one question I had for you relates to the Excel
9 spreadsheet, which presumably comes from your clients, with I think about 24
10 hauliers on it. I just want to be clear, in the column for "discount given" there
11 are various percentages. Where do those percentages come from? Maybe
12 it's clear from other documents I have not dug through. But I take it those are
13 percentages that have come from letters or something like that rather than
14 having been calculated?

15 **MR BYRNE:** Sir, I have asked for more information about how that document was
16 compiled. And I wouldn't want -- I mean, with the court's indulgence, perhaps
17 if I can be given an opportunity to come back to sir on that question, because
18 I don't want to give an answer which I am not 100 per cent confident of at this
19 point, because I have seen that very recently, that document, and I would
20 want to be sure of the answer before I provided the Tribunal with one.

21 **MR YOUNG:** Of course. That's perfectly reasonable, Mr Byrne. You will
22 understand, I think, one of Mr Murray's points, I think, in one of his written
23 responses was that this is simply dealing with eligibility rather than what's
24 actually happened on the ground. And I just want to understand what these
25 percentages represent and where they come from. So if you could get that
26 information, that would certainly be helpful.

1 **MR BYRNE:** One thing I want to say to the Tribunal is that one of the questions
2 I asked was to check that very question, which is: is this a list of who is
3 eligible or is it a list of who obtained discounts? My understanding of the
4 enquiries I made this morning is that this is a list of who is eligible.

5 **MR YOUNG:** Yes, I think it tags in with what Mr Murray said. I will come to
6 Mr Murray in a minute. I will leave you, if that is okay, Mr Byrne.

7 Mr Murray, I do have a specific question for you, but I think you wanted to say
8 something in response to the last point Mr Byrne made.

9 **MR MURRAY:** Yes, I mean, I find it difficult to understand all this vagueness. The
10 order is very straightforward: it's that received discounted fares. So all we are
11 asking for is, what hauliers -- not transporters of other goods or groceries or
12 grocers -- what hauliers received discounted fares on that specific route over
13 that period.

14 Now, my contention is that there was only one up until 2019, and that was
15 Sinclair Haulage. Thereafter, the Sanday Community Shop qualified for them.
16 But to me it's quite simple.

17 I am sorry, Mr Young, yes.

18 **MR YOUNG:** That's helpful, Mr Murray. The question I had for you though was if we
19 were looking at again time periods, because this is covering a ten-year
20 time period --

21 **MR MURRAY:** Yes.

22 **MR YOUNG:** And if what Mr Byrne said is accepted, that it's a vast issue trying to
23 track down all the documentation -- and we'll put that to one side at the
24 moment -- would your purpose be satisfied by taking perhaps shorter periods,
25 almost like an audit, to test what the sort of levels of discounted fares were to
26 Sinclair Haulage, over perhaps three years or a year here or there? Would

1 that satisfy your purpose here?

2 **MR MURRAY:** Yes. You can reduce or extend the period as a sort of
3 mathematician or with a mathematician's bent, I thought 10 years proves
4 conclusively what the pattern is. So if you see for 10 years the only company
5 that's ever receive any discounts is Sinclair Haulage, then it substantiates our
6 claim. That was the purpose of it.

7 I mean, really, frankly, as somebody who runs a business myself, I do struggle with
8 how complicated this is being dressed up as being.

9 Firstly, companies know who they give discounts to. Very simple. No managing
10 director, chief executive, senior partner, doesn't know who they give discounts
11 to. It doesn't involve some great soul-searching, especially when that number
12 is only one.

13 Secondly, to take a look at the payments you've received from that client again isn't
14 a very complicated feat of accounting. You know, it's very easy these days to
15 follow the movement of cash through bank accounts.

16 **MR YOUNG:** Sorry to cut across you, Mr Murray. I think we understand that point.
17 I am just wanting to focus on the time period.

18 **MR MURRAY:** Yes.

19 **MR YOUNG:** The wording is the last 10 years. For example, is it relevant for you to
20 know what has happened since 2019, which is I think when you say there was
21 a change because Sanday Community Shop then started getting the
22 discount? Are you particularly interested in 2019 to date, or 2019 and earlier?

23 **MR MURRAY:** No, I am not, Mr Young. So if it stopped at 2019, I would be okay
24 with that.

25 But I just come back to this point that, you know, this is intrinsically a very simple
26 exercise; it is being dressed up to appear complicated. But in all honesty it

1 isn't.

2 **MR YOUNG:** That's everything I wanted to ask. Thank you very much.

3 **MR ANDERSON:** Sir, if I may, just briefly.

4 Mr Murray, can I just be clear about that. Does it come to this, that all you really
5 want is the information about discounts paid to and received by
6 Sinclair Haulage?

7 **MR MURRAY:** I couldn't ask for that alone because that won't prove my point. My
8 argument is that the monopoly has been handed out on that route. The
9 recipient of that monopoly has also benefited from discounted fares. It has
10 uniquely benefited from it.

11 Now, I know from the Sanday Community Shop and living on the island and others,
12 nobody else delivers to that island. The people on that list, some of them
13 we've asked and they haven't. Sanday Community Shop was denied access
14 to discounted fares up until 2019.

15 I am sorry, I have lost the thread of the thing. I guess the point I was coming back
16 to, Mr Anderson, was -- sorry, I beg your pardon, I kind of lost the thread of it.
17 If you want to put the question to me again, I will ...

18 **MR ANDERSON:** I think perhaps you answered it in your first sentence, that you
19 wanted more than just Sinclair Haulage.

20 **MR MURRAY:** Yes, I beg your pardon. You've jogged my memory now. I mean, if
21 I had simply said, "Give me the discounted fares for Sinclair Haulage", that
22 would simply prove what they'd received. If I asked for discounted fares for all
23 recipients, the list of all recipients that had received discounted fares and we
24 only get one company, then we know that we are dealing with a monopoly, or
25 one recipient of that. Put it this way -- not a monopoly, it's a separate issue.
26 But we know that only one company qualified for those discounted fares.

1 That is why --

2 **MR ANDERSON:** Thank you.

3 **MR MURRAY:** Sorry, that's why the question was framed as it was.

4 **MR ANDERSON:** Lord Ericht, I think you are on mute.

5 **THE CHAIRMAN:** What I propose to do now is to adjourn, and that will allow the
6 panel to have a discussion about what we've heard so far. It will also allow
7 Mr Byrne to take instructions, so that when we come back he can give us
8 a concrete version of his alternative proposal, which will deal with how long it
9 will take to have this material available and how is it going to be made
10 available, and also to consider the points which have just been made about
11 whether it's actually a simpler exercise than perhaps the council thought.

12 We'll advise you when we are ready to return. We are now adjourned.

13 **MR MURRAY:** Thank you.

14 **(3.28 pm)**

15 **(A short break)**

16 **(4.15 pm)**

17 **THE CHAIRMAN:** Yes, I think we are now all back in the virtual Tribunal room.

18 Mr Byrne, have you had opportunity to take instructions?

19 **MR BYRNE:** Yes, my Lord. What I have been able to do is, having a very quick-fire
20 correspondence with agents, we decided to put a red pen through that
21 process, and then had a very quick Teams meeting with the ferry manager at
22 the second defender, where I was able to get some further information.

23 The format of the documentation, the format it is in, includes invoice stubs, direct
24 debits, ticket stubs and bank statements, all in hard copies. Those are not
25 broken down into any particular route between any particular island. They are
26 not broken down between hauliers and individual passengers. And those are

1 held for the last financial year in the office. For the preceding six years they
2 are stored, because they are under a legal obligation to keep the
3 documentation for six years. And this is perhaps straying into irrelevant
4 circumstances but it was conveyed to me that because of the nature of the
5 council -- it's a very small council and lots of council workers are doing at least
6 three jobs, and there's not much in the way of estate within the council -- lots
7 of the information in the last six years -- not in the last year, which is within the
8 office -- is distributed amongst the estate offices, and would be an exercise to
9 try to locate and track down all these boxes, which are stored variously.

10 Obviously that exercise will be instituted if the Tribunal so orders it. The ferry
11 manager was clearly very anxious about providing a third party with access to
12 those boxes, for two reasons: firstly because it contains personal information
13 of people who have bought tickets, not just hauliers. And in respect of both
14 hauliers and individuals it contains their names, potentially their addresses
15 and their bank details. Obviously personal information of the fact that they are
16 travelling, and secondly --

17 **THE CHAIRMAN:** If I might just interject there. That seems a good argument for
18 doing what you were told to do and producing a list rather than original
19 documents.

20 **MR BYRNE:** Yes, I acknowledge that, my Lord. The second matter the ferry
21 manager was anxious in relation to, but which strikes me as not in any way
22 insuperable -- is providing a non-council employee access to the office. And
23 again it's just Data Protection concerns, and providing a council worker to
24 supervise that. But that does not strike me as in any way insuperable. And
25 that would just have to be done in terms of the bank statements, the query
26 raised by the pursuer and then followed up in questioning by Mr Anderson.

1 It seems that whilst that might have been a promising avenue of enquiry, if one were
2 to interrogate the bank statements one wouldn't get any more information
3 other than to see bank payments from hauliers. It wouldn't tell anybody what
4 journeys they were doing. So ultimately it wouldn't be of any great assistance
5 to the pursuer.

6 So insofar as the Tribunal are looking to order further disclosure of documents, those
7 are really the only documents that we can identify as potentially relevant to
8 the type of enquiry the pursuer is looking to pursue.

9 In respect of his central thesis that the third defender primarily provided haulier
10 services on Sanday, that is something which may be capable in some way,
11 shape or form of following discussions with the pursuer it may be capable of
12 some form of agreement. And it strikes me that the pursuer, and the first and
13 second and third defender, haven't attempted to see if they can agree a form
14 of words of precisely what the toing and froing and use of hauliers was on
15 Sanday over the last 10 years.

16 And it may be there is another way to skin the cat, but obviously I have not been in
17 touch with the pursuer directly, or the agents haven't been in touch with the
18 pursuer directly, to see if some form of agreement could be reached, because
19 my impression is that, well, our legal argument does not depend on the
20 pursuer establishing that factual premise, because even if he can show it was
21 only one haulier who was providing services, we still have our argument.

22 And it may be that there is some force that the third defender was providing
23 predominant haulier services to Sanday.

24 **THE CHAIRMAN:** Yes. Thank you. That is helpful. What I have not heard from
25 you is a concrete alternative proposal.

26 **MR BYRNE:** Yes. So because of those difficulties identified by the manager, as

1 I ascertain it, I do not have instructions to provide(?) that. And I regret to
2 come to that position, but it's a position which is on the basis of the concerns
3 about personal data. But what I can tell the Tribunal is that it would appear
4 that the documentation does exist and therefore if ordered to do so then the
5 first and second defender would have to gather that documentation, I am told,
6 and in terms of finding the boxes it would be weeks. I was told four weeks, to
7 recover all the boxes and bring them into one place within the council estate.
8 And if the defenders were ordered to do so then they would have to give the
9 pursuer access to those documents and the defenders would have to find
10 a way of ensuring that that was supervised in a way that didn't restrict his
11 ability to complete his review.

12 **THE CHAIRMAN:** Yes. Thank you very much, Mr Byrne.

13 Mr Murray.

14 **MR MURRAY:** Yes, my Lord.

15 **THE CHAIRMAN:** Do you have anything you wish to say in response?

16 **MR MURRAY:** I just repeat what I said. I mean, this should be easily provided, this
17 information. The order stands. It was arrived at, as you have said, after the
18 arguments were heard, and deliberation. The other side have had weeks to
19 comply with this. Absolutely weeks. They have not done so. The reasons
20 that they are putting forward now are as unconvincing as the ones they put
21 forward before.

22 I mean, this information should be at hand. People who run that business,
23 Orkney Ferries, will know who got discounted fares on that route. There can
24 be no doubt about it. This idea that it involves enormous amounts of
25 searching of data, whatever, is simply untenable.

26 My understanding is that Sinclair Haulage buys books of 50 tickets. Now, it may be

1 that they pay in other ways as well. But I suspect that whatever way they pay,
2 whether on credit account or whatever, there will be bank records showing
3 this. I mean, the idea that they are turning up with cash and paying in cash in
4 this day and age I think is very very unlikely.

5 So I think it's more of the same: let's over-complicate things and dress this up as
6 being a much bigger problem than it is.

7 I think the information could simply be got together very quickly.

8 **THE CHAIRMAN:** Thank you very much, Mr Murray.

9 Now, we've had an opportunity to discuss matters during the adjournment and

10 I propose to give a ruling based on that discussion, unless Mr Anderson or
11 Mr Young think it would be helpful to retire again to consider matters further.

12 **MR ANDERSON:** No, thank you, my Lord.

13 **MR YOUNG:** No.

14 **THE CHAIRMAN:** Thank you.

15 **RULING**

16 **THE CHAIRMAN:** The first and second defenders seek a variation of an order to
17 produce certain materials, made on 23 March. The motion to grant the order
18 was opposed and was only granted after discussion and vigorous opposition.
19 There is nothing new in the arguments being put forward today in favour of
20 the variation which was not or could not have been put forward at the hearing
21 when the order was made.

22 We do not accept the submission by counsel for the first and second defenders that
23 it is in some way incompetent for us to order production of a list unless a list
24 was previously in existence. Nor do we accept his argument that the order
25 has been complied with as no list was previously in existence.

26 Under rule 60(3), we have power to give directions as to how disclosure is to be

1 given and we ordered that disclosure was to be given in the form of a list. In
2 any event, we have wide case-management powers under rule 53 which
3 would entitle us to order the production of a list in any case.

4 I am slightly bemused by the submissions of counsel, which we heard after the latest
5 adjournment, as to the practical difficulties of allowing the pursuer access to
6 the original documents, because these arguments are arguments in favour of
7 complying with the order and producing a list rather than the original
8 documents.

9 Counsel founded on rule 57, which provides that if a party fails to comply with
10 a direction the Tribunal may, if it considers that it is in the interests of justice,
11 waive the direction.

12 In our view, the interests of justice do not require that the part of the order which is
13 now sought to be deleted should be deleted and the order amended. It is in
14 the interests of justice that parties to a Competition Appeal Tribunal case
15 engage properly with the Tribunal process and bring any objections to
16 motions before an order is made. It is in the interests of justice that once an
17 order is made it is complied with, unless there are good reasons not to do so,
18 such as a change of circumstances. It is also in the interests of justice that
19 the parties comply promptly with any order and also prepare promptly and
20 obtain instructions promptly and not at the last minute, before a hearing or
21 during a hearing. The pursuer has legitimate reasons for asking for the list
22 which we ordered to be produced, and it is in the interests of justice that it is
23 provided to him.

24 We also note the first and second defenders' position, which was set out after the
25 latest adjournment, that the original documents could be collated in one place
26 in a period of four weeks. We note the original order was made on 23 March,

1 so even if the first and second defenders had a difficulty with the list there is
2 no reason why they could not have had these documents ready and available
3 for inspection by the end of April.

4 In all these circumstances, the motion to vary the order is refused.

5 Now, the effect of that is that the strike-out hearing will proceed on the day
6 previously fixed. If the first and second defenders have provided the list which
7 they have been ordered to do by then, well and good. If they have not, then
8 the strike-out hearing will go ahead on the basis of the information which has
9 been produced to date and on the basis that the first and second defenders
10 have failed to comply with the direction.

11 If I might just make some general comments. The Tribunal is gravely concerned by
12 the failure of the first and second defenders to comply with its order and also
13 the disruption to today's hearing due to the lack of someone present from
14 whom instructions could be taken.

15 The Tribunal is hereby giving a warning to the first and second defenders that they
16 must comply with all orders given by this Tribunal timeously and that there will
17 be consequences for them if they do not do so.

18 I also want to state that, in the light of circumstance and events to date, the Tribunal
19 expects that at all future hearings, whether strike out hearings, proofs or case
20 management hearings, or whatever, the chief executive of the first defenders
21 and a director of the second defenders, or some other senior official if these
22 people are not able to attend personally, shall attend at the hearing so that
23 instructions which are definitive and swift can be given instantly on any issue
24 which may arise at the hearing.

25 Now we left over from earlier today how we were going to deal with point two of the
26 letter of 8 April. We do not want (audio distortion) as sought in that by

1 Mr Murray to delay the hearing on the strike-out, which is due in just a few
2 weeks' time, and we note that it does not appear that they are absolutely
3 essential to the strike-out hearing. So we are going to refuse paragraph 2
4 in hoc statu, and what that means is that if it is still necessary for these
5 documents to be produced the motion can be brought again once the result of
6 the strike-out is known.

7 Now I think that deals with the motions that we had before us. I also indicated at the
8 beginning that we would just check everything was in order for the strike-out
9 hearing. Obviously we are not going to the substance of that today, we are
10 just checking procedurally we are in a good position to proceed.

11 I have a few points I want to raise in relation to that, firstly with you, Mr Byrne. I take
12 it that you have abandoned your point on prescription and that we can note
13 that that is the case?

14 **MR BYRNE:** Yes, my Lord.

15 **THE CHAIRMAN:** Thank you. Now generally I will just give parties a reminder,
16 since you are not accustomed to appearing in courts and Tribunals, I am sure
17 you know this already but at the hearing it will just be legal argument and
18 there will be no witnesses required for that particular hearing.

19 I think that is all I wish to raise by way of general thoughts about the hearing. Is
20 there anything that either any of the parties or the Tribunal wish to raise
21 before we close?

22 **MR BYRNE:** No, my Lord.

23 **MR ANDERSON:** My Lord, if I may, just one matter for the benefit of Mr Neil. He
24 may or may not be intending to be present and participate in that hearing but,
25 Mr Neil, it would be helpful if you consider your position against at least one
26 alternative or one possible outcome of that hearing, because if the argument

1 that Mr Byrne is going to advance succeeds that would bring to an end the
2 case against the first and second defenders but you would still be in the case.

3 **MR NEIL:** Okay.

4 **MR ANDERSON:** I appreciate this may just seem a little obscure and complex to
5 you and again, whilst the Tribunal certainly cannot give you advice, you may
6 well find it helpful to consider the position with appropriate solicitors and/or
7 counsel.

8 **MR NEIL:** Thank you, sir.

9 **THE CHAIRMAN:** Thank you. Does that deal with all matters we have to deal with
10 today? Thank you.

11 Well, we shall now adjourn and the panel will retire to the retiring room.

12 **(4.40 pm)**

13 **(The hearing adjourned)**

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