

IN THE COURT OF SESSION, PARLIAMENT HOUSE

Case No: 1418/5/7/21

Supreme Courts
Parliament House
Parliament Square
Edinburgh
EH1 1RQ

Thursday, 26 May 2022

Before:
The Honorable Lord Ericht
Peter Anderson
Lord Young
(Sitting as a Tribunal in Scotland)

BETWEEN:

Blue Planet Holdings Ltd

Pursuer

v

Orkney Islands Council
Orkney Ferries Limited
Sinclair Haulages Limited

Defenders

APPEARANCES

Kenneth Murray (on behalf of Blue Planet Holdings Ltd)
Daniel Byrne and Mark Lindsay QC (on behalf of Orkney Islands Council and Orkney Ferries Limited)
Dave Neil (on behalf of Sinclair Haulage Limited)

Transcription by Larking Hodge Pollock
Suite 3F, 30 Gordon Street,
Glasgow, G1 3PU
Tel: 0141 248 6211 | Email: transcripts@larkinghodgepollock.co.uk

1 (Thursday, May 26, 2022)

2 (10.35am)

3 LORD ERICHT: Good morning. Please sit.

4 I just begin with some introductory remarks.

5 First of all, this is a sitting of the Competition

6 Appeal Tribunal here in the Court of Session

7 building in Edinburgh. We have on the

8 bench myself, Lord Ericht. We have Mr

9 Anderson and we also have Lord Young,

10 who is, unfortunately, unable to be here in

11 person. You will see him on the screen, and

12 so this is a hybrid hearing where he will be

13 appearing on screen. We will just check that

14 he can hear.

15 Lord Young, can I just check you can hear

16 us?

17 LORD YOUNG: I can hear you now,

18 actually, yes.

19 LORD ERICHT: Thank you.

20 In terms of how we are going to proceed

21 today, we are going to have a break at about

22 quarter to 12.00 for about quarter of an hour

23 or so. Other than that, we will sit from now

24 until 1.00, and then we will sit from 2.00

25 until 4.00. We have tomorrow available also,

1 so if we finish today, then that is fine, but no-
2 one is under any time pressure because we
3 can come back tomorrow also.

4 This is a strike out hearing, so it is the first
5 and second defenders' motion for strike out,
6 so the procedure will be, I shall ask Mr
7 Lindsay, QC, on behalf of the first defenders
8 to address us first, and then I shall ask Mr
9 Neil, and then after that, Mr Murray, you can
10 address us and then we will take it from
11 there.

12 Now, there are microphones on the desk.
13 You will see there is a button. If you are
14 going to speak, can you press the button and
15 a red light should come on.

16 (To Mr Young) So you do not need to press
17 the button, but if I could just make sure you
18 are near the microphone. And I see Mr
19 Neil's is pointing the wrong way, so when it
20 comes to his turn to speak, he will no doubt
21 wish to turn it round.

22 Yes, Mr Young.

23 MR YOUNG: Yes, thank you, my Lord.

24 On behalf of the first and second defenders, I
25 would formally move their motion to strike

1 out the claim under --

2 LORD ERICHT: Can you just bear with us

3 for a minute. We just need to check a

4 technical issue. Now, I will just ask Lord

5 Young, can you hear me?

6 LORD YOUNG: I can hear you, my Lord.

7 LORD ERICHT: And now I am going to ask

8 Mr Lindsay just so say something to see if

9 you can hear him.

10 MR LINDSAY: Lord Young, are you able to

11 hear me?

12 LORD YOUNG: No, I can't hear Mr

13 Lindsay, unfortunately.

14 LORD ERICHT: Well, we are going to try

15 another microphone for Mr Lindsay to see if

16 that helps if we move them around.

17 LORD YOUNG: (After a pause) No, I still

18 cannot hear anything, unfortunately.

19 LORD ERICHT: What I am going to do is

20 just adjourn for a few minutes to allow this to

21 be dealt with and we will get our IT person to

22 come and solve the problem. Thank you.

23 We are now adjourned.

24 (10.39)

25 (A short adjournment)

1 (10.44)

2 LORD ERICHT: Well, we have a practical
3 solution, I understand, of speaking into a
4 different microphone. So, Mr Lindsay, if we
5 could just check that, that Lord Young can
6 hear you, and then you can comment your
7 submissions.

8 MR LINDSAY: Yes. Lord Young, are you
9 still able to hear me?

10 LORD YOUNG: Yes, I can hear you very
11 clearly, thank you.

12 MR LINDSAY: Thank you, my Lord.

13 LORD ERICHT: Yes, Mr Lindsay.

14 MR LINDSAY: Thank you, my Lord.

15 On behalf of the first and second defenders, I
16 would formally move their motion to strike
17 out the claim under Rule 41. There is a
18 motion in the alternative to grant somebody
19 judgment under Rule 43, but they are very
20 much two sides of the same coin and the
21 authorities make clear that the same test
22 applies. So, I do not propose to differentiate
23 between the two limbs, and the primary
24 motion is for strike out under Rule 41.
25 A revised skeleton argument lodged on

1 behalf of the first and second defenders and,
2 for the sake of brevity, I would formally
3 adopt the revised skeleton argument as part
4 of my submissions to the tribunal today.
5 It may be of assistance to the tribunal if I
6 indicated the approach I propose to take this
7 morning to ensure it meets with the tribunal's
8 approval, and also to provide a summary at
9 the outset.

10 With regard to the approach I propose to
11 adopt, I am, in essence, going to take the
12 skeleton argument as read, supported by a
13 joint bundle of authorities, and I propose to
14 deal with what the pursuer has said in its
15 response to the motion for strike out, to deal
16 with what is raised there, to summarise the
17 main points that the first and second
18 defenders rely upon, and to deal with any
19 questions that the tribunal may have for me.

20 I would anticipate I would be finished before
21 the intended break during the morning and
22 with, I think, strike out, or summary decree
23 in Scottish Court procedure, if there has to be
24 lengthy argument, that is perhaps a clear
25 indication that matters are not clear cut. So, I

1 will endeavour to be as focused as possible to
2 underline the first and second defenders'
3 analysis that this is a clear cut case that can
4 be struck out at this stage under Rule 41.
5 Summarising why the first and second
6 defenders consider that to be the case, if one
7 looks at the submissions on behalf of the
8 pursuer in response to strike out, which
9 incorporate the very lengthy witness
10 statement from December last year, it is clear
11 that, in substance, this is a neighbour dispute
12 between Mr Murray and Mr and Mrs Sinclair
13 that really should be in the Sheriff Court.
14 In substance, it is not a competition law
15 dispute at all. It is correct that the pursuer, in
16 the abstract, raises two points of competition
17 law, the first being the alleged secret
18 agreement relating to the operation of the
19 Northern Isles depot in Kirkwall, and the
20 second issue of competition law which is
21 raised relates to the discounted ferry fares
22 that are available to some hauliers, but they
23 are raised in the abstract and they are
24 immaterial to what the pursuer actually
25 complains of here and do not require to be

1 determined by the tribunal in this application,
2 and I say that for three reasons, which I will
3 summarise now and then look at each in
4 more detail.

5 The first is, even on the pursuer's averred
6 facts, there is no monopoly. The pursuer
7 uses the community shop delivery vehicle for
8 small deliveries and, for larger deliveries,
9 there is no monopoly. It is a public ferry.

10 Any haulier presenting himself at the ferry
11 terminal, if they pay the published fare,
12 which is determined by the length of the
13 vehicle, goods can be transported over to the
14 Island of Sanday. There is no monopoly that
15 requires anyone to use the third defender, or
16 to use the Northern Isles distribution depot.

17 The second reason why the points of
18 competition law are immaterial is there is
19 clearly no causal connection between the
20 losses that the pursuer says it sustained,
21 which all relate to having to send sell the
22 house in Sanday after having spent a lot of
23 money in renovating it, and the difference
24 between expenditure and the likely sale price.

25 And the reason why the pursuer says it has to

1 sell the house is because of the ongoing feud
2 with Mr and Mrs Sinclair and their
3 supporters in the Island of Sanday. It is not
4 said that the property is being sold because of
5 the discounted tariffs, or the way that the
6 depot is operated. It is being sold because of
7 the ongoing feud with the Sinclairs, which
8 makes life on the Island of Sanday no longer
9 attractive to Mr Murray and his family.

10 The third reason is that the averments
11 relating to damages are wholly irrelevant in
12 the sense that the wrong measure of damages
13 has been used, and here the measure of
14 damage is said to be the difference between
15 the expenditure and the likely sale price, the
16 loss having to be crystallised now because of
17 the conflict with the Sinclairs, and that has
18 got nothing to do with the alleged breaches
19 of competition law.

20 Now, if the complaint is all to do with only
21 one haulier and the way the depot is operated
22 and the discounted fares, then the only
23 relevant measure of loss for this pursuer
24 would be an argument that the fares that were
25 paid to get the materials over, were higher

1 than they should have been, or there were
2 delays in getting the materials which
3 increased other costs, and that is not what is
4 averred.

5 So, that is the overview on behalf of the first
6 and second defenders that, taking the
7 pursuer's case at its highest, looking at what
8 the pursuer actually says, this is a neighbour
9 dispute between the Murray family and the
10 Sinclair family, and that is why the Murrays
11 wish to leave the Island of Sanday. It is not a
12 competition law dispute. Yes, two points of
13 competition law are raised, but they are
14 completely immaterial in the three ways that
15 I have summarise, and before looking at that
16 in a little bit more detail, I would wish to say
17 a few words about the legal test for strike
18 out. This is dealt with in the revised skeleton
19 argument at paragraph 4 under reference to a
20 tribunal case *Forrest Fresh Foods Limited v*
21 *Coca-Cola European partners*, and it is at
22 tab 1 in the bundle of authorities lodged by
23 the first and second defenders -- sorry, it is
24 tab 2. It is the second authority.

25 I see that the tribunal are using paper copies

1 and I think following Lord Justice Sedley's
2 rule on the numbering of documents, there is
3 at least two, sometimes three, numbers on
4 every page. I am not sure which one would
5 be of greatest assistance for me to refer to.

6 LORD ERICHT: Well, we have been
7 provided with paper copies. Unless Lord
8 Young thinks otherwise, it is probably easier
9 just to go by the paper copy numbering, and
10 as long as we know what you are talking
11 about, we will not take any points about
12 which of these numbers you use.

13 LORD YOUNG: I will be able to find it no
14 matter which page that you refer me to.

15 MR LINDSAY: Thank you.
16 Looking at the judgment in *Forrest Fresh*
17 *Foods*, the consideration of the relevant legal
18 principles starts at paragraph 22, which is at
19 page 8 of the report, PDF page 10. The
20 consideration starts at paragraph 22 and over
21 the page at paragraph 24, the case of
22 *Wolseley v Fiat Chrysler Automobiles* is
23 cited by the tribunal as setting out the
24 principles, which the tribunal can read for
25 itself. The point that I would wish to take

1 from all of this is, it is not enough for there
2 simply to be an arguable case. There has to
3 be some realistic, as opposed to fanciful,
4 prospect of success, and if one applies that
5 yardstick of there having to be a realistic, as
6 opposed to fanciful, prospect of success, then
7 if that measure is applied here, then it is
8 appropriate to strike this application out
9 because it does not have a realistic prospect
10 of success.

11 Moving forward to paragraph 30, there is
12 helpful summary there by the tribunal of
13 what an applicant requires to do, and we see
14 at 30, reading from the second sentence:
15 “The onus is on a claimant advancing a claim
16 of infringement of competition law to
17 identify: (i) the relevant primary facts which
18 are the foundation of that claim; (ii) the way
19 in which those facts are said to infringe the
20 relevant competition law provisions relied
21 upon; and (iii) the way in which that alleged
22 infringement is said to have resulted in the
23 loss or damage.”
24 It is (iii), the way in which the alleged
25 infringement is said to have resulted in the

1 loss or damage that is the main difficulty
2 here for this pursuer who claims of having
3 sell a house earlier than anticipated because
4 of a feud with other people on the island,
5 whereas the causal connection with the
6 abstract and academic discussion of alleged
7 secret agreements and issues with discounts
8 on the ferry fare.

9 So, moving on from the legal test which, in
10 any event, will be well known to the tribunal,
11 and just looking to see what the facts are here
12 that the pursuer relies upon to demonstrate
13 that it is, indeed, a straightforward neighbour
14 dispute of allegation of various intentional
15 delicts, if not criminal conduct, the remedy
16 being damages and/or interdict. This is not a
17 competition law dispute and it is certainly not
18 a completion law dispute involving the first
19 and second defenders.

20 So, we see from the pursuer's reply to the
21 motion for strike out - document 10 - that the
22 facts that he relies upon are to be found in his
23 first witness statement dated 12 December of
24 last year. He tells us what it is where the
25 detail is to be found. That witness statement

1 is document 14 in the joint bundle, and I
2 would wish now to turn to the pursuer's
3 witness statement and I think it is best, rather
4 than me putting a gloss on what the pursuer
5 says, to actually take the tribunal to what the
6 pursuer itself relies upon. The witness
7 statement is a very lengthy document indeed;
8 however, the pursuer helpfully provides an
9 introduction and summary which makes clear
10 what the pursuer is complaining of, and it
11 starts at page 683 in the bundle,
12 document 14.

13 At page 715, we have got Part I, and we have
14 an introduction. And then at 2, we have the
15 background, but it is helpful to read the
16 background because it makes crystal clear
17 that this is, in substance, a neighbour dispute.

18 So, on page 715, reading from
19 "Background", we see the pursuer say:
20 "On 20 September 2013, the claimant, Blue
21 Planet Holdings Ltd, a company of which my
22 wife and I are directors, purchased a property
23 called 'Marygarth' on the Island of Sanday,
24 one of the Orkney Islands, for £123,152. The
25 property consisted of a house, some

1 outbuildings and 8.54 acres of land. The
2 purchase price of £123,152 comprised
3 £122,000 in consideration, plus £1,152 in
4 legal fees and outgoings. Evidence
5 substantiating that can be found in
6 Appendices 1 and 2. It was to be a place
7 where my wife, our young daughters and I
8 could relax and enjoy time together.”
9 So, pausing there, although it is owned by a
10 company, these are not commercial premises.
11 They were purchased with the aim of
12 providing pleasure, presumably a holiday
13 home where the directors and their daughters
14 could relax.
15 “The house and outbuildings were
16 dilapidated, and we set out restoring them
17 and have since spent £791,577 doing so.
18 Evidence substantiating that expenditure can
19 be found in Appendix 3. Our total
20 expenditure on the property to date is
21 £914,729.”
22 So, the expenditure that forms the basis of
23 the claim is the purchase price and the cost of
24 renovating the property. Nothing to do with
25 competition law. Nothing to do with the

1 depot or the discounted fares.

2 Reading on:

3 “It was not long thereafter that I first became
4 aware of Malcolm Sinclair and his wife
5 Jacqueline. People I met on the island
6 would, once they knew that we had bought a
7 house there, warn us not to ‘cross them’
8 otherwise they ‘would make life very
9 difficult for us’.”

10 “Amongst the first to do so were Mr and Mrs
11 Alan Trott, the owners of Braeswick B&B,
12 where I would stay when I was on the island
13 supervising building work. Another was the
14 man who looked after the property in our
15 absence, Adrian Weston.”

16 “Time and time again, people, most of whom
17 I barely knew would warn me not to get on
18 the wrong side of them. They were
19 characterised as a vindictive, unpleasant
20 couple who should be avoided. There are no
21 police on the island and the Sinclairs, to all
22 intents and purposes, ruled it; they did
23 whatever they wanted to whomever they
24 please.”

25 “They dominated the island’s economy and

1 controlled its essential services and if they
2 saw fit, they would cut off your access to
3 them, spread malicious gossip and drum up
4 ill-will against you. In general, they would
5 make life as unpleasant as possible for you
6 until you could stand it no more and were
7 forced to leave the island to escape their
8 persecution.”

9 So, that is the background, what the pursuers
10 are complaining of, conflict with Mr and Mrs
11 Sinclair, who are not council employees.

12 They are not council agents. It is not
13 suggested that the council are in any way
14 vicariously liable for what appears to be
15 delict actions, putting it mildly. Of course,
16 that is all denied by Mr and Mrs Sinclair.

17 The council are not here to take sides, but
18 that is the background and that is what is
19 being complained of.

20 We then --

21 LORD ERICHT: Just for the sake of
22 balance, given this is a public hearing, just to
23 be clear that Mr and Mrs Sinclair, although
24 they were previously owners and, I think,
25 perhaps directors of the third defenders, that

1 is no longer the case.

2 MR LINDSAY: That is correct, and I think

3 Mr Neil is a director and no doubt if the

4 tribunal have any questions about the

5 background to all of that, Mr Neil can assist,

6 but what my Lord Ericht has said is

7 absolutely correct and --

8 LORD ERICHT: And the other thing, just

9 while you are on the subject of what you said

10 is a neighbourhood dispute, it might be

11 helpful if you could just read into the record

12 part of the response from the third defenders

13 as to how they see this side of the

14 neighbourhood dispute, just so that members

15 of the public are not left with just that one

16 impression of it.

17 MR LINDSAY: Yes, I think that is very fair,

18 my Lord.

19 LORD ERICHT: I am thinking of probably

20 the defences of the defender --

21 MR LINDSAY: Yes, that was the document

22 - yes, it is document 3 in the joint bundle and

23 it starts at page 18. There is a very helpful

24 historical context of freight carriage to the

25 Island of Sanday and some context about the

1 island itself.

2 LORD ERICHT: I am thinking more about
3 the addendum really, I think. On page 21,
4 the first known paragraph I think gives an
5 alternative perspective on what you have
6 described as a neighbourhood dispute.

7 MR LINDSAY: Yes. Would you like me to
8 start at the beginning of the addendum, or
9 simply read the first proper paragraph on
10 page 21?

11 LORD ERICHT: Well, I think perhaps just
12 from the beginning of the addendum just so
13 that it is clear.

14 MR LINDSAY: Yes, addendum.
15 “Sinclair Haulage Ltd serves only Sanday. It
16 isn’t a profitable concern. It has been for
17 sale for some time and the sale due to
18 complete 1 December fell through as a result
19 of this legal case. The owners continued to
20 operate it more as a service to the island as it
21 is apparent that nobody else wishes to
22 operate these antisocial hours and achieve the
23 qualifications required. Mr Murray is
24 welcome to buy and improve the company he
25 so despises.”

1 “Mr Sinclair has decided as a direct result of
2 Mr Murray’s actions, to cease offering heavy
3 haulage services to the island as of the end of
4 2021. He and his wife have invested their
5 savings and to provide lifeline services to the
6 island, for the island, which realise very little
7 profit. They work 16 hour days, 365 days a
8 year and have been unable to take a holiday
9 in 10 years and are extremely well thought of
10 on the island. They have decided to leave as
11 soon as possible, closing down the businesses
12 which employ approximately 18 islanders in
13 various roles, citing ongoing vexatious
14 bullying and harassment. This leaves the
15 farms with no way of getting their livestock
16 to market or” --

17 LORD ERICHT: I think probably we can
18 stop there because Sinclair Haulage service
19 has been bought by somebody else, but I
20 think I just wanted any members of the
21 public to be aware to that reference,
22 particularly the Sinclairs have left “citing
23 ongoing vexatious bullying and harassment”,
24 which is an aspect of what you call a
25 neighbourhood dispute. Now, we are not

1 here to resolve that, of course, but that just
2 gives people an understanding of the
3 background to the case.

4 MR LINDSAY: Yes, and in a nutshell, that
5 is the first defender's point. This tribunal is
6 not here to resolve the neighbour dispute,
7 which is the substance of the dispute. If
8 there is any merit in Mr Murray's allegations,
9 then that is something that can be determined
10 in the Sheriff Court.

11 So, I have read the background section of the
12 witness statement to the tribunal where we
13 see that the background is, it is alleged, feud
14 persecution by the Sinclairs. There is then a
15 very detailed account of the alleged
16 misconduct by the Sinclairs with photographs
17 of fuel tanks, ride-on lawnmowers, boats on
18 beaches, the difference between feudal and
19 (inaudible) law when it comes to the
20 foreshore cars parking and verges. And there
21 is a helpful summary on page 789 of the
22 statement where the pursuers set out what
23 they are actually complaining about in these
24 proceedings, and this is document 14 in the
25 joint bundle at page 789.

1 LORD ERICHT: Yes.

2 MR LINDSAY: This is the summary of the
3 foregoing very lengthy witness statement.

4 Summary:

5 “By this stage we had had enough. The
6 directors of Sinclair Haulage had exploited
7 and abused their monopoly and dominant
8 market position repeatedly to: (1) Overcharge
9 us” - details are provided - “(2) Discriminate
10 against us; (3) Defraud us; (4) Wilfully delay
11 the delivery of and mistreat goods they were
12 given and paid to deliver to us; (5) Extort
13 money from us; (6) Misappropriate and
14 destroy our belongings; (7) Stifle competition
15 and cut off our access to their only
16 competitor; (8) Aid and abet law breaking;
17 (9) Refuse to supply us without objective
18 good reason; (10) Make the provision of
19 haulage and other services conditional on us
20 accepting supplementary obligations, which,
21 by their nature or according to commercial
22 usage, had no connection with the subject of
23 the contract; (11) Abuse public services
24 entrusted to them to improperly charge us for
25 a service we had already paid for and to

1 harass and victimise us”- and that is to do
2 with the refuge collection service on the
3 island - “(12) To organise a relentless,
4 vindictive and spiteful campaign of
5 defamation, harassment and intimidation
6 against us.”
7 And just seeing what is said there:
8 “Even after we sought to distance ourselves
9 from them and had not spoken to or had any
10 direct dealings with them for a year or two,
11 the directors of Sinclair Haulage continued to
12 victimise and terrorise us. Abusing their
13 economic dominance of the island and, in
14 particular, their shop, to defame and malign
15 us and drum up animosity towards our family
16 with a view to making life unbearable for us.
17 Inciting their employees and complete
18 strangers to intimidate us by putting us under
19 surveillance” - and I think there are
20 photographs of a red Land Rover Freelander
21 that was allegedly carrying out the
22 surveillance - “in our own home and sending
23 us abusive and threatening text messages and
24 emails. It was very distressing and shocking
25 that this could be going on in 21st century

1 Britain. They have made Sanday an
2 unpleasant, threatening and unsafe place for
3 our family.”
4 “These are only some of the ways in which
5 the directors of Sinclair Haulage abused their
6 dominant market position/monopoly and
7 breach of Chapter II of the Competition Act
8 1998. There were others.”
9 “In nearly forty years in business, I have
10 never witnessed directors of a company
11 behave in as shocking and depraved way as
12 the directors of Sinclair Haulage. Their
13 conduct is so bad, so dishonest and their
14 abuse of their dominant market positions to
15 harm their customers so perverse and
16 atrocious that they are, in my opinion, unfit
17 to be directors of a company.”
18 “Sinclair Haulage’s position of market
19 dominance is not borne out of free and fair
20 competition. In a free and competitive
21 market, they would have been out of business
22 long ago. It arises from the illegal activities
23 of the Cartel of which they are part.
24 Activities that have been exposed by the
25 manager of the Outer Isles Freight Depot in

1 Kirkwall, Dave Neil, and which are self-
2 evident from empirical evidence. It has
3 granted Sinclair Haulage a monopoly and
4 captive consumers and has erected barriers to
5 entry to protect that monopoly from
6 competition, in breach of Chapter I of the
7 Competition Act 1998. Many businesses and
8 consumers, including as, have suffered as a
9 result.”
10 “Sinclair Haulage believe that they and they
11 alone have the right to those captive
12 consumers’ business irrespective of how bad
13 a service they offer and how badly they treat
14 them. We are their property. They do not
15 believe in free and fair competition. They
16 resent consumers” and so on and so forth.
17 And then the final two paragraphs:
18 “Having endured years of their appalling
19 behaviour, the situation became so
20 intolerable that we could stand it no more
21 and were forced to abandon our plans of
22 living on the island. We decided to put our
23 home up for sale.”
24 “To get it ready for sale, more money will
25 need to be spent on it and the sale price we

1 achieve is likely to be substantially less than
2 we have spent on it. In addition, there is the
3 money we were overcharged and defrauded
4 out of and the losses we suffered because of
5 Sinclair Haulage malevolent behaviour. We
6 wish to be compensated for those losses.”
7 So, the pursuers making very serious
8 allegations against Mr and Mrs Sinclair,
9 which they say amounted to persecution of
10 the Murray family by the Sinclairs and their
11 supporters, and as a result of that persecution,
12 they no longer wish to live on the Island of
13 Sanday and are selling up earlier than they
14 had anticipated.
15 So, in the pursuers’ own words, this is a
16 neighbour dispute between the Murrays and
17 the Sinclairs. They no longer wish to live in
18 Sanday because of the Sinclairs’ conduct and
19 are selling their property. Nothing to do with
20 the first and second defenders. Nothing to do
21 with competition law. Straightforward
22 allegations of criminality or delictual conduct
23 which sound in damages, if not provide them
24 the basis for an interdict. This is a dispute
25 for the Sheriff Court and it is not for this

1 tribunal, still less, the first and second
2 defenders, to try and adjudicate between the
3 Murrays and the Sinclairs.
4 Yes, there is an abstract discussion of certain
5 matters which might give rise to competition
6 law concerns: the alleged Cartel and the
7 alleged secret agreements relating to the
8 depot, all of which are denied by the first and
9 second defenders, and issue is taken with the
10 structure of discounted fare for certain
11 hauliers. But none of that is material to the
12 substance of the dispute, the neighbour
13 dispute, and there are three points that I
14 would wish to make in connection with that,
15 which can be labelled: firstly, the no
16 monopoly point; secondly, the no causal
17 connection point; and thirdly, the irrelevant
18 measure of damages, or measure of loss
19 point.
20 LORD ERICHT: Well, Mr Lindsay, I am
21 sure you are going to cover this, but so that I
22 am quite clear, it may be said by Mr Murray -
23 I am not sure if it will be - that the long list of
24 grievances which the pursuers describe
25 against the Sinclairs was only made possible

1 because of what they say are the breaches of
2 Chapter I of the Competition Act. So, would
3 that not give the potential relevance, or
4 possible relevance?

5 MR LINDSAY: Well, no, because the first
6 point is there is no monopoly.

7 LORD ERICHT: Well, I appreciate you are
8 coming to that now.

9 MR LINDSAY: Yes.

10 LORD ERICHT: I was just flagging my
11 question. It may well be you are going to
12 deal with it in the way in which you are
13 approaching.

14 MR LINDSAY: Yes, and I am happy to deal
15 with Mr Anderson's question head-on now.
16 That would be an allegation of an abuse of
17 market position by the third defenders. It
18 would give the pursuer a right of action
19 against the third defender, but it has got
20 nothing to do with the first and second
21 defender because they were not responsible
22 for the third defender's alleged conduct
23 which is said to constitute the abuse of a
24 dominant market position. Because we are
25 not dealing with a densely populated urban

1 area, we are dealing with remotely populated
2 and geographically distant islands where it is
3 because of market failure that the council has
4 had to step in and provide a distribution
5 depot and subsidised fares. Because if it
6 were all simply left to the free market, no-
7 one would deliver to Sanday, because this
8 has no money, or if they were prepared to
9 deliver the costs would be prohibitive. It is
10 for similar reasons that the ferry network,
11 Caledonian MacBrayne and Northern Link
12 all have to be heavily subsidised because if
13 it's left to the market, the market fails and for
14 political and policy reasons that's considered
15 to be unacceptable and the state steps in.
16 And merely because a dominant position
17 may arise in a remote, sparsely populated
18 geographical location, because there is
19 insufficient business to sustain two suppliers
20 and competitors, merely because they may,
21 as an unavoidable economic consequence of
22 the geography and population, because there
23 may be one dominant supplier, that in itself
24 isn't a breach of competition law and doesn't
25 bring home any liability against the first and

1 second defenders. It is only if there is an
2 abuse of a dominant market position that
3 there's any problem. On the pursuer's
4 averment the abuse is all by Sinclair
5 Haulage. It's not being suggested that the
6 council were aiding and abetting the
7 persecution or were complicit or were
8 inciting, that this was some sort of joint
9 enterprise. There's no suggestion of
10 vicarious liability at all for the abuse of the
11 dominant market position.

12 MR ANDERSON: No. I don't want to take
13 you off your line of reasoning at this stage,
14 Mr Lindsay. I may come back to the point.

15 MR LINDSAY: Yes. I think this may be,
16 you know, a very helpful point just to be
17 clear about the underlying legislation and
18 how it impacts on the various defenders. The
19 suggestions that the cartel and the secret
20 agreement which is said to prevent, restrict or
21 distort competition, that is section 2 of the
22 1998 Act and, clearly, if there were a causal
23 connection, if it were relevant this is
24 something that would stick against the first
25 and second defenders. However, the abuse

1 of dominant position isn't section 2, it is
2 section 18 of the Competition Act 1998.

3 LORD ERICHT: Yes. I think the tribunal is
4 very conscious that the pursuers make two
5 quite separate cases.

6 MR LINDSAY: Yes.

7 LORD ERICHT: And the case against you is
8 that the things that may be complained of
9 create a result, an effect, which is a breach of
10 section 2, and that the abuse of the dominant
11 market position is the case against Sinclair.

12 MR LINDSAY: Yes. And I'm obliged to
13 Mr Anderson for that helpful clarification of
14 the law and I perhaps had not been as clear as
15 I should have been. The sole point that I
16 wish to make is merely because there is a
17 dominant position that is not necessarily a
18 breach of competition law, it is only if there
19 is an abuse of the dominant position and it is
20 the abuser that is liable for the abuse. So no
21 liability attached to the first and second
22 defenders simply because their actions may
23 have created a dominant position for Sinclair
24 Haulage.

25 LORD ERICHT: Can I just clarify before

1 we leave that, because this may be an
2 important point and I do not want to lose
3 sight of it, as I have you noted you say the
4 cartel, secret agreement, section 2 would
5 stick against the first and second defender if
6 there was a causal connection?

7 MR LINDSAY: Yes.

8 LORD ERICHT: And you say there is not a
9 causal connection. But do I take that as a
10 concession in relation to the competition law
11 points on section 2, in which case we should
12 be absolutely clear what that concession is?

13 MR LINDSAY: Yes. As a matter of fact, no
14 concession is made. It is strongly denied by
15 the first and second defenders that there were
16 any secret agreements, there was no cartel
17 and the legal position is exactly as is
18 disclosed in all of the official documentation
19 which, of course, was recovered. So on the
20 facts, there is no concession. There is also no
21 concession that there is any causal
22 connection. For the purpose of strike out, the
23 first and second defenders' position is that all
24 the pursuer can point to is two emails from
25 individuals who weren't council employees

1 which are very in different terms from the
2 official documentation and that if one applies
3 the realistic prospects of success test then at
4 this stage there is no realistic prospect of the
5 pursuer establishing that the position is
6 anything other than is not disclosed in the
7 contractual documentation which has been
8 produced. So there is no concession that this
9 point is not subject to strike out. Where there
10 would be a concession if, ultimately, after an
11 inquiry into the facts the tribunal concluded
12 that there was this secret agreement and
13 cartel, and then went on to conclude that
14 there was a causal connection with the losses
15 claimed by the pursuer and that a relevant
16 measure of loss had been adopted, then in all
17 of those circumstances and, of course, every
18 stage is a dispute, but if the pursuer were able
19 to get over all three hurdles then, yes, section
20 2 is engaged.

21 LORD ERICHT: Thank you.

22 MR YOUNG: Mr Lindsay, could I ask a
23 question just about the issue of the cartel
24 because we have come onto that? I
25 appreciate your position that there is no

1 cartel. What is your understanding of what --
2 do you take any point in relation to how the
3 cartel is set out in the papers, who is involved
4 in it and how it -- and in terms of the secret
5 agreement?

6 MR LINDSAY: Yes. The point I take is that
7 even if, for the purposes of today, one
8 accepts there is this secret cartel, if we look
9 at what the pursuer is complaining about and
10 if we look at the lawsuits that they are
11 seeking to recover, the cartel is completely
12 immaterial to all of that. There is no causal
13 connection.

14 MR YOUNG: Okay.

15 MR LINDSAY: Because the pursuers say
16 they are leaving the island because of
17 persecution by the Sinclairs and there is, you
18 know, a whole list of (inaudible) if not
19 criminal allegations which are made against
20 the Sinclairs which, you know, are labelled
21 as persecution and it is because of that
22 ongoing persecution they are leaving the
23 small island that is Sanday with only a few
24 hundred inhabitants. So, returning to my
25 submissions, I was going to deal with the

1 three reasons why the competition law issues
2 are immaterial. The first is even on the
3 pursuer's account of events there is no
4 monopoly. We saw from the summary that
5 despite not using Sinclair Haulage for over a
6 year the problems had continued and because
7 they didn't use Sinclair Haulage for over a
8 year I think it clearly shows that there is no
9 monopoly. I think there's two important
10 things to be aware of when it comes to the
11 absence of any monopoly, even on the
12 pursuer's account of events. The first is that
13 for smaller deliveries the pursuer says it uses
14 the community shop, which has a couple of
15 vans which collect items from the depot and
16 bring them back to Sanday and that the
17 pursuer uses the community shop service, not
18 Sinclair Haulage. And if we return to the
19 witness statement again just to see where the
20 pursuer is very open about its use of a
21 competing service. If we go firstly to p.739
22 of the witness statement and if one looks at
23 page 739 at paragraph 6 we can see the
24 pursuers say, "When we started using a
25 competitor..." Not my word, the pursuer's

1 own word, “When we started using a
2 competitor...” If there is a “competitor” as a
3 matter of fact in law, it is impossible for
4 there to be a monopoly.

5 LORD ERICHT: Is the point about the
6 competitor not, though, that the competitor
7 cannot offer as cheap a service because the
8 effect of the cartel is that the competitor has
9 to pay a higher rate of ferry fares?

10 MR LINDSAY: I think that is a very
11 important point which I was just going to say
12 something about in just a moment.

13 LORD ERICHT: I will let you deal with it
14 when you are coming to it.

15 MR LINDSAY: No. My Lord Ericht having
16 raised it, I think now is an appropriate point
17 to deal with it. Because there is three distinct
18 issues which the pursuer tries to muddle
19 together to say that there is a monopoly or
20 some unfair disadvantage. The first is the
21 roll-on-roll-off ferry that is operated by the
22 second defender. Now, that’s a public ferry.
23 It’s open to everyone if they pay the
24 published fares. There’s various fares for
25 commercial vehicles which depend on the

1 length of the vehicle; the longer and bigger it
2 is, the more you pay, just like CalMac.
3 There is no restriction on the operators of
4 commercials vehicles that want to use the
5 ferry. Say, for example, you were moving
6 house from Edinburgh, Broughton Removals
7 had all your household effects, the Broughton
8 Removal van turns up at the slipway, if they
9 pay the published fare the vehicle goes on
10 and can drive to your house on Sanday.
11 Equally, if you are building on the island,
12 you order building supplies from one of the
13 builders merchants in Kirkwall, they can put
14 it on their flatbed truck, turn up at the
15 slipway and be taken over to Sanday. So
16 that's the first thing to be clear about, it's a
17 public ferry service that's open to everyone.
18 If you rented a Transit van, went to IKEA,
19 had furniture in the back, you turn up, you
20 pay the fare for a van simply to use the ferry
21 service and it's just like if you use CalMac
22 ferry service, you don't need to be registered
23 or approved, you turn up, you pay the fare,
24 you get over there. So, there is no monopoly.
25 Hauliers, whoever they are, if they pay the

1 fare can use it to get over to Sanday. The
2 second issue which is muddled up with the
3 first is the Northern Isles Depot, which is
4 owned by the first defender and through a
5 process of competitive tendering is operated
6 on their behalf by JBT. Now, the purpose of
7 all of that and why the council went to the
8 expense of creating this depot was to correct
9 a market failure. You've got all the small
10 northern islands with very small populations
11 and the purpose behind the depot was to
12 provide a distribution point. Just to give a
13 silly example, if you're doing online
14 shopping with the Co-op in Kirkwall then the
15 expense of sending a delivery vehicle with
16 your 6lbs of potatoes and celery and all the
17 rest of it all the way to Sanday for one
18 delivery would be prohibitive. So the
19 purpose of the depot is everything can be
20 delivered there, it can all be put on one
21 delivery vehicle and delivered to Sanday. So
22 that's there as a benefit for all of the
23 inhabitants of the Northern Isles and it's
24 there to remedy a failure in the free market
25 which it is very easy to understand why it

1 would arise. The only requirement for any
2 haulier using the depot are, firstly, that they
3 are licensed through the old Department of
4 Transport system and we can see in the
5 Sinclair's defence that they have to comply
6 with the same standards as the large
7 operators like Stobarts even although they
8 are just servicing one island. There's also
9 insurance requirements to make sure you're
10 actually insured. So they are not anti-
11 competitive; they are there, basically for
12 issues of public protection. I think the
13 tribunal would be surprised if that local
14 authority were uninsured and unlicensed
15 operators to use the depot.

16 LORD ERICHT: The case made against
17 you, though, is that you designate one haulier
18 for each island and only they can use the
19 depot.

20 MR LINDSAY: Well, that is another
21 contradiction in the pursuer's case. They say
22 that with one breath and then with the other
23 breath say, "No, no, no, the community shop
24 were also allowed to use the depot. All of
25 my stuff was marked for community shop

1 collection.” Because the tribunal will recall
2 that one of the allegations is Sinclair stole
3 sanding belts. This is what gave rise to the
4 emails of Mr Neil. The allegation was the
5 sanding belts were there marked for the
6 community shop to be collected from the
7 depot by the community shop on behalf of
8 the pursuers and Sinclair stole them. So, yes,
9 with one breath the pursuers say there is a
10 monopoly and in the other breath they say,
11 “No, there isn’t a monopoly, there’s a
12 competitor and the problem is Sinclairs are
13 stealing goods that should have been
14 conveyed by the competitor.”

15 LORD ERICHT: Thank you.

16 MR LINDSAY: So, you know, this is why it
17 can be dealt with at the stage of strike out.
18 It’s not as if I’m saying there’s no monopoly,
19 no cartel and the pursuer is saying there is a
20 monopoly. The pursuer is saying there isn’t
21 a monopoly and the problem is the
22 competing haulier, the goods are stolen by
23 Sinclair. So that is very important; Even the
24 pursuer isn’t saying there’s a monopoly
25 situation at the depot. His complaint is the

1 goods which should be collected by the
2 competitor aren't segregated and Sinclair can
3 make off with make off with them. The third
4 issue, which is sort of floating around in the
5 mix are the discounted ferry fares and just to
6 remind the tribunal of what they are. The
7 most up-to-date information is Production
8 117 at page 49 in the joint bundle. The
9 tribunal will see that this is a letter from the
10 second defender effectively to the first
11 defender, setting out the general criteria and
12 also the islands-based discount criteria. So,
13 you know, the intention here is to create
14 employment in the Northern Isles and also a
15 sustainable service, rather than large national
16 delivery companies and hauliers that may
17 pull out at the first downturn the intention is
18 to create local businesses, local
19 employability, sustainability and reliability of
20 service, which is for the benefit of everyone
21 in the Northern Isles because they get the
22 benefit of these discounted fares.

23 LORD ERICHT: So to get the discount there
24 are two significant conditions. One is that
25 you must be resident on an island.

1 MR LINDSAY: Yes.

2 LORD ERICHT: And the other is that you
3 must make 50 trips a year now.

4 MR LINDSAY: The 50 trips point I am not
5 sure about. It may be Mr Neil can shed more
6 light on it.

7 LORD ERICHT: Right.

8 MR LINDSAY: Because the most up-to-
9 date information we have got is the letter of
10 25 February of 2019, where there is no
11 reference to 50 trips. There may have been
12 such a requirement at a much, much earlier
13 point in time and if the tribunal looks at
14 Production 116 at p.47----

15 LORD ERICHT: If you just bear with me,
16 because I have to-- do you have a tab for
17 that?

18 MR ANDERSON(?): It's just two pages
19 back.

20 LORD ERICHT: This is tab -- what tab are
21 we on, Mr Anderson?

22 MR ANDERSON: Tab 5.

23 MR LINDSAY: Yes. It's Production 116
24 and I think it's at p.274, using the bundle
25 page in the bottom right hand corner.

1 LORD ERICHT: Thank you. (Pause)
2 Sorry. We are having difficulty finding this.
3 I'm sure it's our fault.
4 MR ANDERSON: Production 116 is p.274.
5 LORD ERICHT: I've just had a page
6 handed up to me from the referender, so I
7 think we will just look at this.
8 MR ANDERSON: It was the previous page
9 on tab 5.
10 LORD ERICHT: Thank you.
11 MR LINDSAY: So this should be a redacted
12 letter from Mr Sawkins, the Ferry Services
13 Manager, to Mr Gray dated 13 April 2007. If
14 the tribunal looks at "General Criteria" the
15 fourth bullet point is "prove that a minimum
16 of 50 journeys will be made each year". It is
17 certainly my understanding and instructions
18 that that was a requirement back in 2007,
19 however, it ceased to be a requirement and the
20 purpose behind the letter of 25 February
21 2019 was to clarify what the current criteria
22 were. I've had an opportunity to discuss
23 matters briefly with Mr Neil who, of course,
24 is the current operator, and his understanding
25 is the same as mine, there is no requirement

1 to make a minimum of 50 round trips each
2 year. It's not something that's been brought
3 to his attention, he hasn't been asked to
4 vouch for it and he gets the island discount
5 simply by being registered on the island of
6 Sanday.

7 LORD ERICHT: I mean, this letter, if I have
8 understood it correctly, this letter number 49,
9 25 February, is from Orkney Ferries; is that
10 your clients?

11 MR LINDSAY: Yes.

12 LORD ERICHT: The second defender?

13 MR LINDSAY: Yes.

14 LORD ERICHT: Yes. So I wasn't quite
15 sure why you had to find out from Mr Neil
16 rather than from your own client.

17 MR LINDSAY: No, no, no, I wasn't. I was
18 just confirming with him that my instructions
19 were --

20 LORD ERICHT: Were correct.

21 MR LINDSAY: -- accurate.

22 LORD ERICHT: Good. Thank you very
23 much. I'm clear on that now.

24 MR LINDSAY: Yes. So if there is anything
25 in the discounted fares it's requiring someone

1 to be registered on the island that they're
2 providing the service to. Now, that may well
3 be a complaint if you were someone new
4 entering to the market that was wanting to be,
5 you know, based in Kirkwall or on mainland
6 Scotland in Scrabster or -- sorry, Scrabster or
7 Gill's Bay or wherever, but it's not a
8 complaint that this particular pursuer can
9 make who's got no intention of entering the
10 market as a competitor. So, you know,
11 returning to the whole issue of, you know, a
12 competitor, the pursuer using the competitor,
13 the community shop, if we return to the
14 witness statement, Document 14 in the
15 bundle, and go to page 739, looking at page
16 739 I think I got as far as paragraph 6,
17 "When we started using a competitor, the
18 community shop, for smaller deliveries they
19 abused their unique access rights to the Outer
20 Isles Ferry Depot to misappropriate and
21 destroy those goods and wilfully damage the
22 business of that competitor." Then we've got
23 examples of what happened. So, the
24 allegation isn't that there was a monopoly,
25 the allegation isn't that only Sinclairs have

1 access to the depot; the allegation is one of
2 criminality on the part of the then operators
3 of Sinclairs in effectively stealing property
4 from the depot. The first and second
5 defenders have no liability for that
6 whatsoever. The use of the competitor,
7 there's a little bit more detail on page 770.
8 Looking at page 770, this is under heading
9 13, "Misappropriation of 60 sanding belts for
10 electric floor-sander anarassment. In January
11 2019, our builders were up from Edinburgh.
12 One of the jobs they had to do was sand the
13 floors of our house. By this stage we'd had
14 enough of Sinclair Haulage's abuse of
15 deliveries entrusted to them, so we looked
16 around for an alternative courier and were
17 told that the community-owned shop in
18 Sanday, the Sanday Community Shop, had
19 two small vans and could transport smaller
20 items from Kirkwall to Sanday for us. They
21 were unable to deliver any of the larger items
22 we required, but at least this was one way of
23 avoiding some of our goods falling into the
24 hands of Sinclair Haulage. So we
25 determined to use the Sandy Community

1 Shop for as many deliveries as we could.
2 When the directors of Sinclair Haulage found
3 out that we were using the Sanday
4 Community Shop they became even more
5 hostile towards us and stepped up their
6 campaign of defamation, harassment and
7 intimidation, abusing their monopoly to do
8 so. When our builders were running low on
9 sanding belts we ordered 60 more from Mr
10 MacGregor, Industrial Supplies in Kirkwall.
11 That was on Thursday, 31 January 2019.
12 Evidence of that can be found in Appendix
13 50. The following morning MacGregors
14 marked the sandpaper for the attention of
15 Sanday Community Shop and dropped it off
16 at the Outer Isles Freight Centre for the
17 Sanday Community Shop to collect and
18 deliver to us later that day.” Then we’ve got
19 the story that when the Sanday Community
20 Shop’s driver went to collect the sanding
21 belts they’d gone. So, the pursuer making
22 clear there is a competitor, they use the
23 competitor and the competitor’s got access to
24 and use of the depot. Of course, it’s the
25 Sinclairs that have the complaint about that,

1 because the tribunal will have seen from the
2 terms of their defence the Sinclairs say,
3 “Look, we are licensed, we are insured, we
4 have to meet all of these really onerous
5 requirements, the community shop doesn’t
6 have to do any of that. We are at a
7 disadvantage.” So if there is a problem with
8 any of this it’s a problem that hits home with
9 Sinclairs, not the pursuer.

10 LORD ERICHT: Would that be an
11 appropriate time to have a break, Mr
12 Lindsay? Or do you wish to complete a point
13 first?

14 MR LINDSAY: I’m happy to break. I’ll
15 probably just be another 10/15 minutes.

16 LORD ERICHT: Well, I think we’ll have a
17 break. It’s really for the benefit of the
18 transcriber, because it’s quite a concentrated
19 job. Thank you.

20 (11.49)

21 (A short adjournment)

22 (12.07)

23 LORD ERICHT: Yes, Mr Lindsay.

24 MR LINDSAY: Thank you, my Lord.

25 Before the break I was just dealing with the

1 first reason why the competition law
2 arguments are immaterial and not engaged,
3 and the first is that there is no monopoly on
4 the pursuers' own factual account, there is no
5 monopoly. There is a competing service
6 provided by the community shop, and there
7 is no monopoly on the use of the depot
8 because the community shop uses the depot
9 as well. So the competition law argument
10 really fails at the outset because the pursuer
11 is not claiming there is a monopoly.

12 The second reason why the competition law
13 arguments are immaterial is there is no causal
14 connection between the alleged breaches of
15 competition law and what the pursuer is
16 complaining of. The pursuer is complaining
17 "I have to sell my property in Sanday earlier
18 than I anticipated at a loss because I am
19 being persecuted by the Sinclairs who are
20 defaming me, intimidating me, stealing my
21 property, damaging my property, trespassing,
22 and so on and so forth, and it is because of
23 the alleged intolerable conduct of the
24 Sinclairs, that it is causing the Murray family
25 to sell up. There is no suggestion that it

1 would not be selling up if they were another
2 haulier because there is another haulier
3 supplying a delivery service at the moment,
4 the community shop, which Mr Murray has
5 used for a number of years, and persecution,
6 rather than stopping, got even worse because
7 they were using the competitor; has not me,
8 that is what the pursuers say. The suggestion
9 that they would not have to sell up if they
10 were a competitor is not made out. There is a
11 competitor, the competitor was used by Mr
12 Murray, and the persecution got worse rather
13 than better because he had the temerity to use
14 the competitor. There simply is no causal
15 connection between the loss and damage that
16 the pursuer is seeking to recover, and the
17 alleged breaches of the competition law.
18 The third reason why the competition law
19 arguments are completely immaterial is that
20 the measure of loss is completely irrelevant,
21 and there is absolutely no point in spending a
22 lot of time and money looking at the alleged
23 breaches of competition law if the end point
24 that we are going to get to, the damages, is
25 completely irrelevant, and it is the measure

1 of loss that is irrelevant.
2 What the pursuer is seeking to recover from
3 the first and second defendants is the
4 difference between what he has spent on his
5 property and what he thinks he can sell it for.
6 There will always be a shortfall, you can
7 spend over £700,000 on a property and
8 expect to make an instant profit, so what
9 appears to be being complained of is what
10 would have been a paper loss, it is actually
11 going to be crystallised into actual loss
12 because he has to sell up at this point in time.
13 Why does he have to sell up at this point in
14 time? Because of the alleged persecution by
15 the Sinclairs. Nothing to do with the breach
16 of competition law. The only possible
17 relevant measure of loss or damage would be
18 to carry out the required before and after
19 analysis of: what are the costs that have been
20 incurred in the current circumstances, and
21 what costs, if any, would have been incurred,
22 but for the cartel and but for the discounted
23 ferry fare and fares, what is the difference
24 between the two? Have there been increased
25 costs as a result of the structure? Have there

1 been delays that caused other consequential
2 losses? That is not the approach that the
3 pursuer adopts. It is a diminution in value, or
4 just the difference between outlays and sale
5 price, they are completely divorced from the
6 breaches of competition law, particularly the
7 competition law breaches that the first and
8 second defenders could have any liability for.
9 The abuse of dominant market position is
10 directed only against the third defender and,
11 taking the pursuer's case at its highest, the
12 criminal conduct that is complained of could
13 be viewed as an abuse of a dominant market
14 position to a certain extent, but that is just
15 directed against the third defenders.
16 What is directed against the first and second
17 defenders is the cartel secret agreement, and
18 the approach that has been adopted of simply
19 looking at the difference between outlays and
20 market value that bears no relationship at all
21 to any losses that could be properly
22 recovered for some sort of unlawful cartel.
23 If one applies the test that has to be applied at
24 this stage of strike out: is there a realistic
25 prospect of the pursuer recovering from the

1 first and second defenders a sum of
2 damages? The precise sum is £569,729.42.
3 Is there any realistic prospect of the pursuer
4 recovering that sum of money from the first
5 and second defenders on the basis of a
6 measure of loss that looks at the difference
7 between outlay and estimated sale price? I
8 would submit is clearly no. There is not even
9 a fanciful prospect of any sum on that basis
10 being awarded by this tribunal.
11 If the damages are wholly irrelevant, despite
12 being given an opportunity to provide a
13 further specification, and to put their house in
14 order, if the measure of loss is still wholly
15 irrelevant, then this application should be
16 struck out at this point in time. That is why
17 the first and second defenders respectfully
18 submit that the test for striking out the
19 application is satisfied, that if the pursuer's
20 factual assertions are taken pro veritate, and
21 not even asking the court to carry out a
22 criminally fact finding exercise, but consider
23 inherent probabilities, internal consistencies
24 and so on and so forth, if everything that the
25 pursuer says is taken pro veritate, it is a

1 neighbour dispute between the Murrays and
2 the Sinclairs; their case is they have been
3 persecuted, defamed, been the subject of
4 criminal acts by the Sinclairs, which has
5 driven them from the island of Sanday.
6 Whether any of that is true or not is not a
7 matter for this tribunal. It is for the normal
8 civil courts, whether there be a remedy in
9 damages for any criminal acts. That there
10 simply is not monopoly. There is a
11 competitor, the community shop, which is
12 used, there is no monopoly of an access to
13 the depot, the community shop uses the
14 depot. The 50 round trips are no longer a
15 requirement. There simply is no causal
16 connection between the abstract discussion of
17 potential competition law issues and what
18 these pursuers are actually complaining of,
19 and the measure of loss is wholly irrelevant,
20 which is why there is no realistic prospect of
21 success, and why the strike out motion is
22 made and insisted upon. Those are the
23 submissions for the first and second
24 defenders.
25 Unless I can give further assistance to the

1 tribunal.

2 LORD ERICHT: Thank you, Mr Lindsay. I
3 do not have any questions for you. I am
4 going to ask each of my colleagues in return.

5 MR ANDERSON: I am obliged, my Lord. I
6 just have one matter for you, please, Mr
7 Lindsay, and it is this, by reference to the
8 production 117, which you refer to, which is
9 page 204, that is a letter from Orkney Ferries
10 to the Council on 25 February 2019, which
11 sets out the criteria, and, in particular,
12 towards the foot of that page, the isles' based
13 discount criteria, which says: "The haulier
14 must be resident on the island to qualify for
15 full haulier discount rate." Is that not at least
16 potentially something which could breach the
17 Chapter 1 test, in that it is, using the words of
18 Section 2, "could be an agreement between
19 undertakings which may affect trade and
20 have, as its effect", not necessarily its object,
21 but its effect, "the restriction or distortion of
22 competition."?"

23 MR LINDSAY: In the abstract, the answer
24 to Mr Anderson's question is clearly yes, but
25 the abstract would have to involve some

1 causal connection, some link between what
2 has been complained of, the loss. Where it
3 could potentially raise competition law issues
4 would be a new entrant coming into the
5 market saying "I want to compete, but I do
6 not want to be based in Sanday, I want to be
7 based in --

8 MR ANDERSON: Yes -- Kirkwall.

9 MR LINDSAY: -- Kirkwall; that is unfair",
10 so that theoretical new entrant would, at the
11 very least, have a stateable argument to
12 make. Why it is all just in the abstract and
13 the ether here is the pursuer is not potentially
14 a new entrant, he does not want to compete,
15 so the system of subsidies, it is there for his
16 benefit because this 50 per cent discount, if
17 you get the island rate; so that is all there for
18 the benefit of the islanders. What he is
19 complaining of is not that he wants to run a
20 competing business, he is complaining he has
21 been the subject of criminal conduct by the
22 Sinclairs, which has driven him from the
23 island.
24 There is no suggestion that that criminal
25 conduct would not have happened if there

1 had not been any discount paid to the
2 Sinclairs. Take away the discount, the
3 Sinclairs have to pay the full amount. Is it
4 seriously suggested that if the Sinclairs had
5 to pay even more on the ferry, they would
6 have desisted from their criminal conduct
7 and campaign of persecution and
8 defamation? Yes, in theory, in abstract one
9 could construct a relevant case for some new
10 entrant, but if we focus on what the pursuer
11 is complaining of, if there was no discount,
12 then the persecution would still have
13 happened, and the persecution still happened
14 when he used a competitor. Not only did it
15 still happen, the pursuer claims it got worse
16 because he had the temerity to use the
17 competitor. The competition and the
18 subsidy, on the pursuer's only account of
19 events, have got nothing to do with the
20 persecution, which is causing him to sell the
21 property.

22 MR ANDERSON: Yes, I follow your broad,
23 and at least, two-pronged attack, on these
24 issues of causation, but just reducing this to
25 its basic, it would seem that what you have

1 just given me an answer is, at least
2 potentially an acceptance that the agreement
3 is as described in that letter could be
4 prohibited under Section 2.

5 MR LINDSAY: A stateable argument by a
6 new entrant.

7 MR ANDERSON: Does it need to be a new
8 entrant because Section 2 do just talk about
9 such an agreement being prohibited, it does
10 not necessarily have to be at the instance of
11 some intending competitor; does it?

12 MR LINDSAY: The pursuer would have to
13 have title and interest.

14 MR ANDERSON: His title and interest, I
15 am accepting what Mr Murray may say, but
16 title and interest would appear to be that
17 losses, which I know you challenge by
18 reasons of causation, which I understand,
19 arose because of the existence of was a
20 prohibited agreement, and so he has title and
21 interest because he says he has sustained a
22 loss, even though he was never intending to
23 be another competitor.

24 MR LINDSAY: The cartel I think just
25 relates to the operation of the depot, and the

1 discounted fare seems to be distinct from
2 that, not wholly detached, but, as I read it, it
3 seems to float around as two separate
4 arguments.

5 MR ANDERSON: Yes, I follow that; I think
6 I agree with that. But I think my point to you
7 I hope is a fairly simple one, which is those
8 losses that, simply on the face of it at least,
9 the agreement, which is summarised in
10 production would seem to be one that is
11 prohibited, and it may or may not give rise to
12 losses from someone other than an intending
13 competitor.

14 MR LINDSAY: Yes. I do not accept that
15 that discount is prohibited by anything in the
16 1998 Act. The only concession I would
17 make is that I think it would be possible for
18 someone who is title and interest to construct
19 a stateable case. That is all I am conceding.

20 MR ANDERSON: All right.

21 MR LINDSAY: Orkney Council are not
22 unique in providing an element of public
23 money to reduce fares, but if one thinks of
24 the Caledonian MacBrayne network, the road
25 transport equivalent, which is meant to

1 reduce the cost of the ferry to the same cost
2 as if you could drive there in fuel costs, and
3 also to get to Orkney there are competing
4 ferries, NorthLink and Pentland Ferries, one
5 gets public subsidy and one does not. Merely
6 because there is an element of public money,
7 which only certain people can qualify for,
8 does not automatically resolve it in any
9 breach of competition law.

10 MR ANDERSON: Thank you for your
11 answer.

12 LORD ERICHT: Thank you. Lord Young,
13 do you have anything to ask?

14 LORD YOUNG: Mr Lindsay, it is really in
15 relation to the third part of your submissions
16 and the question of measure of loss being
17 irrelevant and the way you described it was
18 that the acquisition costs and the outlays for
19 the house were divorced from the breaches. I
20 am just wondering what is the legal analysis
21 for that that you would rely upon? These are
22 breach of statutory duty cases. Are you
23 saying that this is an account of loss that falls
24 outwith the scope of that statutory duty, or is
25 it a remoteness argument; or how would you

1 say that there is that divorced element?
2 MR LINDSAY: It is not a loss that is caused
3 by the alleged breaches of competition law.
4 As I understand it, and I am willing to be
5 corrected, the normal rules and causation
6 apply. If you identify a breach of
7 competition law, you then need to identify
8 that the causal connection with the loss that
9 you have suffered. Here we have the pursuer
10 saying “I bought it for X amount”, he is not
11 saying “as a result of competition law I got it
12 cheaper or more expensive”, it is just “that is
13 what I paid”. He has also averred how much
14 he has spent on renovating the property.
15 Again we do not have any averments or
16 anything in the witness statements saying
17 “but for the breach of competition law, I
18 could have done it for half that price, or
19 two-thirds of that price”, or, “thanks to the
20 island’s discount, I saved a bit of money”.
21 The two sums, the purchase price and the
22 expenditure seem to be completely
23 independent of any breach of competition
24 law. So these are outlays that would have
25 been incurred in any event. Because they

1 would have been incurred in any event, the
2 difference between outlays and estimated
3 sale price is a loss that the pursue would have
4 incurred in any event regardless of whether
5 there is any breach of competition law. All
6 that he is complaining about is he is having
7 to sell at this point in time, crystallising his
8 loss into actual loss, rather than just a paper
9 loss. Why is he crystallising his loss at this
10 point in time? The criminal conduct of the
11 Sinclairs? Would that criminal conduct not
12 have happened if no discount had been paid?
13 Clearly not. Would it still have happened if
14 he had been able to use another haulier?
15 Well, he did use another haulier, and that
16 made things worse, rather than better. This
17 loss that would have occurred in any event is
18 completely independent from the alleged
19 criminality. The point that a paper loss may
20 be crystallised into an actual loss, the reason
21 for that crystallisation has nothing to do with
22 the breach of competition law; it is solely to
23 do with the alleged criminality on the part of
24 the Sinclairs.
25 LORD YOUNG: I think I understand. It is

1 essentially factual causation that is really
2 central to your submission on that. Can I
3 double check though, if Mr Murray was to go
4 away, and, for the sake of argument, reframe
5 this, and was to say “this house that I have
6 bought and developed, because of excessive
7 haulage charges that I have paid to the
8 Sinclairs, because of a breach of competition
9 rules, it has cost me an extra £50,000 to build
10 my house, to renovate my house”, would that
11 be a relevant claim?

12 MR LINDSAY: Not against the first and
13 second defenders. It would only be a
14 relevant claim against the third defender
15 because there the allegation would be an
16 abuse of a dominant market position. It is
17 the abuse that is unlawful and would sound
18 in damages. On the hypothesis that Lord
19 Young has put for me for comment, my
20 answer is: it would be wholly irrelevant
21 against the first and second defenders, and
22 only potentially relevant against the third
23 defender. If the pursuer were to go away and
24 reformulate it in those terms, then the strike
25 out motion would be renewed.

1 LORD YOUNG: Thank you very much.

2 LORD ERICHT: Thank you, Mr Lindsay.

3 Mr Neil, I will now invite you to address us.

4 I might ask Mr Lindsay just to move the

5 microphone. A technical matter, what I am

6 interested to know at the moment is: do you

7 adopt Mr Lindsay's submissions?

8 MR NEIL: Yes, I do, my Lord.

9 LORD ERICHT: Thank you. Please

10 proceed to address us.

11 MR NEIL: My Lord, I do not dispute

12 anything that Mr Lindsay has had to say. I

13 do believe that the motion put by the pursuer

14 is out of scope of this tribunal. There is no

15 monopoly, as Mr Lindsay has already

16 outlined. There are criteria in place for both

17 hauliers to receive a discounted fare on the

18 ferry, and to use the isle's freight centre. I

19 just clarify those, just for the avoidance of

20 any doubt. Hauliers to receive 50 per cent

21 discount on the ferry, they have to have a

22 registered address on the island that they are

23 serving, or be resident on the island, and they

24 need to be registered as an operator with

25 VOSA, and meet all the financial criteria that

1 is associated with that. There are quite strict
2 financial tests that are applied by VOSA to
3 ensure they can operate perfectly legally,
4 smaller operators under three and a half
5 tonnes do not have to do that, they do not
6 have to register. My understanding is to
7 receive the discount on the ferry, you have to
8 be a registered haulier with VOSA.

9 There have, in the past, been more than one
10 registered haulier in Sanday. Up until 2007,
11 Michael Muir, a sole trader, was another
12 registered haulier in Sanday, and received the
13 same discount as Sinclair Haulage at the
14 same time as Sinclair Haulage did, and had
15 access to the isle's depot.

16 For personal reasons, Michael Muir decided
17 to cease trading and sold his business assets
18 to Sinclair Haulage in 2007 and moved to
19 Kirkwall. Since then there have been no
20 other hauliers operating in Sanday.

21 The separate issue of overcharging, having
22 taken over Sinclair Haulage this year, and
23 having done due diligence in the build up to
24 purchasing Sinclair Haulage, I could see no
25 evidence of overcharging, the rates that were

1 applied to Mr Murray were the same rates
2 that were applied to any customer in Sanday,
3 essentially there is a standard rate schedule
4 that is applied. There are 1 or 2 large
5 customers that achieve maybe a discounted
6 rate for volume, such as on parcel volume
7 and things like that, but, by and large, most
8 customers are charged the same rate
9 schedule, and Mr Murray was charged the
10 same rate schedule.

11 I have seen evidence where Mr Murray has
12 maybe been double charged for goods going
13 out to Sanday, and where that has been
14 identified, credit has been raised, as is normal
15 practice.

16 Apologies for my notes not being set out in a
17 legal framework. Really to summary, I do
18 not much have to add, there is no monopoly
19 and no secret agreement. Sinclair Haulage
20 meets the criteria applied by Orkney Ferries.
21 That criteria is no different to the western
22 isles, where western isles' based haulier,
23 such as DR Macleod in Stornoway, they
24 receive a discount with CalMac Ferries, that
25 a mainland based, such as Jamie T Mainlands

1 Distribution, could not receive, and I know
2 that from first-hand experience. It is like for
3 like. It is to preserve businesses on these
4 remote communities. Likewise, it prevented
5 Jamie T Distribution from going in and
6 providing haulage services direct out to
7 Sanday, and wiping out the local based
8 haulier, which would then have an impact on
9 employment on the island, and potentially all
10 the prices for goods and services out to the
11 outer isles.

12 The alleged behaviours of Mr and Mrs
13 Sinclair, I am not able to defend or make
14 comment on those. They are individual to
15 Mr and Mrs Sinclair, I do not believe apply
16 to Sinclair Haulage itself. I may be corrected
17 on that, but, from my understanding, having
18 recently taken over the business, I cannot
19 vouch for those behaviours or make an
20 explanation for those behaviours.

21 That is really all I have to add at this stage,
22 my Lord.

23 LORD ERICHT: Thank you very much, Mr
24 Neil. I do not have any questions for you. I
25 am going to ask Mr Anderson. He does not

1 have any. Lord Young?

2 LORD YOUNG: No, I do not.

3 MR NEIL: Thank you, my Lord.

4 LORD ERICHT: Yes. Before you begin,
5 can we just do a sound check, just to check
6 that your microphone is working all right.

7 MR MURRAY: Hopefully that is working,
8 Lord Young.

9 LORD ERICHT: Thank you. Traditionally
10 you stand up to speak in court, but if there is
11 an issue, and you prefer to sit.

12 MR MURRAY: I will stretch my legs. I
13 would like to go on to some prepared notes,
14 but, before I do, I would like to address a
15 point that Mr Anderson brought up, which I
16 think is absolutely critical. Mr Anderson
17 commented on the fact that, in order to get
18 discounted fares, one of the conditions was
19 you had to be island based -- that is true -- as
20 are the other ones, and we will provide
21 evidence on the 50 return journeys also being
22 required.

23 The Competition Act and Chapter 1
24 prohibition is very straightforward. It is very
25 simple. If I could read it: "Subject to section

1 3, agreements between undertakings,
2 decisions by associations of undertakings or
3 concerted practices which— (a) may affect
4 trade within the United Kingdom”, which it
5 clearly does, “have as their object or effect
6 the prevention, restriction or distortion of
7 competition within the [UK]” is illegal.
8 Clearly if you have a situation where a
9 haulier based on an island gets a 50 per cent
10 discounted fare and one outwith the island
11 does not, that distorts competition. It is very
12 simple. It is not complicated. If you are a
13 businessman, you understand that. If you
14 have two companies competing with each
15 other, one has a cost base that is significantly
16 lower than the other, then it is bound to fail
17 because the company with the competitive
18 advantage has got a higher profit margin; it
19 simply erodes its price to force the
20 competitor out of business. I would just like
21 to mention that point because Mr Anderson
22 raised it, and I thought it was a very
23 important point in respect of a legislation that
24 is considering.
25 If I may, I would like to go on to my

1 prepared notes. As the tribunal is aware, I
2 respect the pursuer. I have set out why I
3 believe the case should not be struck out and
4 summary judgment given in my submission
5 of 25 April. I hope that everybody on the
6 bench received that.

7 I would ask the bench to consider it, and the
8 arguments contained within it. It is my
9 primary submission for this hearing.

10 As regards the first and second defenders'
11 application for the case to be struck out, my
12 submission of 25 April sets out why I believe
13 the application for strike out should be
14 refused. In addition, I would like to make the
15 following points. I would also like to make
16 an observation because I did not expect
17 today's hearing to be so convoluted, and to
18 consider what I regard as things I would have
19 thought would have been dealt with at a
20 hearing. Rule 41 is intrinsically very simple.
21 It is not complicated. Under Competition
22 Appeals Tribunal Rule 41(1): "The Tribunal
23 may, of its own initiative or on the
24 application of a party, after giving the
25 Parties an opportunity to be heard, strike out

1 in whole or in part a claim at any stage of the
2 proceedings if”, and the relevant bit here I
3 think, “it considers there are no reasonable
4 grounds for making the claim” -- “no
5 reasonable grounds for making the claim”.

6 The test applicable to Rule 41(b) is, on the
7 face of it, straightforward. There either are
8 reasonable grounds for making the claim, or
9 there are not. If there are reasonable
10 grounds, then the tribunal may not strike it
11 out.

12 I believe there are reasonable grounds for
13 making the claim. Our case is a good one, it
14 is sound in law, and supported by a robust
15 body of evidence. From an economic
16 perspective, it is rock solid. It is well
17 particularised and clearly set out. It is
18 substantive and has a realistic prospect of
19 success.

20 We have explained in our pleadings, which
21 included a 115-page witness statement and
22 115 appendices of supporting factual
23 evidence, the relevant facts that are the
24 foundation of our claim, the way in which the
25 defenders are alleged to have infringed the

1 Chapter 1 and Chapter 2 prohibitions that are
2 we are relying upon, and the way in which
3 those infringements have resulted in the loss
4 that we are now seeking to recover from
5 them. We have also quantified that loss. We
6 continue to build our case, and gather in
7 more evidence in support of it.

8 The first and second defenders are referred to
9 the judgment in the case of Forest Fresh
10 Foods Limited v Coca Cola European
11 Partners Great Britain Limited. In
12 paragraph 30 of that judgment, the tribunal
13 set out what it believed to be the necessary
14 criteria for a case to be properly
15 particularised.

16 I believe we have met those criteria. Any
17 diligent person reading our pleadings ought
18 to have a clear understanding of what our
19 case is and be able to build a defence and
20 prepare for trial. I think the concern in the
21 case of Coca Cola was that the pleadings
22 were so poor that the defendants could not
23 understand what it was and prepare for trial.

24 In my opinion, there are reasonable grounds
25 for making the claim. Rule 41(1)(b) is not

1 engaged. The first and second defenders'
2 application for the case to be struck out
3 should therefore be refused.

4 As regards the first and second defenders'
5 application for summary judgment, my
6 submission of 25 April sets out why I believe
7 the first and second defenders' application
8 for summary judgment should also be
9 refused.

10 In addition to the reasons given in that, I
11 would make the following points. In terms
12 of Rule 43, only subclauses (1)(a)(i) and (b)
13 are relevant in this instance. Consequently,
14 the tribunal may only give summary
15 judgment if it considers the claimant has no
16 real prospect of succeeding on the claim, and
17 (b) there is no other compelling reason why
18 the case should be disposed of at a
19 substantive hearing.

20 In terms of Rule 43(1)(a)(i), our pleadings
21 and submissions will have given the bench a
22 good feel for the substance of our case, and
23 allowed it to form an opinion on its prospects
24 of success. I believe, and I hope the tribunal
25 will agree, our claim has a real prospect of

1 success. It is a good case, sound in law, well
2 articulated and supported by a robust body of
3 evidence. We are continuing to build it.
4 For the tribunal to give summary judgment, it
5 would have first have to conclude the case
6 has no real prospect of succeeding. I do not
7 believe that can be said of it.
8 The Competition Act exists, amongst other
9 things, to allow parties who have suffered a
10 loss, because of alleged breaches of it, to
11 seek remedy in the courts. The right to bring
12 a complaint to the courts is an important
13 aspect of our Society and a fundamental right
14 that has existed for centuries.
15 To prevent complainants from exercising that
16 right could be to defeat Parliament's
17 intentions and unreasonable. It should,
18 therefore, in my view, only be countenanced
19 in exceptional circumstances where genuine
20 and compelling grounds for doing so. I do
21 not believe this is one of them.
22 In terms of Rule 43(1)(b), there is a
23 compelling reason why the case should be
24 disposed of at a substantive hearing, it is
25 because it is in the public interest for the case

1 to be heard. Significant numbers of
2 businesses and people have suffered loss
3 because of the defenders' actions, and large
4 amounts of taxpayers' money appears to
5 have been improperly diverted to enrich a
6 small group of private businessmen. These
7 matters have been concealed from public
8 scrutiny and need to see the light of day.
9 They need to be examined in court. It is in
10 the public interest that they are, and the
11 defenders are found to have infringed the
12 law, that affected parties can bring follow-on
13 actions if they so desire.
14 For the reasons set out in my submission of
15 25 April and those I have just mentioned, I
16 believe the first and second defenders'
17 application for summary judgment should be
18 refused.
19 I would, in addition, like to address one or
20 two of the points brought up by Mr Lindsay.
21 The implication given by Mr Lindsay that the
22 only people who can bring an action under
23 the Competition Act are competitors. That is
24 not true. Consumers are entitled to bring
25 actions and I suspect that many of the actions

1 brought under the Competition Act are
2 brought either on behalf of consumers - for
3 example, (inaudible) against some of the
4 credit card companies or others - but they are
5 entitled to bring actions. We are consumers
6 here. We were affected by breaches of the
7 Act.

8 We had set out our case as to why the Act
9 was breached. Chapter I and Chapter II
10 prohibitions were breached. Probably
11 (inaudible) and so many times we have
12 written this but it is intrinsically simple, I
13 think, the argument, and I hope it will be well
14 understood by the bench.

15 The argument was also cited - or was said
16 this was a neighbourhood dispute, or
17 neighbourly dispute. It is not. We had no
18 dealings with the Sinclairs. We kept away
19 from them. But leaving that aside, the other
20 contention appears to be that if you have
21 remedy under the criminal law, or some other
22 law, delict or otherwise, then somehow it is
23 wrong to bring an action under the
24 Competition Act. Well, that is palpably
25 wrong. There is no mutual exclusion. I

1 suspect that many actions brought under the
2 Competition Act result in, or identify
3 criminal acts by some of the people who are
4 seen to have perpetrated it. So, the idea that
5 somehow they are mutually exclusive, I think
6 is wrong and I would argue against that.
7 There is another point made that, frankly, I
8 found surprising. It was this idea that
9 somehow it is reasonable for a party - first,
10 second defenders - to carve up a market. It is
11 simply prohibited. I mean, I gave an
12 example in the submission I made on 25
13 April regarding law firms in Edinburgh,
14 because I do think sometimes it is helpful to
15 see things in another context. It just makes
16 them a lot clearer. The example I gave was a
17 direct analogy. If you happen to be a haulier
18 up there and were excluded from that market,
19 as many were, then it is very clear these
20 arrangements are anti competitive. When
21 you see them in the context of the example in
22 Edinburgh, if Edinburgh City Council gave,
23 as I said, set up a centre here and said all
24 legal claims must be brought to this centre,
25 no-one other than one legal firm has a right

1 to take claims from that and handle them.
2 That would be palpably obvious that that is
3 anti competitive. The whole point of the
4 Competition Act is to create a level playing
5 field. It is to stop favouritism. It is to stop
6 practices that result, as the Act says, in
7 distortion of competition.

8 LORD ERICHT: It is a very interesting
9 analogy. What we have heard today is
10 perhaps -- does not fit exactly with the
11 analogy, and your analogy was if there was
12 only one supplier was able to do the law
13 work which was funnelled into the equivalent
14 of the depot. What we have heard in
15 submissions today is that there were no
16 restriction as to who used the depot, so it is
17 not the case they were all funnelled to one
18 person.

19 MR MURRAY: Well, obviously I disagree
20 with that and I would refer the panel to Dave
21 Neil's email of 7 February. His statement of
22 fact, as he put it, gives a very different
23 account of events that he now gives today as
24 a director of Sinclair Haulage, the third
25 defender. I would also point the panel to the

1 email from - and I am sorry, I forgot the
2 gentleman's name - from the other manager
3 of that centre who corroborated that
4 evidence. And as I said, we are continuing to
5 build our evidence, but we have evidence
6 from the two parties who have ran that centre
7 for the last 15 years that there were
8 restrictions. Only one party from each island
9 was -- sorry, one haulier was allowed to
10 remove goods from it and transport it to the
11 island. We know there is another email out
12 there, or we believe there is another email out
13 there that may corroborate that and we are
14 trying to get that at the moment. It
15 apparently has been lost or destroyed by the
16 first or second defenders. So, I believe that
17 there is evidence, very good evidenced - it is
18 contained in our pleadings - to support our
19 case.
20 So, that, essentially, is the points I would
21 make, my Lord, regarding this. As I say, my
22 statement of 25 April, I hope is helpful in
23 allowing the tribunal to consider these things,
24 and covers all of these aspects.
25 There were a great many things said today by

1 Mr Lindsay that I could comment on, but I
2 want to restrict my comments to the Rule 41
3 issue, summary judgment, rather than be
4 diverted, unless the tribunal would want me
5 to deal with other things - for example,
6 regarding the monopoly. Again, there is a
7 misrepresentation on the monopoly. It is
8 very simple. There is a monopoly on the
9 transportation of goods from - or there was -
10 from the Outer Isle freight centre to Orkney -
11 - Sanday. Nowhere else other than those one
12 preferred hauliers were allowed to transport
13 those goods. The idea that we could use a
14 competitor is simply not the case. When we
15 ordered something from John Lewis or
16 anybody else online, it went to that centre. It
17 ended up getting handling by Sinclair
18 Haulage. We could not elect to have
19 somebody else handle it because we were
20 given no choice. They had a monopoly. And
21 again, all of this is set out in the papers that I
22 have put to the court.
23 But intrinsically, all of these practices are
24 anti competitive. They are in breach of the
25 Act. We have set out at length why we

1 believe they are. The idea that, I suspect - if
2 I may, I am sorry, go back - that there are no
3 reasonable grounds for making the claim
4 could hold true in the light of all this
5 evidence, in the light of all these pleadings, I
6 do not think is tenable. I mean, there are, in
7 my opinion, clearly reasonable grounds for
8 making the claim. Had I not felt there were
9 reasonable grounds, I would not be here. But
10 as I said, we have pleaded our case. We
11 continue to build it. We have provided
12 evidence and the bench is well aware of what
13 that is and it is for it to decide this matter
14 now.

15 LORD ERICHT: Thank you very much, Mr
16 Murray. Well, we do have the benefit of
17 your written submissions and you witness
18 statement, etc., which very clearly set out
19 your case. There are some things I just want
20 to ask about to check I have got a proper
21 understanding, but as it is almost lunchtime, I
22 think we will break now and come back. But
23 I would just indicate to you what I think
24 might be helpful.

25 The first thing is that we heard a lot this

1 morning about the issue of causation - in
2 other words, did the alleged breach of
3 competition law actually cause the loss that
4 you are seeking. So, I would be interested to
5 have your response to that.

6 Another matter, just so I am absolutely clear,
7 is you have your Chapter I case - and, as I
8 understand it, the loss in relation to that is the
9 shortfall in the price of the house - and then
10 you have your Chapter II case and I
11 understand that the loss in relation to that is
12 the figure of about £800, or whatever it is.

13 Could you just - we can come back after
14 lunch. I am just raising these because I
15 might be wrong in that, which is why I felt
16 we should check that. What I would like to
17 know is just exactly who you seek to recover
18 these amounts of damages from - in other
19 words, is it all against the first, second and
20 third, or are there some of them you are just
21 seeking against the first and second and some
22 of them against the third?

23 And the other thing is, in relation to the
24 figure of £800, I am not quite sure how that
25 is made up. In your very thorough and very

1 clear and cogent witness statement, you have
2 a summary at the end of overcharging,
3 discrimination, defrauding, and it might be
4 helpful if we could go through that and put a
5 figure on what you are seeking in relation to
6 each of these, and also what particular
7 incidents you say applies to each of these in
8 terms of the actual money that you are
9 seeking.

10 MR MURRAY: Okay.

11 LORD ERICHT: Good. I do not know if
12 there are any - do the other members of the
13 panel have anything else that they might
14 want to give Mr Murray an indication of over
15 lunchtime that you will be asking about? If
16 not, we can ask any further questions.

17 No, nothing further at the moment.

18 MR MURRAY: Thank you.

19 LORD ERICHT: So, we will adjourn now
20 and we will resume at two o'clock.

21 (12.58)

22 (The short adjournment)

23 (13.59)

24 LORD ERICHT: Yes, Mr Murray, have you
25 had a chance to think about the things that I

1 mentioned before lunch?

2 MR MURRAY: Yes, I have, my Lord.

3 LORD ERICHT: Yes, if you would just like
4 to go ahead.

5 MR MURRAY: I can explain the causation.

6 LORD ERICHT: Yes.

7 MR MURRAY: When we bought the
8 property in Sanday, we soon found out
9 whenever we ordered -- anything we ordered
10 ended up in the hands of Sinclair Haulage
11 because they had the monopoly on the
12 transportation of goods from the Outer Isles
13 freight centre to us. So, everything that we
14 ordered ended up in their hands. So, that
15 permitted them to abuse that monopoly,
16 which they did, ruthlessly for years in many
17 ways, from defrauding us, from taking our
18 property, smashing it up, etc, etc. So, that
19 gave rise to the rule -- the Chapter II breach.
20 They had the dominant market position.
21 They had that monopoly, and they abused
22 that monopoly in the way set -- in the ways
23 set out in my pleadings.
24 The reason they had that monopoly was not
25 in a free, fair and competitive market. They

1 did not win it because they excelled or they
2 offered a better service than anybody else.
3 That monopoly was derived from the first
4 and second defenders' breaches of the
5 Chapter I prohibition. They, as I explained
6 in the submission of the 25th of this month,
7 they channelled all goods coming to Sanday
8 into the Outer Isles freight centre and they
9 only permitted Sinclair Haulage to remove
10 them. Now, in doing so, that was in breach
11 of the Chapter I prohibition. It restricted
12 competition. As I explained in my
13 submission, if you cannot enter a market, you
14 cannot compete. I mean, the end result of
15 those arrangements was that we had no
16 choice. We were left with no choice
17 whatsoever, and the same with everybody
18 else on Sanday.
19 So, any goods destined for us would end up
20 in the hands of Sinclair Haulage. Had it not
21 been for that breach of the Chapter I
22 arrangement - and, again, I explained in my
23 submission of 25 April how that is entirely
24 manufactured. I mean, it would be very
25 possible to remedy that by simply saying that

1 goods coming in to the Outer Isles freight
2 centre can be given to the haulier of your
3 choice. In other words, expand it to
4 competition; free competition. Give
5 consumers a choice. But it was not.
6 So, the causation was the breach of the
7 Chapter I prohibition resulted in these
8 monopolies. The market was concentrated in
9 one place, carved up and handed out to these
10 monopoly suppliers. That monopoly supplier
11 - to use the terminology of the Act - had a
12 dominant market position. A very dominant
13 market position. A complete dominant
14 market position, which they abused to do the
15 things that they did and are set out in my
16 witness statement and other pleadings.
17 So, the link is very straightforward. Sinclair
18 Haulage would never, ever have had the
19 monopoly if it had been down to the service
20 it delivered. It was appalling. I mean, if
21 there was a free and fair market, it would
22 have been out of business years ago. But the
23 reason that you ended up with this dreadful
24 situation, is because there was no
25 competition. People could not go to

1 somebody else. If you were in Edinburgh
2 and you are dissatisfied with your lawyer,
3 you just hire another lawyer. I mean, if you
4 have no choice, then you cannot.

5 So, the situation that we found ourselves in
6 was entirely because of these breaches of the
7 Chapter I and Chapter II prohibition. The
8 second one stems from the first one.

9 LORD ERICHT: Thank you. So, just so I
10 completely understand, how do you get from
11 there to the actual amount of money that you
12 are seeking in terms of damages?

13 MR MURRAY: Okay. Because of the
14 Sinclairs' abuse of the monopoly and the
15 defrauding us, harassing us, etc, etc, we were
16 forced to sell our property on the island, like
17 others before us. They cut off our supply to -
18 - we had one of their employees trespassing
19 on our land, using our land, and you have
20 read the pleadings. Our solicitors wrote to
21 them. Gave them a year's grace. "Stop
22 doing it. Get off our land." They refused.
23 They reappeared again. Refused. When we
24 contacted our solicitors again and said,
25 "Look, these guys are back. Can you please

1 do something about it”, Sinclairs cut off our
2 access to all haulage services. Now, we
3 could not carry on with the restoration of our
4 house. All of the stuff that we needed came
5 from them. All the bulk stuff we tried to get
6 Orkney Aggregates to deliver them. They
7 would not. Contractors from other islands
8 will not compete because they have non-
9 compete agreements. That is very obvious to
10 me as a businessman. So, it went to Sinclair
11 Haulage. The minute they cut off our access
12 to that, we could not finish off the restoration
13 of our house. And because we were - or we
14 had been - forced to sell it, that is likely to
15 result in us suffering a loss. Now, that loss is
16 directly attributable to those breaches of the
17 Competition Act and that is why we have
18 brought the action we have under the
19 Competition Act.

20 LORD ERICHT: Thank you very much for
21 that. And just so I am clear, you are suing
22 for damages for the loss on the house and
23 another figure of about £800. Are you trying
24 to recover, then, all of that from all the
25 defenders, or --

1 MR MURRAY: Jointly and severally.

2 LORD ERICHT: Yes.

3 MR MURRAY: For the simple reason, my
4 Lord, that it is so connected. As I say, I
5 believe that the first defenders ultimately -
6 and they may not be the bad guys in this in
7 the sense of the Sinclairs - but the Sinclairs
8 were -- what they did was only possible
9 because of their breaches of the Chapter I. If
10 they had not breached the Chapter I
11 prohibition, the Sinclairs would not have a
12 monopoly. We could have gone to
13 somebody else. We would have had choice.
14 But we had no choice.

15 LORD ERICHT: Thank you. And just on
16 the 800, do you - I could not find it. It might
17 just be my fault, but is there a breakdown of
18 how you calculate that 800?

19 MR MURRAY: Well, I spoke to one of our
20 accountants at lunchtime, and it is,
21 essentially, derived from - I am sorry -
22 appendices -- I am referring to appendices of
23 my witness statement.

24 LORD ERICHT: Yes.

25 MR MURRAY: 28, 4, 5, 6 to 10, 29, 11, 12,

1 30, 13 and 32. I am sure I could give you a
2 table showing it and it would make it a lot
3 easier for the bench to see, but that is what it
4 is derived from. I think the overcharging and
5 those - it may be mentioned in my witness
6 statement how it is constructed. I cannot
7 recollect.

8 LORD ERICHT: Thank you. And I think
9 that gives me enough to tie them together so
10 that I can just see exactly what your position
11 is. So I do not need to ask you for a table. I
12 will just look at these appendices which you
13 have indicated and work it out from that,
14 thank you.

15 MR MURRAY: Okay.

16 LORD ERICHT: I think that answers my
17 questions. I will ask Mr Anderson.

18 MR ANDERSON: Perhaps just two matters,
19 if I may, Mr Murray. Firstly, as I understand
20 matters, you have not yet sold the house, is
21 that right?

22 MR MURRAY: That is correct.

23 MR ANDERSON: Given that the Sinclairs
24 have now sold their business and they, as
25 individuals, no longer have the shareholding,

1 it would appear, and Mr Neil is here as a
2 representative, does that not change
3 everything so far as the need to sell is
4 concerned?

5 MR MURRAY: No, it does not, because -
6 why does it not? Because my wife will not
7 take our children up there. She will not go
8 up there. I mean, we were subjected to pretty
9 terrible things. People parking at the end of
10 your driveway watching you. We have got
11 an 8-year-old daughter and a 10-year-old
12 daughter. There is no police on that island. I
13 mean, we had a lot of people doing things
14 that have left her feeling so uncomfortable
15 and, frankly, myself as well, that we do not
16 want to live there. The Sinclairs still have a
17 vice-like grip on that island and there are
18 people there who do their bidding for them.
19 You will have seen the emails -- the text
20 messages that we got from complete
21 strangers, who we've never engaged in any
22 conversation. I mean, we received these
23 things. We had people park in our driveway.
24 Breaking into our car. Hiding things under
25 the seat, like some IRA bomber, you know.

1 MR ANDERSON: Just so we are clear, that
2 incident you are talking about, you say
3 people breaking into your car, are you talking
4 about the incident where there was a delivery
5 to you and the delivery people left the
6 package inside your car rather than taking it
7 back?

8 MR MURRAY: There was a second
9 occasion as well, my Lord.

10 MR ANDERSON: All right.

11 MR MURRAY: I was in the house at that
12 time. The lights were on; they knew we were
13 there. It is highly irregular, I put it to the
14 court, for somebody to enter your car and put
15 a package under the driver's seat when all
16 you need to do is knock at the door, like a
17 normal person, say "excuse me, sir, I have a
18 parcel for you". I mean it was done, seen in
19 the light of all these other things, to
20 intimidate us; and it did.

21 MR ANDERSON: Just following that
22 through, presumably there would now be
23 nothing to stop you having the remaining
24 works done that need to be done, and
25 materials delivered and so on; you are not

1 being prevented from doing that, are you?

2 MR MURRAY: To the extent we have no
3 dealings with Sinclair Haulage. They cut off
4 our services.

5 MR ANDERSON: That was when they were
6 under their previous ownership; they now
7 have new owners.

8 MR MURRAY: They have, and that is what
9 has resulted in us putting the business up for
10 sale -- the property up for sale.

11 MR ANDERSON: Yes, but you could now
12 have the remaining --

13 MR MURRAY: We are now --

14 MR ANDERSON: -- to finish the job, could
15 you not?

16 MR MURRAY: We are now trying to finish
17 the job to get it sold. It is made much more
18 difficult because of what is going on. The
19 reason we have to sell it is for the reason I set
20 out; my wife will not take our children there,
21 she does not want to go there, I do not want
22 to go there because of what we were put
23 through by the Sinclairs, Sinclair Haulage
24 exploiting their monopoly.

25 MR ANDERSON: Yes. Of course your

1 wife is not a pursuer in this case, nor are you.

2 MR MURRAY: That is true.

3 MR ANDERSON: Yes. I have one other

4 question for you, Mr Murray, and it is this:

5 your statement of case explains that very

6 large sums have been sent on Sunday to

7 improve the house you bought for £122,000.

8 MR MURRAY: Yes.

9 MR ANDERSON: That is not reflected in

10 what is said to be the valuation in its

11 condition, or, for that matter, I suppose, even

12 its finished condition. How can that be a loss

13 that is attributable to any action of the

14 defenders; this difference in value between

15 what you have spent and what the end

16 product is worth? That is not an unfamiliar

17 situation.

18 MR MURRAY: Yes, it was not a

19 commercial transaction like that. We had no

20 intention of selling our property.

21 MR ANDERSON: No, but what you would

22 then have had was a property that, had you

23 for reasons of necessity had to sell, would

24 always have been worth what the valuation

25 report says it is worth. It is not, as Mr

1 Lindsay would have put it, it is a paper loss,
2 it is not a real loss until it is crystallised.

3 MR MURRAY: I entirely agree, and that is
4 where we have framed our claim, so that, you
5 know, once the real loss is crystallised.

6 MR ANDERSON: It is not a real loss, is it?
7 Because it was never going to be worth more
8 than what is shown in the survey report.

9 MR MURRAY: We had no intention of
10 selling it.

11 MR ANDERSON: No, but if it had been
12 winding up your estate, for example, the
13 valuation that would have gone on it, the
14 value inherited by your beneficiaries would
15 have been the value that is expressed in the
16 survey report, is that not right?

17 MR MURRAY: If you are winding up an
18 estate, but this is a different set of
19 circumstances.

20 MR ANDERSON: What we are trying to get
21 at is the value, and the value to you may be
22 one thing, but it is the hard pounds and pence
23 value that is dealt with in litigation. Does it
24 not really mean that it was never worth more
25 than the valuation?

1 MR MURRAY: I see it in a different vein, if
2 I may. We spent nearly £1 million in that
3 house. We intended to stay in that house and
4 use it for years with our children there; we
5 had no intention of selling it. We were
6 forced to sell it. Had we never sold it, had
7 we never been subjected to all these things,
8 then it would have remained, as it were, on
9 our balance sheet.

10 MR ANDERSON: Yes, but it would have
11 had to remain at a value that is reflected in
12 the survey, not on the money that you had
13 spent on it; is that not right?

14 MR MURRAY: What the value is we have
15 said is the value we will soon find out when
16 we realise it, but we have been forced by
17 these breaches to sell that property. We are
18 being forced to crystallise a loss, we think. It
19 is not by choice, it is because of these
20 breaches that is the reason.

21 MR ANDERSON: Thank you very much.

22 LORD ERICHT: Thank you. I am going to
23 ask Lord Young if he has any questions for
24 you.

25 LORD YOUNG: Yes. Mr Murray, there is

1 one point I would like to clarify, really as a
2 point of general interest for me. When you
3 are talking about a cartel, who do you say
4 were the participants in that cartel?

5 MR MURRAY: The cartel participants are
6 the first and second defenders and the
7 companies would have received monopolies.

8 LORD YOUNG: You say the companies, so
9 that is going beyond Sinclair Haulage, you
10 are including the other hauliers on the island?

11 MR MURRAY: I believe they are part of a
12 cartel, and my case here is not to focus on
13 them, I am keeping it focusing on Sinclair
14 Haulage, because Sinclair Haulage was the
15 one who abused its dominant market
16 position. But speaking to me as an
17 economist and a businessman, it is fairly
18 clear that these arrangements which created
19 these monopolies are linked.

20 Also, we were looking at access to the
21 subsidised fares, and now we have got some
22 information provided since the last court
23 hearing, and I have not responded to that, but
24 I will in due course, but that clearly shows
25 that where those benefits accrued to, and they

1 accrued to, in the case of Sanday, that
2 monopoly holder.

3 LORD YOUNG: Again, just so I am clear
4 about your position, Mr Murray, do you say
5 that the cartel is something that we can see
6 by inference rather than actually pointing to
7 particular agreements? You mentioned
8 secret agreements, but I am taking it there is
9 nothing that you can point to in terms of
10 documentation that has been recovered which
11 actually evidences the cartel directly; it is
12 still an inference you are drawing; is it?

13 MR MURRAY: I think we have evidence
14 that shows monopolies were created.
15 Monopolies seen together -- a number of
16 monopolies were created. Private companies
17 were given the exclusive right to transport
18 goods from the Northern Isles Freight Centre
19 to individual islands. My intention is not to
20 broaden beyond to what immediately has
21 affected me, but it is to me fairly obvious that
22 that arrangement is in breach of the
23 Competition Act. Whether you want to say it
24 is a cartel, or not a cartel, or there are
25 individual agreements is something that can

1 be debated, but to me, as an economist, a
2 businessman, it is a cartel.

3 LORD YOUNG: Thank you very much, Mr
4 Murray.

5 LORD ERICHT: Thank you, Mr Murray. I
6 am now going to ask, firstly, Mr Lindsay,
7 and then Mr Neil if we have anything to say
8 to respond. Mr Murray, I think you have
9 something else you wish to say.

10 MR MURRAY: I beg your pardon.

11 LORD ERICHT: Please proceed.

12 MR MURRAY: There was just one other
13 thing that I noticed over lunch that I forgot to
14 respond to, but I meant to, so if you would
15 just give me one second to find my notes,
16 please. Mr Lindsay mentioned an abstract
17 breach of the Chapter 1 prohibition. I just
18 thought I would comment on that. There is
19 no such thing as an “abstract breach”, a
20 breach is a breach. There is nothing abstract
21 about it.

22 LORD ERICHT: I think to be fair to Mr
23 Lindsay, what he was saying was that this
24 was, if you like, a theoretical breach, but it
25 had no practical consequences.

1 MR MURRAY: If that is what Mr Lindsay
2 meant or implied, then I accept that. I
3 thought the suggestion was that somehow
4 you could have a real breach and an abstract
5 breach. My contention is there are only real
6 breaches.

7 LORD ERICHT: Thank you, Mr Murray.
8 Mr Lindsay, do you have anything you wish
9 to add?

10 MR LINDSAY: Nothing further, my Lord.

11 LORD ERICHT: Thank you. Mr Neil, do
12 you have anything you wish to add?

13 MR NEIL: No, nothing further, my Lord.

14 LORD ERICHT: Thank you very much.
15 That brings us to the end of the hearing
16 today. The next stage is for us to consider
17 everything that we have heard told and the
18 written submissions and the other material
19 lodged of the we will produce a written
20 judgment setting out our views on all these
21 matters and then procedure can you taken
22 from there, depending on what that judgment
23 says. I would like to thank all of you for
24 your submissions today and also the work
25 you have put into written submissions

1 beforehand, and the court is now adjourned.

2 (14.19)

3 (Hearing adjourned)