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5
6 **IN THE COMPETITION**
7 **APPEAL**
8 **TRIBUNAL**
9

Case Nos. : 1751/5/7/25 & 1760/12/13/25

10 7 Rolls Buildings
11 Fetter Lane
12 London
13 EC4A 1NL

Wednesday 15th April 2026

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16 Before:

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18 The Honourable Mrs Justice Bacon
19 Professor Pablo Ibáñez Colomo
20 Robert Herga

21
22 (Sitting as a Tribunal in England and Wales)
23

24
25 **BETWEEN:**

26
27 Mr Graham Thomas & Others

Claimants

28
29 v

30
31 Durham County Council

Defendant

32
33
34
35 BEK Developments Ltd and Others

Applicants

36
37 v

38
39 Durham County Council

Respondent

40
41
42
43 **A P P E A R A N C E S**
44

45
46 Emily Hayward (instructed by Nexa Law) on behalf of Mr Graham Thomas & Others and
47 BEK Developments Ltd & Others

48
49 Richard Howell (instructed by DWF Law LLP) on behalf of Durham County Council

Wednesday, 15 April 2026

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(10.30 am)

(Proceedings delayed)

(10.36 am)

MRS JUSTICE BACON: Good morning everyone. I am just going to start with a few housekeeping points.

Housekeeping

MRS JUSTICE BACON: First of all, I have, to my right, Mr Ibanez, and to my left Mr Herga, who are the other panel members on this case. Thank you very much both of you for your submissions, provided to us in writing. We have also received further authorities from the claimant.

I think we are all working electronically, so please just give us references during the hearing to the electronic bundles.

Now, just let me make sure that we all have the right bundles. We have a hearing bundle, a supplemental hearing bundle, an authorities bundle, the further authorities from the claimant, and we have a statement of costs from the claimant. We don't have one from the defendant, is that right?

All right. We have a second witness statement of Mr Wood. I am not sure if that has made it into the bundles.

MR HOWELL: It's not, madam. It was filed after the bundles were prepared.

MRS JUSTICE BACON: Is there anything else that we ought to have but is not in the list that I have just read out?

MS HAYWARD: One point. In relation to the further authorities you received, my instructing solicitor filed some with no page numbers. On that basis, I have come prepared with a printed copy which is paginated. My learned friend has a copy of this

1 bundle. Would it assist if I handed that up?

2 **MRS JUSTICE BACON:** Yes. How many copies of that do you have?

3 **MS HAYWARD:** I am afraid I have the one. But what I suggest I do is forward on the
4 electronic version, if that would assist?

5 **MRS JUSTICE BACON:** Yes, why don't you do that.

6 **MS HAYWARD:** I am grateful.

7 **(Document handed)**

8 **MRS JUSTICE BACON:** In any event, we are working, as I said, electronically, other
9 than I have certainly printed out the skeleton arguments, I think everyone else is
10 working fully electronically. So you could, if you want to refer us to the page numbers,
11 the best thing I think would be to just refer us to the page number of the PDF. For my
12 part, I have a 217 page PDF, so you can just refer us to the page numbers of that.

13 **MS HAYWARD:** I am grateful, Madam.

14 **MRS JUSTICE BACON:** All right, let me just look and see.

15 The next thing on my housekeeping list is the question of whether Mr Thomas is
16 formally proposing to proceed as a claimant in the Competition Act claim. We note
17 that, in the second amended claim form, which is the one that we are working from,
18 he is not listed as one of the claimants. I have four claimants there, BEK, Alleyhaus,
19 Dales and Moors, and Masonic Hall, whereas, on the skeleton argument of both
20 parties, he is listed as the first claimant. What is the position regarding Mr Thomas?

21 **MS HAYWARD:** Forgive me, my Lady. He does want to proceed as a claimant in this
22 matter, in the Competition Act claim. However, as you rightly note, in the Subsidy
23 Control Act proceedings, it will stand as the four appellants that are listed.

24 **MRS JUSTICE BACON:** Yes. But does that mean that the amended claim form is
25 incorrect? That he should be listed as the first claimant?

26 **MS HAYWARD:** Yes, Madam. I do believe that would be right.

1 **MRS JUSTICE BACON:** Thank you for that confirmation. We will just make a note
2 of that.

3 Now, just let me check if there is any other housekeeping matters to deal with from my
4 side.

5 The only other housekeeping matter I have is the running order today. Do you have
6 any proposals regarding that? Have you managed to speak to each other?

7 **MS HAYWARD:** Yes, we have. The claimants' view and then having consulted with
8 my learned friend before this, is that the majority of the extant applications turn on
9 whether or the amendment is allowed and on that basis we propose to start with the
10 amendment application and then deal with the follow-on applications in sequence. If
11 that would assist.

12 **MRS JUSTICE BACON:** In what sequence then? So you want to start -- effectively
13 you want to start out with your amendment application or their strike-out application.
14 I assume that you are going to deal with them together.

15 **MS HAYWARD:** Quite. Madam, I do think they sort of stand in tandem. So I would
16 suggest that we deal with those two first and then subject to my learned friend's view
17 we move on to the question of security because it turns on the outcome of those
18 applications and then fall to deal with the stay application.

19 **MRS JUSTICE BACON:** All right. One possibility could be that we deal with security
20 last.

21 If you wanted us to we could see if we could reach a decision, we are not going to give
22 an ex tempore judgment now but we could see if we could reach a decision on the
23 amendment and strike-out applications and on that we could then tell you at the end
24 whether you need to deal with the question of security. Or you should just deal with
25 security last in any event. Do you have a preference as to those courses?

26 **MS HAYWARD:** I think that is very pragmatic, Madam. We have no objections.

1 **MRS JUSTICE BACON:** But which? What would you prefer?

2 **MS HAYWARD:** Oh forgive me, that the security is dealt with at a latter stage.

3 **MRS JUSTICE BACON:** All right. Do you want us to see if we can give a view which
4 would then save you needing to deal with security if we reach the view that the
5 strike-out succeeds or do you want to address security briefly for the avoidance of
6 doubt in any event?

7 **MS HAYWARD:** We would prefer to address it.

8 **MRS JUSTICE BACON:** You would like to address it.

9 Mr Howell.

10 **MR HOWELL:** From our perspective we are in the tribunal's hands as to whether it
11 wants to give an indication of its decision on the amendment application and it would
12 be helpful in terms of the running order, in light of the tribunal's indication that it does
13 want to be addressed on the question of its jurisdiction under section 70 that will take
14 me some time to develop. In those circumstances it seems to me it would be sensible
15 to deal with security, which has been well developed in the skeletons, last. So we deal
16 with the amendment application first and then the *Weis* question if I can put it that way.

17 **MRS JUSTICE BACON:** Yes. So, so both of you are content to deal with security
18 last. I agree that has been quite fully developed already in the skeleton arguments
19 and it may be that we don't need to hear very much further on that. Just to place
20 a marker now we will need to finish by at the very latest 4.30, ideally a little bit before
21 that. The time today should be ample for everyone to address us on everything before
22 then but there is no scope to go in after that because I have a meeting immediately
23 after court.

24 All right. So as I understand it then, are you proposing to address me on everything
25 save for security? Mr Howell will then deal with everything save for security and then
26 you should both make brief submissions at the end or, Mr Howell, are you proposing

1 that you should both make submissions on everything?

2 **MR HOWELL:** I think it would make sense, because the applications are in reverse
3 order, it is my learned friend's application to amend, so I suggest she opens that,
4 I respond to it and she then replies. And then to move on to the *Weis* question, which
5 I think is for me to open.

6 **MRS JUSTICE BACON:** Okay. Do you have any views at to the timing as
7 between -- when you both want to sit down on the first two applications?

8 **MR HOWELL:** My instinct would be if we could start the latter by no later than
9 2.30 pm.

10 **MRS JUSTICE BACON:** Yes.

11 **MR HOWELL:** Then that should be sufficient.

12 **MRS JUSTICE BACON:** All right. So we start on the -- are we pronouncing this *Weis*
13 or *Weis*?

14 **MR HOWELL:** That was certainly how it was referred to in the *New Lottery* case but
15 somebody may tell me that is wrong.

16 **MRS JUSTICE BACON:** All right. The German speakers among us have a marginal
17 preference for *Weis* but I am not going to stand on ceremony. Pronounce it whichever
18 way you want, it doesn't matter for the judgment. You want to start the stay question,
19 if you like, by 2.30 pm?

20 **MR HOWELL:** I think that would be -- I mean if we go slightly later I don't think that
21 would be an issue but I suspect it will take me at least 40 minutes to open that because
22 I will need to take you through the Act and then the case.

23 **MRS JUSTICE BACON:** All right. Let's proceed on that basis. Ms Hayward you are
24 going to start then.

25 **MS HAYWARD:** I am grateful, Madam.

26 **Application by MS HAYWARD**

1 **MS HAYWARD:** Madam, I set out what the claimants submit are the matters that fall
2 to be determined at paragraph 1 of my skeleton argument. I will start of course with
3 the application to amend the claimants' claim pursuant to rule 32(1)(b). Initially my
4 submissions are set out at paragraphs 13 to 23. I then set out the claimants' response
5 to the defendant's opposition to the claimants' amendment application and their
6 application to strike out, which we submit should be read in tandem, at paragraphs 24
7 to 52 of my skeleton argument.

8 The way the claimants submits the tribunal's discretion under rule 32.1(b) is that it
9 should be read together with the governing principles set out at rule 4, which the
10 tribunal will find at page 75 of the agreed bundle of authorities.

11 In essence, that asks two questions: whether the amendments are necessary and
12 proportionate; and whether if allowed the amended claim presents any prejudice to
13 the defendant.

14 Starting with the question of whether the amendments are necessary and
15 proportionate. As the tribunal are aware, the claimants acted chiefly in person, only
16 instructing solicitors and counsel on an ad hoc basis. When the initial pleadings were
17 drafted the claimants were acting entirely in person. They were then amended again
18 and they were again acting in person and latterly instructed solicitors to deal with *Weis*
19 but these solicitors never went on the record.

20 They later instructed counsel to deal with the amended pleadings that are now in issue,
21 which for ease of reference will be referred to as the second amended pleadings. In
22 reality we are looking at the third to an extent.

23 Insofar as the claimants' position is they have opted to refine their claim for the
24 purposes of legal and procedural clarity, which the claimants submit aligns with what
25 was in furtherance of rule 4.7. It's not a change of case as such but a legitimate and
26 necessary process of refinement, ensuring that the claim is advanced on a proper

1 legal footing. You will find the second amended claim form at page 38 of the hearing
2 bundle. That is the defendant's hearing bundle. And represents a substantial
3 narrowing and focus of the case. It is acknowledged as my learned friend points out
4 in his skeleton argument and indeed in the correspondence with the defendant certain
5 portions of that claim have fallen away.

6 For obvious reasons various points that counsel took at the material time would be
7 procedurally and legally right as opposed to others which needed to fall away,
8 therefore removing peripheral broader matters, clarifying the legal bases under
9 chapters 1 and 2 and presents a structured and more intelligible formulation of where
10 we are.

11 What we submit is that the amendments before the tribunal aren't merely permissible
12 but positively encouraged by the tribunal's procedural framework insofar as rule 4 is
13 structured. In those circumstances, permitting the amendment would be necessary to
14 ensure they continue on that properly defined footing. The tribunal's approach in
15 *2 Travel Group*, which we include -- there are two versions of that authority in the
16 bundle. I would like to take you to page 260 in the authorities bundle at paragraph 7,
17 which chiefly deals with the question of prejudice. However what we submit is it
18 reinforces that amendments should be permitted where they enable a case to be
19 properly advanced and where any prejudice can be addressed. So this reads in
20 tandem with my later submissions in relation to whether or not it does represent
21 demonstrable prejudice that cannot be accounted for in costs.

22 **MRS JUSTICE BACON:** Yes. I don't understand the defendant's case to be that the
23 amendment should be refused on grounds of prejudice, but rather that the amendment
24 should be refused on the basis that no coherent case is pleaded.

25 **MS HAYWARD:** Quite. On that basis I am very happy to take you to, instead, to my
26 submissions in that regard, which deal with those points ad seriatim.

1 I think it would assist at the outset, before I begin responding to my learned friend's
2 submissions, I think what may assist the tribunal is a breakdown of the case,
3 reinforcing what has been set out in the amended claim. So insofar as the Competition
4 Act claim is concerned, the relevant economic activity and market, the claimants' case
5 concerns the supply of commercially viable town centre premises suitable for
6 hospitality, leisure and associated uses in the Bishop Auckland area.

7 The pleaded market is not all commercial property, however it is a functionally defined
8 subset of premises which are capable of supporting regeneration-backed, scale
9 appropriate hospitality and mixed use operations.

10 **MRS JUSTICE BACON:** What does that mean. Capable of supporting?

11 **MS HAYWARD:** Forgive me. Capable of supporting what we say
12 regeneration-backed -- which is why we are here today, Madam, insofar as this
13 particular lot of funding was positioned to be for regenerating that particular region.
14 So when we say regeneration-backed it is a broad term.

15 **MRS JUSTICE BACON:** But on what -- so regeneration-backed what?

16 **MS HAYWARD:** Oh forgive me, the operations. We are speaking to the question of
17 operations. What the purpose of those grants were for or forgive me of the funding in
18 question.

19 **MRS JUSTICE BACON:** Sorry, I am just trying to write down exactly what you say
20 that your market definition is. You say not all commercial properties and I have written
21 down capable of supporting, regeneration-backed, and what is the rest?

22 **MS HAYWARD:** Scale appropriate hospitality and mixed use operations is what we
23 say.

24 **MRS JUSTICE BACON:** Scale appropriate hospitality and mixed use operations.

25 **MS HAYWARD:** Which, if it would assist, Madam, it does work in tandem with -- which
26 is what is set out in the first witness statement of Graham [Thomas].

1 **MRS JUSTICE BACON:** Let's break down each of those. What do you mean by
2 regeneration-backed?

3 **MS HAYWARD:** When we say regeneration-backed we mean in relation to the
4 intention of the available funding in terms of what the councils offer at that time. When
5 we say scale appropriate --

6 **MRS JUSTICE BACON:** Sorry, I don't understand. Regeneration-backed means
7 what?

8 **MS HAYWARD:** Regeneration-backed. Defining each term. Forgive me if it is the
9 wrong turn of phrase. When we say regeneration-backed we mean in the context of
10 the intention of the grant. Forgive me if I am not understanding.

11 **MRS JUSTICE BACON:** I am not talking about context. Define regeneration-backed.
12 This is a market definition. So you say you don't mean all commercial property but
13 you mean property that is capable of supporting regeneration-backed, scale
14 appropriate hospitality and mixed use operations. That is what I have written down.
15 Let's just unpick each of those terms because regeneration-backed is not what you
16 have pleaded.

17 **MS HAYWARD:** Forgive me, my Lady, that is an elaboration --

18 **MRS JUSTICE BACON:** I don't mind you elaborating for the purpose of this hearing
19 but you need to explain exactly what is defined, what you define as
20 regeneration-backed in the context of a market definition exercise.

21 **MS HAYWARD:** Of course. Certainly, Madam, just bear with me.

22 **(Pause)**

23 Bear with me, my Lady, my bundle is loading. I have some of the copies here but not
24 in physical form.

25 **MRS JUSTICE BACON:** I don't need you to take me to anything, I just need you to
26 explain what you have just set out as the market definition. On what basis is that

1 an economic market as defined for the purpose of the competition rules and what do
2 you mean by that in the context of a market definition exercise?

3 **MS HAYWARD:** Of course, my Lady. It is more in relation to just finding the pleadings
4 which I do have here. Just to see if there is any departure from them.

5 **MRS JUSTICE BACON:** I don't mind if you are elaborating, I just really need you to
6 explain to us so that we understand what you mean by regeneration-backed, given
7 that what we are doing here is defining a relevant market. We need to be able to
8 understand what you say falls inside and outside that market and how that market is
9 drawn.

10 **MS HAYWARD:** So it goes directly to the geographical area. It goes to the
11 Bishop Auckland town area in terms of definition, in terms of geographical region.

12 **MRS JUSTICE BACON:** All right. But we are not talking about geographical market
13 here.

14 **MS HAYWARD:** In terms of the economic market. Forgive me, Madam, I am just --

15 **MRS JUSTICE BACON:** You are saying it is a market for the supply of town centre
16 premises but it is not all commercial property. It is certain properties that are capable
17 of supporting regeneration-backed and so on. So I think we need to understand --

18 **MS HAYWARD:** I think what would assist is it is grounded in location size,
19 configuration of that region insofar as commercial viability is concerned. Our case is
20 that the competition takes place within that constrained specialised segment. It is
21 a mixture of both as you say, Madam, insofar as --

22 **MRS JUSTICE BACON:** What is that segment? What do you mean by
23 regeneration-backed?

24 **MS HAYWARD:** Insofar as -- sorry I am struggling to follow why I haven't answered
25 the question.

26 **MRS JUSTICE BACON:** Well, I need to understand what it means in order that we

1 and the defendant can understand whether a property falls in or outside that market.

2 **MS HAYWARD:** Of course.

3 **MRS JUSTICE BACON:** What do you actually mean by regeneration-backed?

4 **MS HAYWARD:** Sites whose commercial viability depends, is contingent on
5 coordinated redevelopment activity. Typically it can be public sector intervention --

6 **MRS JUSTICE BACON:** Sorry, can you just repeat that slower?

7 **MS HAYWARD:** Forgive me. Of course. Regeneration-backed in this context we say
8 refers to sites whose commercial viability is contingent on coordinated redevelopment
9 activity. We would say typically involving some form of public sector intervention. If
10 that assists.

11 **MRS JUSTICE BACON:** All right. So that is what you mean by regeneration-backed.
12 What do you mean by scale appropriate?

13 **MR HERGA:** Sorry, public sector intervention. Do you mean public by grant, does
14 that mean or --

15 **MS HAYWARD:** So it cross refers I think because we have got -- as the tribunal are
16 aware there are two things acting in tandem here. Two claims acting in tandem. We
17 have the SCA appeal that deals with the grant and the subsidies. It is more in terms
18 of the funding itself. So yes to an extent we mean insofar as the council's role is
19 concerned, where it is contingent on that funding in respect of how they have been
20 foreclosed from the market.

21 **MRS JUSTICE BACON:** So are you saying that the market is sites where
22 redevelopment is contingent on public sector funding?

23 **MS HAYWARD:** Yes.

24 **MRS JUSTICE BACON:** All right. And scale appropriate, what do you mean by that?

25 **MS HAYWARD:** So when we say scale appropriate, it would mean in relation to the
26 size of the proposed development itself. Insofar as where we are.

1 **MRS JUSTICE BACON:** All right. But that is just to say it is something about size.
2 But we need to know if something falls inside or outside the market, so precisely what
3 do you mean by scale appropriate? How big are you talking?

4 **MS HAYWARD:** Forgive me, my Lady, I will pull up my submissions on that score.
5 Forgive me, bear with me.

6 **(Pause)**

7 So the way we position it, it refers to premises of sufficient size and of configuration
8 and operational capacity to support, we say, a commercially viable hospitality, leisure
9 or mixed use scheme of the type in question. The type in issue at the moment.

10 **MRS JUSTICE BACON:** But no, not the type in issue, because market definition
11 comes before we start talking about what the issue is and the type in issue. So exactly
12 how big are you talking about?

13 **MS HAYWARD:** I think we define it, my Lady.

14 **(Pause)**

15 My Lady, the way in which we plead it is in relation to the -- in terms of size and
16 configuration that's as I say capable of supporting it.

17 **MRS JUSTICE BACON:** Yes. But that doesn't tell me what you mean by that.
18 Because there could be lots of different sizes of hospitality and mixed use operations.
19 We haven't even got on to what you mean by hospitality and mixed use. So we and
20 the defendant need to understand exactly what your pleaded case is and this is not
21 an evidential issue, it is what you say the market is. So what do you mean by sufficient
22 size? How big approximately?

23 **MS HAYWARD:** Well, so approximately we say within about 10,000 square feet.

24 **MRS JUSTICE BACON:** Do you mean at least 10,000 square feet?

25 **MS HAYWARD:** At least. Quite.

26 **MRS JUSTICE BACON:** Right. So that is what you mean by scale.

1 Hospitality and mixed use operations. What do you mean by that? Especially what
2 do you mean by mixed use? Mixed what?

3 **MS HAYWARD:** So I do have a definition for that, forgive me.

4 **(Pause)**

5 Forgive me, we do plead this.

6 **(Pause)**

7 Insofar as the core definition it would mean for our purposes in relation to hospitality
8 would mean bars, restaurants. Leisure would mean events, entertainment, social
9 venues.

10 **MRS JUSTICE BACON:** So wait a minute. Hospitality means bars, restaurants.

11 **MS HAYWARD:** Retail. So small shops as well.

12 **MRS JUSTICE BACON:** That's not hospitality, that's retail.

13 **MS HAYWARD:** Forgive me, it is sort of in tandem. Retail that would exist within it.
14 So it would be hospitality, bars and restaurants. Leisure, events, entertainment and
15 social venues.

16 **MRS JUSTICE BACON:** Sorry, leisure?

17 **MS HAYWARD:** Events. Entertainment and social venues.

18 The ancillaries from there would be event space, so outdoor areas and communal
19 spaces as well we say would fall within that.

20 **MRS JUSTICE BACON:** That is what is meant by hospitality. All right. What is meant
21 by mixed use?

22 **MS HAYWARD:** So when we say mixed use we would define that more as the
23 ancillary use as I mentioned before, before forgive me, to clarify, event space, outdoor
24 areas, communal space.

25 **MRS JUSTICE BACON:** So mixed use means events based.

26 **MS HAYWARD:** Outdoor areas and communal space.

1 And further than that it would also include hotel space insofar as the commercial
2 activity.

3 **MRS JUSTICE BACON:** Also includes hotel space. So I have written down
4 hospitality means bars, restaurants, leisure events, entertainment and social venues.
5 Mixed use means event space, outdoor areas and communal space and also hotel
6 space.

7 **MS HAYWARD:** Yes.

8 **MR HERGA:** Hotels is in hospitality, isn't it?

9 **MS HAYWARD:** It would fall within it, yes.

10 **MRS JUSTICE BACON:** All right. So hotels should be added to hospitality. All right.
11 So the next question is, then, in terms of your market definition and the dominance
12 assessment, what is your pleaded case, perhaps you can take us to where in your
13 claim form you set out or what else you say if it's not in the claim form, about the
14 number of premises which fall within this definition in Bishop Auckland, in the town
15 centre, and the extent to which the council owns those premises?

16 **MS HAYWARD:** Certainly. Insofar as the -- I can take you through -- I think taking
17 you directly to where it is referenced in the claim. If we look at page 39 at paragraph 2
18 it references the redevelopment and commercial proposals for three separate areas.

19 **MRS JUSTICE BACON:** Do you say that those all fall within the relevant market
20 definition?

21 **MS HAYWARD:** We do. In terms of that point I can address you more
22 comprehensively.

23 **MRS JUSTICE BACON:** So the premises that fall within the market definition
24 are -- but that is just some of the premises. Where is your complete list of all of the
25 premises which you say fall within that market definition? Is there one?

26 **MS HAYWARD:** There is no complete list, no.

1 **MRS JUSTICE BACON:** Do you know how many premises fall within the market
2 definition?

3 **MS HAYWARD:** Not presently. Not as an exact figure.

4 **MRS JUSTICE BACON:** Right. Even an approximate figure? Or even an estimated
5 figure?

6 **MS HAYWARD:** Forgive me, my Lady, may I just turn my back.

7 **(Pause)**

8 We would approximately say it is about 74 empty properties. I do appreciate that is
9 not in the pleading.

10 **MRS JUSTICE BACON:** How many properties that are not empty or do you say that --

11 **MS HAYWARD:** As a global figure, forgive me, Madam, it is 100 or so as
12 an approximate figure, within that 70 empty premises.

13 **MRS JUSTICE BACON:** Sorry, 100 is the figure for what?

14 **MS HAYWARD:** For the total catchment. The approximate figure for that area within
15 which the market definition is premised, and then 70 within that approximately --

16 **MRS JUSTICE BACON:** So there are around 100 properties that fall within your
17 market definition.

18 **MS HAYWARD:** Approximately. This is not a strict figure.

19 **MRS JUSTICE BACON:** No, I have written around --

20 **MS HAYWARD:** Forgive me, Madam. Yes so within that the 70 premises are the
21 ones that are vacant.

22 **MRS JUSTICE BACON:** When you say there are around 100 properties within the
23 market definition, what is your geographic definition? We are talking about
24 Bishop Auckland town centre?

25 **MS HAYWARD:** Yes.

26 **MR HERGA:** It is not the larger town or whatever it is called?

1 **MS HAYWARD:** No, forgive me. It is the Bishop Auckland region.

2 **MRS JUSTICE BACON:** Sorry, Bishop Auckland region?

3 **MS HAYWARD:** Town centre. Forgive me. I put for clarity.

4 **MRS JUSTICE BACON:** So there are around 100 properties that fall within that

5 market definition in the Bishop Auckland town centre. You say that within that 100

6 there are around 74 empty properties. All right. How many of those are owned by the

7 council?

8 **MS HAYWARD:** Insofar as ownership is concerned, there are two points to make, if

9 I may. What we say there, Madam, is that the focus on legal ownership of particular

10 sites we say is misaligned in terms of the fact that when we speak to dominance under

11 chapter 2 we are thinking about questions in relation to economic strength and ability

12 to control access to the market, not necessarily title to the asset. It is more the control

13 of the premises rather than the ownership.

14 **MRS JUSTICE BACON:** So do you mean that in paragraph 53 when you say the

15 council is the sole owner and controller of the core commercial land or holdings, you

16 mean -- you don't mean the owner but you mean controller in some other sense?

17 **MS HAYWARD:** This was our understanding at the time and the council's

18 understanding at the time it was drafted. However it has since come to light through

19 either FOI requests or correspondence with the other side that they are not in fact

20 owned, however it is more a question of who has effective control over access to the

21 market for the purposes of chapter 2.

22 **MRS JUSTICE BACON:** All right. So how many of the 74 or even the 100 does the

23 council own? Do you know?

24 **MS HAYWARD:** Not to hand.

25 **MRS JUSTICE BACON:** Even approximately?

26 **MS HAYWARD:** Forgive me. It is an approximation but around 10 to 12 in terms of

1 ownership is the estimation.

2 **MRS JUSTICE BACON:** Right. If you say that the relevant criterion is not ownership
3 but control, what do you mean by control? Because you said in 53 it is the sole owner
4 and controller, that gives it unilateral control over. So what is your new definition of
5 control?

6 **MS HAYWARD:** So insofar as it is addressed in the authorities, which I appreciate
7 are not in the bundle. The reason they are not is because we approached this not to
8 look at the minutiae of the matter but insofar as -- because we are not sort of a mini
9 trial question.

10 **MRS JUSTICE BACON:** No, but we are not talking --

11 **MS HAYWARD:** But we are not, quite.

12 **MRS JUSTICE BACON:** -- about the authorities. I am talking about your pleaded
13 case. Your pleaded case at the moment is on your amendment that the council is the
14 sole owner and controller.

15 **MS HAYWARD:** Yes.

16 **MRS JUSTICE BACON:** This, as in the fact that it is the sole owner and controller,
17 gives it unilateral control over which --

18 **MS HAYWARD:** Yes.

19 **MRS JUSTICE BACON:** So what is your new definition of the way in which the council
20 is controlling and therefore supplying commercially viable town centre premises
21 according to your market definition?

22 **MS HAYWARD:** Quite. So in terms of the position of economic strength which would
23 enable them -- forgive me to, in terms of the control question itself.

24 **MRS JUSTICE BACON:** Yes.

25 **MS HAYWARD:** To behave to an appreciable extent --

26 **MRS JUSTICE BACON:** No, what --

1 **MS HAYWARD:** -- independently. Forgive me

2 **MRS JUSTICE BACON:** -- we are talking about the authorities on what constitutes
3 dominance. What is your definition now of control by the council? What do you say
4 the council has to do in order to control one of these premises?

5 **MS HAYWARD:** Forgive me, Madam, I am just making sure that I am consistent with
6 the pleadings.

7 **MRS JUSTICE BACON:** Well I am looking at paragraphs 53 and 54 but mainly 53
8 because 53 asserts control based on your pleaded position that the council is the sole
9 owner and controller.

10 **MS HAYWARD:** So we say on that score, in terms of point 8(b), we stand by that
11 point. So we don't depart from that definition.

12 **MRS JUSTICE BACON:** No I am not talking about 8(b). You said a moment ago that
13 you are now not saying that the council is the relevant owner but you are saying it is
14 in some way the controller of some sites even if it doesn't own them. What do you
15 mean by control?

16 **MS HAYWARD:** We mean by control in terms of which operators have, as I say, had
17 access to the market.

18 **MRS JUSTICE BACON:** I am not talking about the -- I am not talking about which
19 operators have access. I am asking you what mean by the council controlling
20 a building if it doesn't own it.

21 **MS HAYWARD:** Insofar as the controlling of funding, the interaction between that. If
22 they don't necessarily, not in the context of ownership but control it would be
23 a question as to what that funding allows it to do to develop that region. So in terms
24 of our definition there, it does relate to, in our submission, those four points in terms
25 of although it's not owned by the council explicitly, instead the control is
26 a consequence of that, rather than it being rooted in it.

1 **MRS JUSTICE BACON:** Your market definition isn't based on funding. Your market
2 definition is, I have written it down, is the supply of commercially viable town centre
3 premises. And then you explain that that was premises that were capable of
4 supporting regeneration-backed scale appropriate hospitality and mixed use
5 operations. That is not a market definition that refers to access to funding. So you
6 need to explain how the council is supplying premises by controlling them if it doesn't
7 own them.

8 **MS HAYWARD:** It is to be read in tandem with that, Madam, in terms of the fact that
9 it is the effect -- it is a question of substance not form. I do take your point.

10 **MRS JUSTICE BACON:** No, we are not reading this together with your subsidy
11 control case. That is a different case. We are talking about the Competition Act case
12 and your market definition. The market definition is supply on a relevant market. You
13 have defined the relevant market as the supply of commercially viable town centre
14 premises. Now, you say that in fact the council doesn't own many of the premises that
15 fall within this market. You say it maybe owns 10 or 12. But you are also relying on
16 its control. So that has to be defined.

17 **MS HAYWARD:** No, quite.

18 **MRS JUSTICE BACON:** In terms of control you must be talking about control of the
19 supply of those premises.

20 **MS HAYWARD:** Precisely. So in terms of the ability, whether legal, practical or
21 economic to determine or materially influence the terms on which premises are
22 brought to the market, either developed, allocated or made available to those
23 operators within that. That does read, in our submission, in tandem with that market
24 definition.

25 **MRS JUSTICE BACON:** No. We are not talking about in tandem with anything. I am
26 talking about what is your definition of the market.

1 **MS HAYWARD:** Control. It would be the ability whether legal, practical or economic
2 to determine or materially influence the terms on which premises are brought to
3 market, developed or indeed allocated or made available to operators.

4 **MRS JUSTICE BACON:** All right. But that's not talking about the supply of the
5 premises. We are talking about something completely different. You are now talking
6 about the council's ability to control funding, which determines whether a premises can
7 be regenerated. It's not a case that is set out at all.

8 **MS HAYWARD:** To clarify that is not the position. The position is instead access to
9 those properties which effectively we say the council is a gatekeeper to. I do
10 acknowledge it is somewhat related to the subsidy case but it is not the fact of the
11 funding of the sole issue. It is the question of access to those premises, either for
12 lease or purchase. Which insofar as they are not the owner of all of the properties in
13 question, we say as the controller as we mentioned before --

14 **MRS JUSTICE BACON:** It is controlling the supply?

15 **MS HAYWARD:** Quite. Quite. Which insofar as we say the ability, with the definition
16 that I have provided, can materially influence the terms on which premises can indeed
17 be brought to market, developed or made available to operators, we say.

18 **MRS JUSTICE BACON:** How does it determine or materially influence those terms if
19 it doesn't own the property?

20 **MS HAYWARD:** As the controller itself. So insofar as how it deals with that.

21 **MRS JUSTICE BACON:** What do you mean by as controller?

22 **MS HAYWARD:** So although they don't necessarily own those premises, they either
23 lease them or otherwise. If I may just turn my back very briefly.

24 **MRS JUSTICE BACON:** Are you saying they are premises the council leases and
25 sublets?

26 **MS HAYWARD:** Let me just confirm one point, Madam, if I may.

1 Forgive me, what has been clarified now, because it wasn't clear to me before, is that
2 9 to 11, which is referenced in the pleadings, 9 to 11 Newgate Street is in fact owned --

3 **MRS JUSTICE BACON:** Yes.

4 **MS HAYWARD:** -- by the council. So that is one portion of it but when we speak to
5 other matters which my learned friend contends are relevant to ownership, we say
6 control but insofar as the ownership is concerned, 9 to 11 Newgate street is owned.

7 That is what is relevant to the third party, which is STACK.

8 **MRS JUSTICE BACON:** Yes. There is no dispute about that.

9 **MS HAYWARD:** Quite. So in terms of where we are, in terms of control to the relevant
10 sites in the region, we do say they are effectively by, virtue of controlling who gets the
11 leases for the region -- I can triple check one point if I may --

12 **MRS JUSTICE BACON:** What do you mean by they control who gets the leases if
13 they don't own?

14 **MS HAYWARD:** Well, this is what was somewhat unclear at the beginning. If I may
15 just turn my back one more time.

16 **(Pause)**

17 Madam, my understanding is that what is significantly in dispute is the ownership of
18 9-11 Newgate Street, which is not in dispute, the actual ownership of it and the control
19 that followed from that.

20 **MRS JUSTICE BACON:** All right. But if that is the only thing that is in dispute, then
21 that is one property in around 100. If you are pursuing an abuse of dominance case
22 in relation to that then that doesn't get off the ground if it is simply one property.

23 **MS HAYWARD:** It is more in relation to the fact that as we say in the pleadings it is
24 the only appropriate size for what was being -- what the claimants were applying for.

25 **MRS JUSTICE BACON:** All right.

26 **MR HERGA:** I thought there were 100 properties that were --

1 **MS HAYWARD:** Insofar as what the intention of the claimants -- so they redevelop
2 particular commercial premises that deal with, as we defined the market, leisure as
3 well as various other points related to a hotel. And the question we have or the
4 question for this point is whether or not, not necessarily the square footage or the size
5 but a question as to whether or not there were any other appropriate options within the
6 market for someone operating at their scale.

7 **MRS JUSTICE BACON:** What about the three premises that you have identified in
8 paragraph 2? Are you saying that they weren't appropriate for your needs?

9 **MS HAYWARD:** No, no, these -- so insofar as that specific challenge, so that is
10 a different case from my understanding. The particular property they want to develop
11 in Newgate Street was not necessarily what was approach -- they approached the
12 council for insofar as Masonic Hall, 69 to 71 Newgate Street, and the Mechanics
13 Institute, were, for my understanding, for a different project. Yes. It is for a different
14 project.

15 **MRS JUSTICE BACON:** No, all right. But are you saying that they weren't
16 appropriate for your needs?

17 **MS HAYWARD:** No. Not appropriate for the needs in relation to 9-11 Newgate Street
18 which is a separate project. So there were a number of projects that the claimant set
19 out to develop and 9-11 --

20 **MRS JUSTICE BACON:** Are you saying that those did or did not fall within your
21 market definition?

22 **MS HAYWARD:** No they do fall within the market definition. It is not only -- so insofar
23 as the three that are listed at paragraph 2, these are all projects that we say are in that
24 catchment, within the market definition area.

25 **MRS JUSTICE BACON:** All right. So are you saying that you wanted to do something
26 with 9 to 11 Newgate Street?

1 **MS HAYWARD:** No.

2 **MRS JUSTICE BACON:** All right.

3 **MS HAYWARD:** It was made by way of example.

4 **MRS JUSTICE BACON:** Hang on. That "no" is important. I just asked you did you
5 want to develop 9 to 11 Newgate Street?

6 **MS HAYWARD:** No. The ones that were listed --

7 **MRS JUSTICE BACON:** No, can you just answer the question?

8 **MS HAYWARD:** No.

9 **MRS JUSTICE BACON:** So the answer to that is no, you didn't want to develop 9 to
10 11 Newgate Street?

11 **MS HAYWARD:** Yes. We did not.

12 **MRS JUSTICE BACON:** All right. So why are you saying that was the only
13 appropriate size for what you were applying for? What are you saying about 9 to 11?

14 **MS HAYWARD:** No forgive me, that wasn't clear at all. We are saying -- so in relation
15 to paragraph 2 those three properties are the ones that were approached. 9-11
16 Newgate Street was used as an example insofar as what the single transaction
17 concerning 9-11 Newgate Street was. We don't focus solely on that. It is used by way
18 of reference. Forgive me, if I can just clarify.

19 **MRS JUSTICE BACON:** Well, perhaps you need to move on. I mean we haven't got
20 all day just to spend on this part of the case.

21 **MS HAYWARD:** No. Quite.

22 **MRS JUSTICE BACON:** So I have asked you a number of questions about that, you
23 given me the answers that you can. Let's move on to what you say is the infringement
24 in relation to the Chapter 1 prohibition. What is the agreement or concerted practice,
25 exactly?

26 **MS HAYWARD:** So in terms of that point, we speak to -- so in terms of concerted

1 practice, earmarking is referenced in my learned friend's skeleton --

2 **MRS JUSTICE BACON:** No just tell me in a sentence or a couple of sentences what
3 is the agreement or agreements, if you say that there are several, or concerted
4 practice, which is the basis of your claim under the Chapter 1 prohibition.

5 **MS HAYWARD:** So we say that in relation to -- forgive me -- various meetings
6 between the council and coordinated dealings with STACK Bishop Auckland,
7 structured redevelopment opportunities -- they, the council, structured redevelopment
8 opportunities in a manner which favoured particular operators. That conduct resulted
9 in the foreclosure of, we say, competing --

10 **MRS JUSTICE BACON:** Don't worry about foreclosure. Are you saying there were
11 meetings between the council and STACK?

12 **MS HAYWARD:** Yes.

13 **MRS JUSTICE BACON:** Which did what? In terms of what was the agreement
14 reached at those meetings that you rely on for your Chapter 1 case?

15 **MS HAYWARD:** In terms of the facts that lead to it, Madam, insofar as --

16 **MRS JUSTICE BACON:** No, what is the agreement? We can come on to what the
17 effect of that downstream was but what was the actual agreement? You have just
18 said that there were meetings between the council and STACK.

19 **MS HAYWARD:** Yes.

20 **MRS JUSTICE BACON:** What is the agreement that you say was reached at those
21 meetings.

22 **MS HAYWARD:** Where certain properties would be awarded to STACK.

23 **MRS JUSTICE BACON:** Which properties?

24 **MS HAYWARD:** So that would be 9 to 11 Newgate Street but it is not only that, that
25 is not the question in issue --

26 **MRS JUSTICE BACON:** Because you say you didn't want to do anything with that.

1 **MS HAYWARD:** Exactly. So forgive me.

2 **(Pause)**

3 **MRS JUSTICE BACON:** Were there any other properties that you say were the
4 subject of the agreement?

5 **MS HAYWARD:** One moment, my Lady.

6 **(Pause)**

7 The properties that STACK now own --

8 **MRS JUSTICE BACON:** I am not asking you what STACK owns. I am asking you
9 what were the properties that were the subject of the agreement you say was reached
10 between the council and STACK which favoured STACK.

11 **(Pause)**

12 **MS HAYWARD:** So that is where the 9 to 11 Newgate Street question arises. It is
13 not in relation --

14 **MRS JUSTICE BACON:** You said that there was an agreement whereby certain
15 properties would be awarded to STACK. I have asked you which they were. 9 to 11
16 Newgate Street was one of those. What other properties, because you refer to
17 properties in the plural?

18 **MS HAYWARD:** To clarify, my understanding is that there may have been some
19 confusion as to how many properties were in question at that point. I think 9 to 11
20 Newgate Street is the only one that is in question in relation to the concerted practice.
21 So the pleadings would need to be amended in that respect.

22 **MRS JUSTICE BACON:** So when you say there were meetings between the council
23 and STACK whereby certain properties would be awarded to STACK you just mean 9
24 to 11 Newgate Street?

25 **MS HAYWARD:** That is my updated instructions.

26 **MRS JUSTICE BACON:** Right. So it was an agreement that STACK would get 9 to

1 11 Newgate Street. Do you say that agreement was before the public procurement
2 exercise or if not when?

3 **MS HAYWARD:** We say it was before.

4 **MRS JUSTICE BACON:** So you say it was an agreement before the public
5 procurement exercise that STACK would get the property.

6 **MS HAYWARD:** That was the indication that was given. There was -- I believe it is
7 included in the witness statement in relation to there was what is characterised as
8 a soft launch of it at which STACK attended and we say that 9-11 Newgate Street was
9 the property in question at that point and this was prior to.

10 **MRS JUSTICE BACON:** But STACK -- but you say you didn't want to acquire 9 to
11 11, so how does an agreement between the council and STACK, if there was one, that
12 STACK would succeed in the public procurement for which it was in any event the only
13 bidder, how does that agreement cause you competitive harm?

14 **MS HAYWARD:** We say it speaks to an overarching example of conduct.

15 **MRS JUSTICE BACON:** No, but it is not an example of conduct. That is the only
16 conduct that you have identified. So you say that the agreement was in a meeting
17 between the council and STACK where -- and the agreement was an agreement that
18 the council would award 9 to 11 Newgate Street to STACK. So how does that cause
19 you competitive damage or any damage? Because you say you didn't want to acquire
20 9 to 11 or redevelop that.

21 **MS HAYWARD:** It was -- insofar as our pleaded case goes it is in relation to the fact
22 that they focused on -- my understanding is it is the focus on that particular property,
23 that particular property at 9 to 11 Newgate Street, that possibly, my understanding is --

24 **MRS JUSTICE BACON:** All right. Leaving aside words like "focus". Exactly how do
25 you say, especially in (inaudible) case, how do you say that that caused loss to the
26 claimants if this is only about 9 to 11?

1 (Pause)

2 **MS HAYWARD:** My understanding is, insofar as 9 to 11 Newgate Street is concerned,
3 I do apologise for the confusion because it wasn't clear to me, insofar as where we
4 are with 9 to 11 it was initially it wasn't something that ever came -- in the claimants'
5 view wasn't actually positioned as an option. This is insofar as procurement is
6 concerned, insofar as it wasn't made as an offering at the material time.

7 **MRS JUSTICE BACON:** Sorry, you say that you didn't want to do anything with 9 to
8 11.

9 **MS HAYWARD:** Because they didn't realise it was an option, Madam, forgive me.
10 These are instructions I am given now to clarify the position.

11 **MRS JUSTICE BACON:** There is nothing about this in your amended claim.

12 **MS HAYWARD:** Yes. I agree.

13 **MRS JUSTICE BACON:** You have just told me that you didn't intend to do anything
14 with Newgate Street.

15 **MS HAYWARD:** Only insofar as it wasn't actually placed in the claimant's submission
16 on the market in the same way that it ordinarily would have been.

17 **MRS JUSTICE BACON:** What do you mean by that? There was a public
18 procurement exercise.

19 **MS HAYWARD:** My understanding is the concerted practice that we are alleging
20 relates to that insofar as we say the agreement to award that particular property
21 occurred prior to.

22 **MRS JUSTICE BACON:** But then you are saying it wasn't placed on the market in
23 the same way that it would have ordinarily been. What do you mean by that?

24 **MS HAYWARD:** Insofar as an agreement in principle was made before the property
25 was allocated. Insofar as even if it went to the public procurement stage, we say that
26 the agreement occurred prior to, from my understanding.

1 **MRS JUSTICE BACON:** There was a public procurement exercise. Are you saying
2 that there wasn't?

3 **MS HAYWARD:** Insofar as there may have been one but its --

4 **MRS JUSTICE BACON:** No, are you saying that there was or wasn't a public
5 procurement exercise?

6 **MS HAYWARD:** No, there was. There is no opposition to that. It is more in relation
7 to what was heard before and whether or not that exercise was able to be conducted
8 effectively. I appreciate that is not necessarily a matter for now but it is a question --

9 **MRS JUSTICE BACON:** It is not a matter at all because it is not in your --

10 **MS HAYWARD:** No, quite.

11 **MRS JUSTICE BACON:** -- there is nothing about, there is no hint of it in your pleaded
12 case. I have not got anything on that. There is not even anything on that in your
13 witness evidence. So that's a different case you are not advancing in this pleading.

14 **MS HAYWARD:** Quite. I completely agree with that, my Lady. I apologise.

15 **(Pause)**

16 **MRS JUSTICE BACON:** All right, so returning to what you are saying in this pleaded
17 case, this is your application to amend on the basis that is set out in the second
18 amended claim form. Can you explain by reference to that what is the harm that you
19 say you suffered by the agreement between the council and STACK regarding 9 to 11
20 Newgate Street?

21 **MS HAYWARD:** So insofar as -- the question is whether or not they amounted to
22 favoured operators for the purposes of the question of concerted practice. So we say
23 that there were effectively a series of coordinated actions, which were -- which
24 reflected common commercial objectives between the council and STACK and that
25 there were mutual commitments relating to the allocation of regeneration -- I do
26 appreciate the regeneration funding is a separate issue but insofar as the regeneration

1 strategy is concerned, the properties that are there and I do appreciate that 9 to 11
2 Newgate Street is one property, however what this speaks to is an overarching
3 conduct in terms of what properties were awarded to STACK at that stage. I do
4 appreciate that the claimants did not bid for and do not reference specific properties
5 that they wished to bid for at the material time. But what they say is that STACK and
6 the council coordinated redevelopment together for 9 to 11 Newgate Street, at
7 paragraph 27. They agreed to channel those redevelopment opportunities and again
8 I appreciate this is not relevant to the incident matter, selective grants to STACK.
9 Insofar as denying equivalent opportunities, which is the real question, we say that
10 effectively in the way in which STACK has coordinated with the council prior to and
11 using 9-11 Newgate Street by way of example, which is referenced in the pleaded
12 case at paragraph 27, we say that that is an example of whereby coordinated
13 discussions that occurred between the council and STACK resulted in other properties
14 not being made available. Insofar as where those properties are, what those
15 properties are --

16 **MRS JUSTICE BACON:** Yes. Which properties.

17 **MS HAYWARD:** This is -- quite. Insofar as the properties that the claimants
18 reference, we do say insofar as the pleaded case that 9 to 11 Newgate Street was
19 an issue. However as we have explained that particular property --

20 **MRS JUSTICE BACON:** No, you have just said that the way in which STACK
21 coordinated with the council resulted in other properties not being made available. Are
22 you saying other properties were not made available to the claimant?

23 **MS HAYWARD:** Yes. So my understanding is -- specific properties are referenced
24 in the pleaded case. We reference three at paragraph 2 which are the claimants'
25 properties however --

26 **MRS JUSTICE BACON:** Are you saying that the way in which STACK coordinated

1 with the council resulted in these properties not being made available to the claimants?
2 Because as I understand it you did acquire them.

3 **MS HAYWARD:** Not paragraph 2. Quite, Madam --

4 **MRS JUSTICE BACON:** So which properties were not made available to the
5 claimants as a result?

6 **MS HAYWARD:** This is the question insofar as what we speak to which is a general
7 I believe concerted practice.

8 **MRS JUSTICE BACON:** Which properties were not available to the claimants?

9 **MS HAYWARD:** The remaining vacant properties is my understanding, within the
10 Bishop Auckland town centre, which fit that market definition. So specifically
11 appropriate hotel properties to develop.

12 **MRS JUSTICE BACON:** So are you saying that there was an agreement which
13 somehow resulted in the remaining vacant properties not being made available to the
14 claimant?

15 **MS HAYWARD:** We use 9-11 Newgate Street as an example. I do appreciate there
16 is no --

17 **MRS JUSTICE BACON:** How -- I am struggling -- leaving aside this point about 9 to
18 11 being an example, how did the agreement between STACK and the council in any
19 way touch on the other properties? Are you saying that there was some agreement
20 that the council would prevent the claimant from having access to the other properties?

21 **MS HAYWARD:** Well, quite. It is foreclosure insofar and I do appreciate we are not
22 dealing with foreclosure at this point but insofar as my understanding --

23 **MRS JUSTICE BACON:** But what was the agreement?

24 **MS HAYWARD:** The agreement was that STACK would be the favoured operator.

25 **MRS JUSTICE BACON:** In relation to properties other than 9 to 11 Newgate Street?

26 **MS HAYWARD:** Well, this is what I completely concede is not defined as clearly as it

1 should be.

2 **MRS JUSTICE BACON:** Even if it is not in the pleading, I mean are you saying that
3 STACK would be the favoured operator in relation to other properties?

4 **MS HAYWARD:** If I may just confirm one point.

5 **(Pause)**

6 I think, Madam, respectfully I think what may have occurred is that because this case
7 was then picked up and put down, the case is demonstrably not clear at all insofar as
8 what the position is.

9 So my understanding now is that 9-11 Newgate Street was the property that was
10 allocated to STACK, that there was a certain amount of grant funding, which
11 I appreciate doesn't relate to this specific matter, there was a certain amount of grant
12 funding that was allocated and earmarked specifically for that property. What the
13 claimant contends, which I do appreciate is more a matter for the SCA appeal but
14 insofar as what the claimant contends with the Chapter 1 and 2 prohibitions is that the
15 property itself effectively marked foreclosure from the market because it was all tied
16 to that one grant. A very large grant. Which I do completely appreciate --

17 **MRS JUSTICE BACON:** What do you mean?

18 **MS HAYWARD:** -- is related to the other matter. Sorry forgive me?

19 **MRS JUSTICE BACON:** I am sorry for interrupting. What do you mean by foreclosed
20 the market because it was all tied to that one grant?

21 **MS HAYWARD:** Because on their case the funding that was available at the material
22 time, which I think really is the matter in issue at this point, which wasn't clear, is that
23 instead what happened was the funding itself was only tied to one property, 9-11
24 Newgate Street. Now that funding being inextricably linked to that property even
25 though the funding was meant in the claimant's terms to be able to redevelop all of
26 Bishop Auckland, all that region that we have defined earlier; however because that

1 funding was inextricably linked to that property, that was the only property that could
2 have been awarded that funding. So in order to have access to that funding, one
3 would have to have access to that property specifically when there were a number of
4 other leisure and hospitality industry businesses that they wanted to develop in the
5 region that could have been dealt with at various other premises, including but not
6 limited to those three properties included in the pleading, from my understanding.
7 Then at that point those properties -- forgive me, that one property was -- the one
8 property, which is why we say just one property can't actually amount to a dominant
9 position --

10 **MRS JUSTICE BACON:** Sorry, just pausing there.

11 **MS HAYWARD:** Yes. Of course.

12 **MRS JUSTICE BACON:** This is a case that you are now making a case that there
13 was a finite amount of funding. It was all allocated to 9 to 11 Newgate Street. There
14 was therefore not funding available for other properties.

15 **MS HAYWARD:** That's now my understanding, my Lady. Forgive me, I do completely
16 appreciate where we are.

17 **MRS JUSTICE BACON:** But that is not in any way -- it is not even suggested in your
18 current competition Act claim.

19 **MS HAYWARD:** I think if it would be at all possible. I do appreciate we are very short
20 on time, but if I could have five minutes to confirm some points. I do completely
21 appreciate where we are, that might streamline everything. If I could do that in court,
22 if it would assist.

23 **MRS JUSTICE BACON:** Well, I think we could rise. I think you need to confirm
24 whether you are pursuing your application to amend as it is currently made.

25 **MS HAYWARD:** Quite, my Lady.

26 **MRS JUSTICE BACON:** What you are now saying -- everything that you have said

1 this morning is not within your application to amend.

2 **MS HAYWARD:** I need to clarify that point.

3 **MRS JUSTICE BACON:** Yes.

4 **MS HAYWARD:** I need to clarify that point.

5 **MRS JUSTICE BACON:** I think you do need to confirm whether you are pursuing any
6 of what is currently said in your Competition Act claim.

7 **MS HAYWARD:** Just to clarify a few points, Madam. Thank you very much.

8 **MRS JUSTICE BACON:** We will rise for five minutes and I think we are going to need
9 to get quite quickly to what your case is on this, because Mr Howell has to have
10 a chance to respond.

11 **MS HAYWARD:** Yes, of course.

12 **MRS JUSTICE BACON:** All right. Five minutes.

13 **(11.44 am)**

14 **(A short break)**

15 **(11.52 am)**

16 **MRS JUSTICE BACON:** Yes, Ms Hayward.

17 **MS HAYWARD:** Forgive me at the outset for all the confusion, Madam. What I think
18 the issue has been is a number of different factual points that have developed over
19 time, because this is passed from counsel to counsel and lawyer to lawyer -- solicitor
20 to solicitor, forgive me. So my understanding now is that what would be required
21 instead is that the only pragmatic way forward would be an amended pleading again
22 insofar as the -- effectively an unless order to deal with what has developed in terms
23 of I can give you the loose understanding that the 9-11 Newgate Street property was
24 the property that had the funding allocated to it, a large amount of funding, and in order
25 to access that funding they would have had to have access to that property.
26 I appreciate the public tender point there. That is something that I need to take

1 instruction on what exactly happened prior to, because there are questions which are
2 referenced in the witness statement about various concerted, alleged concerted
3 practices with STACK in terms of whether or not that funding was agreed to prior to
4 going to tender or not. I do appreciate procurement is a different question entirely.

5 **MRS JUSTICE BACON:** So just to be clear, are you no longer pursuing your
6 application to amend on the terms that are currently set out.

7 **MS HAYWARD:** I think so, Madam. I think so.

8 **MRS JUSTICE BACON:** So you are no longer pursuing the application to amend in
9 the form of the second amended claim form, is that right?

10 **MS HAYWARD:** I think so, Madam. I think insofar as it requires significant
11 refinement. As you say it doesn't reference the properties in question, it doesn't
12 reference the, for lack of better word, aetiology of why that property was of such
13 particular importance. I think some confusion comes from the fact that both claims are
14 read in tandem, the SCA appeal as well. But in terms of the 9-11 Newgate Street
15 question, it would be in terms of the ownership of that property, which is not in dispute.
16 It would be in relation to the funding that that property attracted, the claimant's intention
17 to access that funding and the fact or the question which is whether or not a concerted
18 practice did in fact occur prior to tender.

19 **MRS JUSTICE BACON:** All right. So just to be clear, you want to advance a different
20 claim relating to the access to the funding which flowed --

21 **MS HAYWARD:** From ownership of the property.

22 **MRS JUSTICE BACON:** -- which flowed from the 9 to 11 property because you say
23 the majority of the funding was allocated to that.

24 **MS HAYWARD:** And my understanding is also, and this is where a lot of the facts are
25 also pleaded in the Subsidy Control Act notice of appeal, is that there was the
26 STACK -- the TAP project as well, not STACK, The Auckland Project, forgive the

1 acronym, sorry. The Auckland Project, which was allocated the Masonic Hotel which
2 had a similar situation we say that attracted certain funding that could not have been
3 accessed but for access to that property specifically.

4 So that is referenced in the SCA appeal not in the -- it is referenced but not explicitly
5 pleaded. I do concede insofar as the current pleadings are concerned. I do
6 completely appreciate this would require substantial amendment.

7 The underlying facts remain the same that we set out. The underlying facts remain
8 the same. In terms of the actual elements of establishing the Chapter 1 and 2 case,
9 they are related to what is in the pleadings so I completely appreciate that they are
10 distinct from what is referenced here, because the real challenge is the grant funding
11 that was attached to those two properties that effectively we say relates to the
12 foreclosure points in relation to the fact that all of those, that particular market area
13 was earmarked at an earlier stage, speaking to the concerted practice point, for those
14 two separate third parties i.e. STACK and The Auckland Project. And insofar as the
15 procurement points are concerned it needs to be clarified and possibly it is a matter
16 for evidence whether or not the claimant had sufficient access. We do acknowledge
17 it went to tender but the question is what that process was and the process that led up
18 to it.

19 **MRS JUSTICE BACON:** Whether the claimant had sufficient access to those projects
20 or to funding?

21 **MS HAYWARD:** To those projects. To those projects -- as in to those properties.
22 Forgive me, it is 9-11 Newgate Street and the Masonic Hotel are the two that relate.
23 The reason I haven't referenced the Masonic Hotel as it stands, as we completely
24 acknowledge, it is not in the amended pleadings.

25 **MRS JUSTICE BACON:** The Masonic Hotel being The Auckland Project?

26 **MS HAYWARD:** Quite. So then the -- market place. Forgive me. Market Place Hotel.

1 There are a number of properties. The Market Place Hotel and that particular hotel
2 itself is another example we say that was an example of where grant funding was
3 attached, inextricably linked to access to that property and on that basis we say the
4 procedure that was involved in accessing that property fell short of what Chapter 1
5 says is permissible for the purposes of the Competition Act.

6 Again, with all due apology, I do recognise that that is a separate question.

7 **MRS JUSTICE BACON:** All right. That is not the application today. The application
8 today is to amend on the basis of this second claim form. You have confirmed, I think,
9 that you are not pursuing that application, is that correct?

10 **MS HAYWARD:** Not on the basis of the current pleadings. And I do of course
11 acknowledge the other side has not had time to respond to what is effectively a fresh
12 application to amend.

13 **MRS JUSTICE BACON:** All right. So that is not -- the application has not --

14 **MS HAYWARD:** Has not been made. Quite.

15 **MRS JUSTICE BACON:** The application has not been made. There is no further
16 amended claim form. The only thing that we have before us today is the second
17 amended claim form.

18 **MS HAYWARD:** My question, my Lady, would be whether or not it could be cured by
19 what we would argue would be substantive, we acknowledge, amendment and insofar
20 as inadequate particularisation is concerned, the court guide is instructive on that
21 score insofar as if it can be I think cured, and I do accept this is quite liberal use of it,
22 by an amendment, the current pleadings, the second amended pleadings, whether or
23 not that is enough to not justify a strike-out application. Because there are points here
24 that have evolved over time and I do appreciate it has evolved at the 11th hour but it
25 is a question as to whether or not the tribunal is minded to characterise this as
26 effectively what we would be asking for is that unless order, whereby we are asked to

1 amend the second amended claim form in order to account for what has developed
2 today. And you have my tremendous apologies for the fact that this was not picked
3 up but insofar as where we are, rather than abandoning the claim in its entirety, as the
4 claimant has been acting in person, and I do appreciate *Barton v Wright Hassall* tells
5 us that doesn't necessarily afford him much leeway. We say that because this has
6 changed hands so many times and both counsel and solicitors went on the record
7 relatively recently there has been some factual inconsistency that has resulted in us
8 not being able to respond -- in terms of the current application that is before the court
9 which was made at a much earlier stage, it would have been made back in the latter
10 half of last year before counsel was instructed. The question is whether or not now
11 we say if it's possible that the tribunal would agree that we could amend the existing
12 second amended claim form to deal with these points.

13 As I say the underlying facts remain the same, I do appreciate.

14 **MRS JUSTICE BACON:** You have made all those points.

15 Anything else you want to say very briefly in support of your new application for
16 an unless order requiring you to amend further rather than the strike out of the claim?

17 **MR HERGA:** Can I just raise one point. Where you have been going in the last few
18 minutes it seems pretty much that you will say that your case is really the Subsidy
19 Control Act case, which you have already obviously put your notice of appeal in. So
20 actually is there any more you are going to add by having a further amendment to what
21 sounds a difficult case?

22 **MS HAYWARD:** Quite. Considering that point, we completely take your point like
23 that it really is effectively fleshed out in the SCA appeal. However in terms of the
24 Chapter 1 and 2 prohibitions there is an argument that access to those two specific
25 properties foreclosed, and I do understand that that is a matter for another time but in
26 terms of the funding that was attached to it there is an inextricable link between both

1 proceedings here insofar as the ownership of those sites were the gateway to that
2 funding. Insofar as where we land with that, the question is there is still an argument
3 there that may have indeed been concerted practices that occur as set out in the
4 witness statement of the first claimant. The question is whether or not at this juncture
5 the SCA appeal deals with those points. We say not necessarily all of them, because
6 it does raise questions of ownership, it does raise questions of whether or not they did
7 indeed have access to the market at the material time. We say that market though
8 framed in a very small manner, which would require amendment as well I do
9 completely accept, whether or not those properties represented that market for those
10 particular points. They were the only appropriate properties at the material time.
11 In answer to your question, Madam, in terms of the amendment application, I would
12 like to take you to that section of the guide.

13 **MRS JUSTICE BACON:** Sorry, are we talking about the tribunal guide?

14 **MS HAYWARD:** Yes, we are. We are talking about the tribunal's guide in terms of
15 the question of whether or not a pleading should instead, rather than being struck out
16 in its entirety -- because the facts remain the same. The claimants thoroughly
17 appreciate that matters have evolved but the question is whether or not, because we
18 are still alleging the same elements --

19 **MRS JUSTICE BACON:** Which paragraph of the guide?

20 **MS HAYWARD:** Yes of course. One moment, my Lady, I will pull that up now.

21 It is 5.98. That is 135 of the authorities bundle.

22 I do appreciate the guide does say in some limited respects. What we would submit
23 there is that ultimately the facts remain the same, the underlying facts we plead stand.
24 We are still challenging the same points in relation to --

25 **MRS JUSTICE BACON:** Sorry, this isn't about a failure to comply with a practice
26 direction or order. You are now saying that you don't pursue the application to amend

1 on the basis of the amendment that we have.

2 **MS HAYWARD:** I do appreciate that.

3 **MRS JUSTICE BACON:** So that is just that you are not pursuing an application. We
4 don't have before us any other application to amend.

5 **MS HAYWARD:** This is the case. It is effectively an oral application which I do accept
6 the rules are silent on whether or not the tribunal would exercise its general case
7 management powers and allow it, allow in the form of an unless order. I do appreciate
8 that it is not a question as to whether or not we are abandoning the pleadings in their
9 entirety. We say it is not necessarily an abandonment of those pleadings as the
10 underlying facts remain the same and as indeed the challenge remains. I do
11 completely accept that it is a separate case in substance.

12 **MRS JUSTICE BACON:** Yes.

13 **MS HAYWARD:** I do accept that in form the challenge is different. I can only
14 apologise for where we are with respect to the factual inconsistencies.

15 **MRS JUSTICE BACON:** Yes. All right. So it is an oral application to make a further
16 amendment to your case, to plead a different case albeit arising out of the same facts.

17 **MS HAYWARD:** Quite. Arising out of the same facts. We say the same case. We
18 say insofar as the Chapter 1 and 2 prohibition still was in issue.

19 **MRS JUSTICE BACON:** Yes I understand. All right.

20 Extremely briefly in the next couple of minutes is there anything else you want to say
21 in support of that oral application to amend?

22 **MS HAYWARD:** Insofar as that is concerned, Madam, I think other than what has
23 been said before I don't think there is much more. Bar the fact to reiterate that the
24 claimant has been acting in person.

25 **MRS JUSTICE BACON:** Yes. We understand that.

26 **MS HAYWARD:** Quite. I think that is as far as we can take it.

1 **MRS JUSTICE BACON:** All right. Thank you.

2 Mr Howell, you don't need to respond to the application as originally put because that
3 is no longer being pursued.

4 **MR HOWELL:** Yes.

5 **MRS JUSTICE BACON:** What you need to respond to is the oral application to amend
6 to put in a new case, albeit arising out of the same facts.

7

8 **Responsive submissions by MR HOWELL**

9 **MR HOWELL:** Yes. I will be as brief as I can, Madam President.

10 Standing back, the council is a public body and has taken a responsible approach to
11 this litigation, which was first brought in September. It has been alive at all material
12 times, until solicitors came on the record, that the claimants were acting in person, and
13 it has been astute not to take, if I can put it like this, all procedural points. It is, in my
14 submission, critical when looking at the procedural application before you, to look at
15 the history of this matter.

16 So we received the first claim form, which is at page 6 of the hearing bundle, it is no
17 longer relied upon at all, that has been made abundantly clear, on 19 September.
18 Large parts of that were outside the tribunal's jurisdiction, as is now conceded, and
19 the claim itself was wholly inadequately particularised.

20 The council then applied to challenge that. Pending the determination of that
21 challenge, we were then confronted with a further claim form beginning at page 27,
22 which was concerned with essentially grant funding. That was how it advanced the
23 Chapter 1 and Chapter 2 case. It was said in that claim form that the defendant had
24 acted as an undertaking in its commercial capacity as a grant awarding body and
25 occupied a dominant position in the local market for the allocation of regeneration and
26 cultural funding. There aren't numbered paragraphs in that one but it is on page 31.

1 That was the case that was then being put. From what I understood of my learned
2 friend's submissions, it seems remarkably similar to what is now being said.

3 We took issue with that for a number of reasons. The tribunal agreed with us that that
4 pleading was unclear. The claimants were then given a further opportunity to produce
5 what the tribunal in terms directed were to be final statements of their amended case
6 and we got the notice of appeal in the Subsidy Control Act case and the amended
7 claim form in this case.

8 Now, reliance on that has today been abandoned by my learned friend. With respect,
9 the approach that has been adopted to this is simply not consistent with the manner
10 in which litigation is conducted in this tribunal and is liable to give rise to a very
11 significant waste of time and cost, and obviously those are public funds in the council's
12 case.

13 An adjournment was granted by the tribunal, again at prejudice to my client, in order
14 that the claimants could be represented for the purpose of this hearing. If there was
15 any issue with the pleading, and in my submission there were very significant issues
16 with the pleading, indeed counsel in my submission could not have put their name to
17 this pleading properly in the manner it stands. What should have happened is that
18 when solicitors and counsel were instructed in this matter, that should have been
19 identified, a new amended case should have been put forward, and we could today be
20 looking at a pleading which I would have had time to consider, take instructions on
21 and obtain evidence if I needed to, to say particular bits weren't arguable.

22 What instead happened is my learned friend's solicitors in the witness statement of
23 Mr Chisman-Russell and in my learned friend's skeleton argument, simply adopted
24 this claim form. Mr Chisman-Russell said it was likely to succeed, my learned friend
25 made no attempt, in my submission, in her skeleton to address the actual points of
26 detail on which the council had said this claim was simply not viable. It was simply

1 | said that is all a mini trial, I don't need to get into it.

2 | Then this morning, in exchanges with the tribunal, it has become readily apparent that

3 | the claim can't be maintained.

4 | There is no pleaded claim before you today. It is akin to the position in *Forrest Fresh*

5 | *Foods* and there is no pleading on which my learned friend can place any reliance.

6 | The claimants have been given ample opportunity, this would be the fourth

7 | opportunity, and we do submit that three is enough.

8 | So for those procedural reasons alone, given we have turned up here, substantial

9 | costs have been incurred in preparing to meet a case which is now abandoned, we

10 | say the tribunal should draw a line in the sand today. The appropriate course is to

11 | strike out this claim under the Competition Act.

12 | If Mr Thomas then wishes to seek to reformulate a new case in the manner described,

13 | he can attempt to do so in due course. We wouldn't encourage that and we would

14 | suggest he should engage in proper pre-action correspondence, which of course he

15 | didn't do before filing these proceedings. But on any view we say simply on procedural

16 | grounds, the claim should be struck out. There has been ample opportunity.

17 | I do say, however, if I need to say it, that substantively, to the extent I was able to

18 | understand the new case that may or may not be advanced, that case has no prospect

19 | of success. It's difficult perhaps to meet that.

20 | **MRS JUSTICE BACON:** I am not sure if you need to say anything more about that,

21 | because we don't have a formulated new claim.

22 | **MR HOWELL:** No. Well I suppose it was the sort of new market definition and

23 | questions of that. Again, serious allegations were made, for example in relation to the

24 | Chapter 1 prohibition, just taking that as an example, that there had been some kind

25 | of improper coordination between the council and STACK. Now, my learned friend

26 | kept on saying there was a basis for this in the witness evidence. She never took you

1 to any paragraph in it. In my submission, there are no primary facts whatsoever to
2 allege any form of impropriety. Mr Wood's evidence sets out clearly there was a soft
3 marketing exercise, there was a public tender and the claim -- that was obviously all
4 published. It received considerable publicity. You have all of that in the bundle.
5 Witness evidence from a responsible officer of the council, supported by
6 contemporaneous documents, and you simply have nothing beyond completely vague
7 assertions on the Chapter 1 case that there was any kind of impropriety or anything
8 other than precisely what the council describes it as.

9 So, simply to put on the record that we think those allegations have no proper basis
10 whatsoever and really should never have been advanced.

11 I can try to address the questions of market definition because we say on the basis of
12 Mr Wood's evidence, even what my learned friend was saying today to the extent
13 I understood it, has no prospect of success at all.

14 **MRS JUSTICE BACON:** I don't -- let me just check with the panel but I am not sure
15 that you need to say anything more because that case is not pursued. Let me just see
16 if the panel have any questions.

17 No. You don't have to say anything more about that.

18 **MR HOWELL:** I think the only other point which I am prepared to argue if I need to,
19 but I am in the tribunal's hands, is the question which we say standing back actually
20 underlies all of this complaint. Of course the claimants are entitled to pursue
21 proceedings under the Subsidy Control Act in respect of awards of grant funding. The
22 reason they have abandoned attempts to challenge the 2023 agreements with
23 STACK, those were challenged in the original claim form but they have abandoned
24 them for two reasons. One, we say they have nothing whatsoever to suggest that the
25 commercial market operator principle didn't apply. That is the reason the council didn't
26 think it was a subsidy. It was paying money for the redevelopment of its own land and

1 then granting of lease on market terms. There is evidence of the basis on which the
2 council concluded it was a market rent.

3 **MRS JUSTICE BACON:** Yes.

4 **MR HOWELL:** Obviously the application was made vastly, vastly out of time, and we
5 have the tribunal's recent decision in the *New Lottery* case about how the undue delay
6 provision is to be applied. So what we say is actually going on is an attempt to put
7 something that could and should have been challenged as a subsidy. We say it would
8 have been misconceived but that is the means you would challenge such a grant. And
9 then to try to put it into a Competition Act claim, again it is a new one and we don't
10 really understand it.

11 If we are going to be faced with a claim that says the council when awarding
12 grants -- so this isn't the STACK funding which is essentially money being paid to
13 redevelop the property owned by the council, or released, but when paying grants to
14 for instance Mr Thomas, his companies, for development of particular sites in
15 Bishop Auckland, or grants to The Auckland Project for their purposes, if the case is
16 going to be made, well, the council is acting as an undertaking in doing that, we say
17 that would give rise to a short point of law. I can address you on that but I may not
18 need to. It may be it is for another day if we see a new pleading. But we do say that
19 does give rise to a point of some importance, because our case is, as I have set out
20 in my skeleton, and I can develop it if you would like, a local authority in making grants
21 for the regeneration of an area, not in the way of the STACK agreements because
22 they are slightly different, but paying money essentially to improve the area for the
23 public benefit is just not acting as an undertaking.

24 **MRS JUSTICE BACON:** Well, that I think is an argument that might arise on
25 a repleaded case, but the case hasn't been pleaded yet.

26 **MR HOWELL:** In which case I will say nothing further. But to record the council does

1 think that point is where it is.

2 **MRS JUSTICE BACON:** Yes.

3 **MR HOWELL:** I think I have made my points procedurally as far as they go. Unless
4 I can assist further.

5 **MRS JUSTICE BACON:** All right. Would you like very briefly then, Ms Hayward, to
6 respond to the points that Mr Howell has just made, urging the tribunal simply to strike
7 out at this stage rather than permitting a new amended case?

8

9 **Reply by MS HAYWARD**

10 **MS HAYWARD:** Only very briefly that it is thoroughly appreciated that this would
11 effectively be a fourth bite of the cherry in terms of being characterised as an amended
12 pleading. In terms of the material that was available at the time by virtue of -- just by
13 way of background for understanding of why the pleaded case appears in the way that
14 it does, is again just to reiterate a reflection of the fact that the claimants have been
15 acting in person and the information that was available at the material time would have
16 resulted in why the case is pleaded in that way. However, in terms of whether or not
17 it can properly be characterised as an amendment for the purposes of today, I reiterate
18 my previous submissions. And in terms of -- I can respond to my learned friend on the
19 undertaking point but as you say that is not the application that is before the court. It
20 may arise in an amended pleading so I will not.

21 But in terms of the question as to whether or not it should be struck out, I do appreciate
22 the points in relation to *Forrest Fresh* this is effectively now because the case is no
23 longer proceeding on the basis of the substance of the original pleading but instead
24 the tribunal is being asked to favour form, effectively, which is currently the only thing
25 that could be stood by our -- some points but mostly the factual background and the
26 fact that it is being advanced in respect of Chapters 1 and 2. Bar that, it would require

1 substantial amendment.

2 However it is a question as to whether or not an amended pleading would then
3 arguably streamline matters considering they all arise under the same points, it has
4 already been allocated a claim number and such. But I do appreciate it is outside the
5 tribunal's usual course procedurally to do so. It is simply a question set against the
6 background of this matter and how it has arrived here. Rather procedurally
7 abnormally, as to whether or not there would be utility in relation to rule 4 with it would
8 assist the court -- forgive me, the tribunal -- with dealing with those points and
9 amending the claim to deal with it.

10 And in terms of the substance of it the final point I would make is that those allegations
11 that were made, what I was referring to in terms of the concerted practice points were
12 meeting minutes that my understanding is were adduced at one point, that speak to
13 but in no uncertain terms, just to clarify for the court record, were never being
14 advanced as axiomatic evidence of definitive concerted practice i.e. untoward
15 dealing. It is more a question of what was available at the material time when the case
16 was pleaded in terms of those meetings that did occur between the council, STACK,
17 and the claimants.

18 That is simply for the purposes of clarification.

19 Yes, in terms of -- by way of brief summary it is simply the question of whether or not
20 the tribunal feel that it is possible that the amended pleading can instead be replaced
21 by a clarified pleading that deals with exclusively those two points, those two
22 properties that are in question that attract that funding and whether or not that did
23 amount to the breaches of Chapters 1 and 2 that are alleged, simply arising out of
24 different factual points. But I do appreciate it requires substantive amendment.

25 **Decision**

26 **MRS JUSTICE BACON:** All right. Thank you.

1 **(Pause)**

2 I can give our decision shortly. There will be reasons to follow but we are going to
3 strike out the claim and we are not going to make an unless order requiring a further
4 amended pleading at this stage. It will of course be open to the claimant to seek to
5 put in a new claim but that would be a new claim. This claim in its current terms will
6 be struck out.

7 And I thought it was helpful to give you that decision now because that means we don't
8 need to go on to deal with the security for costs issue and we can then proceed to deal
9 with the stay application. That is Mr Howell's application.

10 **Application by MR HOWELL**

11 **MR HOWELL:** I am grateful, Madam. Just to indicate, there will be an application for
12 costs arising out of that, but I will deal with that at the end if I may.

13 **MRS JUSTICE BACON:** Well, yes. Yes why don't you deal with that at the end. In
14 any event we will be giving you a judgment on the strike out issue.

15 **MR HOWELL:** Perhaps it would be easier then because we could do a statement of
16 costs.

17 **MRS JUSTICE BACON:** You could at that point.

18 **MR HOWELL:** To do it then.

19 **MRS JUSTICE BACON:** Yes. You could if you wanted make an application for costs
20 and then there could be -- we could decide the principle of costs at this hearing. Or
21 we could just do it all on the papers after we have handed down judgment. Why don't
22 you consider that with your solicitors over the lunch adjournment.

23 **MR HOWELL:** Yes. We can see how we get to on the subsidy control point. I will be
24 as brief as I can.

25 We applied, as the tribunal knows, for a stay of the subsidy control application.
26 Perhaps just to open this up, it would be helpful to start on page 68 of the hearing

1 bundle which is the issued notice of appeal. So you see on 68 there are two decisions
2 being challenged. A further grant to STACK in 2025 and a proposed £3.1 million
3 subsidy to The Auckland Project for the Market Place Hotel. Then, on page 70, so this
4 is just the appellant's case, we see that reiterated at paragraph 9 and then at
5 paragraph 10 we see a positive assertion that the subsidies remain at the
6 decision-making stage, no grant funding agreements have been executed, no funds
7 have been paid, and the respondent continues to refine its subsidy assessments.
8 Then it says they are current and prospective.

9 Now, you have had evidence from, at various different stages, Mr Etherington,
10 Mr Wood and Ms Hackett as to the stage at which these are at. Perhaps I could just
11 indicate to the tribunal what my instructions are today. The further grant funding to
12 STACK is at least several months off. The reason for that is there has been an issue
13 with the neighbouring property, number 13 Newgate Street, which the council has to
14 address under the building safety legislation.

15 **MRS JUSTICE BACON:** When you say it remains several months off, do you mean
16 that no decision has been taken and any decision will be several months away?

17 **MR HOWELL:** Yes. In the sense that the decision-making process in this case, the
18 council is obviously minded to give this funding and it has applied to the North East
19 Combined Authority essentially to be reimbursed for the funding. But no formal
20 decision to actually approve it will be taken until the North East Combined Authority
21 has indicated the money will be given. There have been supportive comments in the
22 press from the mayor but there has not been a formal decision. The council would
23 only make a formal decision to enter into the agreement to provide the funds once the
24 issue under the building and safety legislation has been addressed.

25 As concerns The Auckland Project --

26 **MRS JUSTICE BACON:** So it will only make a decision once the issue regarding?

1 **MR HOWELL:** The neighbouring property.

2 **MRS JUSTICE BACON:** The safety of the neighbouring property?

3 **MR HOWELL:** Exactly. That has to be addressed under the Building Act 1984.

4 **MRS JUSTICE BACON:** Just for clarity, is the background to that in one of the witness
5 statements? You will need to just remind me.

6 **MR HOWELL:** Yes.

7 **MRS JUSTICE BACON:** If you can just give us the reference.

8 **MR HOWELL:** It is Ms Hackett's statement. Perhaps we might go to Ms Hackett's
9 statement. It begins on 205 of the hearing bundle and then 206 addresses the STACK
10 grant, the second STACK grant.

11 **MRS JUSTICE BACON:** Oh, the stability of the site at 9 to 11 because of the adjacent
12 13. I see.

13 **MR HOWELL:** Yes. So the position is, I am instructed, this was obviously settled
14 in March, at the beginning of March, as is set out there. So there is no formal decision
15 to enter into the grant funding agreement.

16 **MRS JUSTICE BACON:** Yes.

17 **MR HOWELL:** As concerns the Market Place Hotel grant, you can see Ms Hackett's
18 evidence in paragraph 8. So you can see that the council is considering the matter,
19 including with its solicitors, and continuing to conduct its subsidy control assessment
20 in relation to that grant. She said it may be finalised within the coming weeks but she
21 wasn't able to provide a firm estimate. I have checked the position today with
22 Mr Wood. What I am told is that the council has asked for further information from The
23 Auckland Project to enable it to make a decision about what is called the viability gap,
24 and that obviously informs the subsidy control assessment as well. Only once it has
25 got that further information and considered it would things move to a delegated
26 decision to approve the funding.

1 So that is where we are on the facts.

2 In terms of what our application was, we have indicated we have difficulties with the
3 reasoning of the tribunal in *Weis* but given the other matters that were before you
4 which have now fallen away, we took a pragmatic point to say, well, stay this as
5 a matter of case management, we will see when we get to *Weis* that was what was
6 done in that case. We didn't invite you to look at the jurisdictional question.

7 In light of the tribunal's letter of Monday, however, I will seek to persuade you to depart
8 from *Weis*. The consequence of that would not be to grant a stay but rather to
9 conclude that the tribunal has no jurisdiction. On that basis, the proceedings would
10 be struck out under rule 11(1)(a).

11 So if I am wrong about that, of course, we maintain the application for a stay for the
12 reasons I have developed in my skeleton but I am going to focus my submissions on
13 what is actually a point of general importance for the operation of the regime, both for
14 the council and for a number of other public authorities, which is whether the approach
15 in *Weis* is right or wrong.

16 My submission on that point, in a nutshell, is that what is reviewable under section 70,
17 leaving subsidy schemes aside, is a decision to confer on an enterprise an
18 enforceable right to financial assistance from public resources. An in-principle
19 decision to give financial assistance is not sufficient. I will say that is clear from the
20 plain words of the Act which we will go to, read in their context and in light of their
21 purpose. And indeed when one considers the provisions of the Act as a whole, we
22 say it is a fundamental tenet of the statutory scheme. We will see that when you look
23 at the substantive prohibitions themselves, the transparency provisions and the time
24 limits.

25 We say those can't operate sensibly or coherently if inchoate decisions of the type
26 under consideration in this case are reviewable under section 70.

1 In the interests of time, I will develop those submissions as we go through the critical
2 provisions of the Act.

3 **MRS JUSTICE BACON:** Can I just ask this though. You say what is reviewable is
4 a decision to confer on an enterprise an enforceable right to financial assistance. So
5 it is a decision to confer. What do you say would be the analysis if the council did take
6 a formal final decision to grant funding, so it is a decision to confer an enforceable right
7 but that the actual agreement, which embodied the grant of the funding, was not
8 signed on the same day, let's say on one day, on Monday, the council takes the
9 decision within the council and the only thing left at that point is then simply to sign the
10 agreement but the agreement hasn't yet been signed. On Tuesday, or Friday the
11 agreement is signed. Which of those is the reviewable decision? Is it the decision on
12 the Monday, which is the final decision of the council, or is it the signing of the
13 agreement? Of course the agreement may be that funding is then going to be actually
14 transferred a week or a month later, but there would say let's say on the Friday be
15 a signed agreement under which the recipient would have an enforceable right to the
16 subsidy. Which of those is the reviewable decision.

17 **MR HOWELL:** If I can take it in stages. No part of my submission that you have to
18 have received the funds.

19 **MRS JUSTICE BACON:** Yes I understand.

20 **MR HOWELL:** So just to clarify that point.

21 **MRS JUSTICE BACON:** Yes.

22 **MR HOWELL:** There is then the issue which I should stress it doesn't arise in this
23 case, so you may not need to decide it on the present basis. On that basis we would
24 say the terms giving a subsidy as we will see and decision to give a subsidy are
25 perhaps not always used consistently throughout the Act. One thing that you would
26 need to consider if this point did arise is that the prohibitions are directed to the giving

1 of subsidies. So it may be very difficult to assess whether or not the prohibitions have
2 been breached without a subsidy actually having been given. That being said, I don't
3 need to go further than saying that the point where jurisdiction arises is the decision
4 to confer the right, even if for example the council's delegated officer takes that on the
5 Monday, and the grant agreement or the loan agreement or whatever it may be is then
6 formally executed on Wednesday.

7 **MRS JUSTICE BACON:** Yes. So you say that at least there must be the final
8 decision, even if that decision is then implemented by the council's officer later.

9 **MR HOWELL:** Yes. And I don't need to go further than that.

10 **MRS JUSTICE BACON:** Yes, I understand.

11 **MR HOWELL:** I am grateful.

12 So if we could turn up, start with the jurisdictional provision, which is in section 70.
13 That is at 51 of the authorities.

14 **MRS JUSTICE BACON:** Sorry, page?

15 **MR HOWELL:** 51, madam.

16 **MRS JUSTICE BACON:** Yes all right.

17 **MR HOWELL:** So the tribunal's jurisdiction is created by section 70:

18 "An interested party who is aggrieved by the making of a subsidy decision may apply
19 to the Competition Appeal Tribunal for a review of the decision."

20 Then it deals with subsidy schemes which aren't in issue in this case. But we see at
21 (7):The 'subsidy decision' is defined as "a decision to give a subsidy or to make
22 a subsidy scheme."

23 So the critical words you need to construe are "decision to give a subsidy" in
24 section 70(7).

25 Before we come to the definition of "giving" which we will turn to in a moment, a few
26 points of context about this provision while we are here. Firstly, and this is

1 an important point I will return to, there is no requirement for permission to bring the
2 proceedings in contrast to claims for judicial review in the Administrative Court. You
3 will also see from subsection (4), and this is a recurring pattern in these cases, the
4 importance which Parliament attached to time limits as an aspect of commercial
5 certainty and I will come back to the question of time limits in due course.

6 Subsection (5): In determining the application the tribunal must apply judicial review
7 principles.

8 I will come back to that when we look at the provisions on relief. But what this provision
9 deals with is where there is jurisdiction. So you apply judicial review principles there.
10 It doesn't tell you whether the tribunal does have jurisdiction.

11 Subsection (6), we see that the effect of a subsidy decision, so those are the economic
12 effects on the market, is not suspended by reason of making an application under this
13 section, except insofar as the tribunal otherwise directs.

14 So Parliament clearly thought the default position, and we will come back to this in due
15 course, is subsidies have effect on the market unless there is a decision to apply for
16 and obtain interim relief. Or they are later unwound. So those are the points of context
17 in section 70.

18 Then, section 2, which begins on page 21, this deals with the question of what giving
19 a subsidy means. The tribunal will be very familiar with the definition of a subsidy in
20 section 2(1). So it is financial assistance which meets the various limbs there.

21 Then, over the page on 22, subsection 5, which we say is a critically important
22 provision for the purposes of this Act. Financial assistance is to be treated as given
23 to an enterprise if the enterprise has an enforceable right to the financial assistance.
24 So the definition of giving, and it is a deeming provision, is one that applies for the
25 entirety of the purposes of the Act. We say that plainly includes section 70.

26 So, on that basis, on the plain meaning of the words of section 70(7), the definition of

1 subsidy decision, read with section 2(5), we say a subsidy decision is a decision to
2 confer an enforceable right to financial assistance on an enterprise. It's not a decision
3 in principle to give financial assistance which doesn't involve conferring an enforceable
4 right. We discussed earlier the permutations that may arise. You can make an in
5 principle or minded to decision, subject to I will decide later to enter into the grant
6 agreement. We say that is insufficient because the point of no return has not been
7 passed. The subsidy -- there has been no decision to give the subsidy.

8 Then you have the decision to enter into the legally binding grant agreements, which
9 actually would confer the right to assistance and we say that is the point of no return.
10 Or at least in this case it is sufficient and proceedings for review can be brought. What
11 doesn't need to happen of course is for the grant actually to be disbursed.

12 **MRS JUSTICE BACON:** So the decision to enter into the legally binding grant
13 agreement i.e. a formal decision taken by the relevant authority that it will enter into
14 the grant agreement.

15 **MR HOWELL:** Yes. Arrangements of a type that confer a legally enforceable right.

16 **MRS JUSTICE BACON:** But it doesn't have to -- you are not saying that there has to
17 be the signing of the grant agreement.

18 **MR HOWELL:** No. That's not a point that actually you need to get to in this case,
19 because on the evidence there simply hasn't been a decision to enter into binding
20 agreements.

21 The overall submission is Parliament created a clear rule here to provide certainty both
22 to public authorities as to the stage at which their decisions could be challenged, and
23 to affected commercial parties, both interested parties who need to know when they
24 can bring proceedings, and we will see the transparency and time limit prohibitions,
25 but also recipients of financial assistance or potential recipients.

26 And so, if I can just go through the provisions of the Act now to show you why we say

1 our construction is the correct one when you look at them as a whole.

2 **MR HERGA:** Could I just clarify one point. If the council resolves it has seen the
3 documents that are going to be entered into, it has done its due diligence and it
4 resolves to enter into the funding agreement but delegates signature to the chief
5 executive and the CFO, which is quite a common sort of thing, from what I think you
6 are saying is that would constitute the decision.

7 **MR HOWELL:** It would depend on the precise terms. If the delegation is, if I could
8 put it this way, a ministerial one. So it is -- you are the for instance authorised person
9 who can authenticate the council's seal on a document, then I agree. For the purpose
10 of my case today the resolution of the council is sufficient.

11 **MR HERGA:** Okay. Can I just sort of give one more example. If the council resolves
12 it has seen the term sheet of the funding agreement, it is happy with that, it is happy
13 with the due diligence of the person seeking the funds but it says, okay, we agree to
14 proceed but we leave -- we delegate the power to decide, to agree the final legal
15 documents to the chief executive and the CFO or whatever. What about that? Is
16 a decision being made then or not?

17 **MR HOWELL:** I think that is a rather harder question. Because if you -- again it would
18 depend on the precise terms of the delegation. If you are really delegating any
19 substantive aspect of the decision-making process so it is not simply a ministerial
20 delegation, the question may arise - what if when reviewing the precise legal terms
21 there is a disagreement between the authority and the enterprise and the delegated
22 person says, well, you know we can't enter into it on these terms. So we would say
23 again that doesn't arise but that probably is in the stage of no decision at that point to
24 confer an enforceable right. And I do say that is important when we look at the
25 prohibitions which are directed to the giving of subsidies largely, of why on a case like
26 that you might tip the balance against having jurisdiction.

1 **MR HERGA:** Okay. One final point if I may. Sorry, I probably shouldn't go any further
2 but do we have in the evidence the council resolution on this?

3 **MR HOWELL:** I don't believe so. We have -- for the STACK grant we have essentially
4 a grant application made by the council to the North East Combined Authority.
5 I am instructed there are no formal decisions of that type - resolutions have yet been
6 made at all in this case.

7 **MR HERGA:** Okay thank you.

8 **MR HOWELL:** So if we, just to go through the other provisions, section 12, which is
9 the key provision that has arisen in most of these cases and there is an allegation of
10 breach of it, that's on page 33. So the key prohibition here is 12(1) because 12(3) is
11 directed to schemes which aren't at issue. So 12(1)(a):

12 "A public authority must consider the subsidy control principles before deciding to give
13 a subsidy."

14 So we say that means before deciding to confer an enforceable right to financial
15 assistance on an enterprise. So what a public authority can do perfectly lawfully is
16 make an in-principle decision to give financial assistance and then go on to consider
17 whether the subsidy control principles are satisfied. And one might think that would
18 very often be the practical way things are done.

19 But then (b) is we say very important because in a case like this there is no dispute
20 that the council has looked at the subsidy control principles and is continuing to look
21 at them. The prohibition there is it must not give the subsidy unless it is of the view
22 that the subsidy is consistent with those principles.

23 So this in my submission supports the submission that jurisdiction crystallises at the
24 later stage, because the prohibition is directed to the giving of the subsidy and how do
25 you determine whether or not a subsidy has been given, in compliance with this
26 provision, unless it has been given, or at least we are at the very final stages of the

1 decision-making process.

2 We do say, if you are in the world of allowing in-principle decisions to be challenged,
3 the tribunal will simply be unable to form a view about whether section 12(1)(b) has or
4 has not been complied with, and the inevitable consequence will be it will have to stay
5 the proceedings in most cases. I will come back to that, whether that can really have
6 been the intention of Parliament.

7 Just to see the theme of certain other prohibitions, we don't have all of them in the
8 bundle, but if we could look at section 14 next. It is an introductory provision and we
9 see the purpose of Chapter 2 of Part 2 is to prohibit the giving of certain subsidies and
10 impose other requirements in relation to the giving of certain other subsidies. Just to
11 pick up one example relevant in this case, which is about CMA reporting, the relevant
12 prohibition for that is section 31 on page 36. Then we see a subsidy or subsidy
13 scheme in respect of which a public authority must request a report from the CMA
14 under section 52 is prohibited. And then we see the various conditions. You have to
15 go through the mandatory referral process ending in paragraph (d). A mandatory
16 referral request has been submitted, the CMA report has been published but the
17 cooling off period has not expired. And we see the meaning of the cooling off period
18 is in section 54(2). So again it is prohibiting the giving of subsidies.

19 Then, just to show you the other provisions on this prohibition, so you have the full
20 context, section 52 on page 46, mandatory referral to the CMA. A public authority
21 must request a report from the CMA before giving a subsidy or making a subsidy
22 scheme.

23 **MRS JUSTICE BACON:** Which page are we at?

24 **MR HOWELL:** 46. We are looking at section 52, Madam President.

25 **MRS JUSTICE BACON:** I am there. Yes.

26 **MR HOWELL:** So you have to have requested the report from the CMA before giving

1 the subsidy, so you can perfectly well make an in-principle decision to give financial
2 assistance, which the council did in respect of The Auckland Project, but then it had
3 to, before giving the subsidy, conferring the enforceable right, request the report from
4 the CMA.

5 Then, just the final provision on this one, section 54 on page 49:

6 "A public authority must not give a subsidy or make a subsidy scheme in relation to
7 which the CMA has provided a report before the end of the cooling off period."

8 So again the prohibition is concerned with the giving of the subsidy. All of these
9 prohibitions, we say, have that objective. They are not directed to abstract decisions,
10 in principle decisions to give financial assistance.

11 The next point is the provisions about transparency and pre-action information which
12 are a fundamental tenet of this statutory scheme.

13 33, "A public authority", this is on page 38, section 33:

14 "A public authority must ensure an entry on the subsidy database is made in respect
15 of a subsidy given by the authority."

16 So you make the entry in the subsidy database after you have given the subsidy. Once
17 the enterprise has an enforceable right to financial assistance.

18 Then section 76 is the duty to provide pre-action information. That is on page 58.

19 Now, just to introduce this provision, where it is accepted that an authority has given
20 a subsidy, the issue (save where you are in a particular prohibition) the issue under
21 section 12 as the tribunal recently made clear in the *Bristol Airport* decision, is a sort
22 of familiar judicial review one. It is have you essentially conducted a rational
23 assessment of the subsidy control principles and whether they are satisfied? Most of
24 the time it would be very difficult for a claimant to have any idea about what the
25 authority has or has not considered. The consequence of that would be very difficult
26 for most claimants to actually plead a viable challenge without information.

1 So this provision which gives effect to a provision in the TCA is of critical importance
2 for enabling challenges to be brought and for the Act to work.

3 At section 76(1):

4 "An interested party may make a request to a public authority for information about
5 a subsidy or subsidy scheme that the authority has given or made."

6 So the right to obtain pre-action information, which is an essential part of any
7 challenge, or at least many challenges, where the issue is have the principles been
8 complied with, only arises once the subsidy has actually been given. We see from
9 (2)(b) what the purpose of the request is. It is deciding whether to apply for a review
10 of a subsidy decision under section 70 on the ground that the decision did not comply
11 with the requirements of Chapter 1 or 2 of Part 2. And again, we say that illustrates
12 that what section 70 is directed to is a later stage, not decisions in principle.

13 Then from (3) we see the information that actually has to be given:

14 "Where the authority receives a request it must provide such information as would
15 enable or assist in the making of a determination [that is by the interested party] as to
16 whether the subsidy was given or the scheme was made in accordance with the
17 subsidy control requirements."

18 So, it is envisaging that you are giving information about a subsidy that has actually
19 been given. So, it is very much directed to the latter stage.

20 In my submission, the point arising out of section 76 is that information would only in
21 Parliament's view be needed after the subsidy has been given. If applications could
22 in fact be brought at the earlier stage of in principle consideration, applicants who
23 simply have no means of obtaining the required information to plead their case, so the
24 inevitable consequence would be they would have to plead the case on basis of
25 incomplete information, replead when proceedings were underway and the subsidy
26 had been given. We say that would be a recipe for inefficiency and wasted costs. And

1 as in this case, it will likely leave the proceedings in a zombie state until the subsidy
2 control assessments are finalised, the subsidy is given and there can be proper
3 disclosure.

4 So that is the pre-action information.

5 Then the time limits. Now, if we could take this in section 71 of the Act, which is on
6 page 53. I do it from section 71 because although the rule is inserted into this
7 tribunal's rules we say you can draw an inference from its contents because it was
8 actually Parliament that inserted the rule. It is not a rule made by the
9 Secretary of State under the Enterprise Act 2002.

10 So, the tribunal will be familiar with the one month time limit. That runs from the
11 relevant date in relation to the subsidy decision under challenge. Then we see the
12 definition of relevant date in (2).

13 Going through each of the limbs, (2)(a):

14 "In a case where a pre-action information request in respect of a subsidy or subsidy
15 scheme is made within one month of the transparency date, the date on which the
16 notice under paragraph (8) is given."

17 Just to unpack that a little bit, if we go over the page you will see the transparency
18 date and this turns on generally whether or not the subsidy was entered on to the
19 database, which of course has to occur after it has been given.

20 I will come back to the other example in a second. But we see from (2)(a) it is the
21 date on which the notice is given. So that is the response from paragraph (8) to the
22 request under section 76.

23 So (2)(a) is dealing with the position where you have a request under section 76 that
24 is timely. That can only happen after the subsidy has been given, the public authority
25 has responded and then you have a month.

26 (2)(b) is dealing with where there is a post award referral is made in respect of the

1 subsidy or scheme and then it is the date of the post award referral report. I should
2 say this is likely to be quite a rare case. I don't think there has been a post award
3 referral to date. But the provisions on post award referrals, we don't have them in the
4 bundle, as the title implies they only apply when the award has actually been made.
5 So again (b) is dealing only with the position where a subsidy has been given.
6 Then we see in any other case the transparency date for the subsidy or scheme. So
7 that can embrace a few different scenarios. One of which is you have entered the
8 subsidy on to the database but no request under section 76 has been made. So then
9 you have a month.
10 The other example where this applies is where the transparency date is defined. If we
11 go back to page 54, the first limb of (4)(b)(1). So that is in a case where the application
12 relates to a subsidy or scheme in respect of which the duty under section 33(1) or (5)
13 does not apply. The date on which the interested party first knew or ought to have
14 main of the making of the subsidy decision.
15 Now as the tribunal will recall from the *New Lottery* case, that is dealing with subsidies
16 given under subsidy schemes and modifications, which are the only examples where
17 the duty under section 33 doesn't apply.
18 So my learned friend in her skeleton at paragraph 64 says this is what is intended to
19 cover pre-award or in principle decisions. That is simply wrong. It is dealing with
20 subsidies given under subsidy schemes. So they must have been given and it has no
21 bearing at all where the subsidy hasn't been given.
22 In short, when you go through each of the limbs of the relevant date, they all run from
23 when the subsidy has been given. Now, we don't say that this rule is completely
24 exhaustive. In particular, as the President will recall from the *New Lottery* case, what
25 it doesn't cover is the position where the subsidy has been given but the authority has
26 taken the view this is not a subsidy. So the issue in the review is, well, is it a subsidy

1 or isn't it? But we know from section 72(8)(a) which is over the page at page 55 that
2 Parliament did deal with that case because it allowed the tribunal to refuse relief on
3 the grounds of undue delay. We say that provision can very easily be applied in the
4 case where the subsidy has been given and it is in the public domain but there is not
5 a timely challenge to it.

6 What we say it doesn't contemplate, and none of the provisions on time in the Act
7 contemplate, is challenges to preliminary decisions of the kind at issue here. If that
8 occurs there is no express time limit and we say it would be very difficult to apply the
9 undue delay provision, because of course it is actually in the pleading, although we
10 say this responded to a point we didn't make, the pleading for the appellant simply
11 says well there is no undue delay because the subsidy hasn't been given.

12 So, we say the provisions on time are squarely directed to where a subsidy has been
13 given and that supports the view of section 70 that I have told you.

14 I have a few more points to make, but I think it would probably be a convenient
15 moment, or I can continue for another two minutes.

16 **MRS JUSTICE BACON:** If it is two minutes then it might be better for you to continue.

17 **MR HOWELL:** Well, shall I just do the last provisions of the Act and then I have some
18 general submissions and then I will come to *Weis* and I can do *Weis* and the general
19 submissions after the short adjournment.

20 **MRS JUSTICE BACON:** Yes.

21 **MR HOWELL:** Very briefly on relief. One of the points made in my learned friend's
22 skeleton argument is that the effect of our case, although I appreciate we have only
23 put it as a stay, is that what it does is it precludes a preventative challenge to decisions
24 by public authorities. We say there are two answers to that. Or three answers. The
25 first of which is Parliament allowed a challenge to be brought as soon as there has
26 been a decision to confer an enforceable right. You don't have to have given the

1 financial assistance in the sense of transferring funds.

2 The second point is Parliament expressly conferred on this tribunal a power to grant
3 interim relief. So if there was a strong prima facie case that an authority had not
4 complied with the subsidy control requirements, the applicant can come to this tribunal
5 and ask for interim relief on the *American Cyanamid* principles and in some cases that
6 would be granted and in some cases it may be refused.

7 The third and we say rather telling point about this is the primary form of relief, which
8 is a special form of relief only this tribunal can grant. It is not a judicial review remedy.
9 That is section 74 on page 57.

10 So that is the jurisdiction to order recovery. So you can make a recovery order if in
11 the exercise of powers under section 72 and 73 - so those are the judicial review
12 forms of relief - relief has been granted and the tribunal has found there has been
13 non compliance with the subsidy control requirements.

14 And then there is a discretion to make a recovery order. So we say that section 74
15 indicates that Parliament thought in many cases, obviously there is a presumption
16 against interim relief under the Act, in many cases the question of prevention, if I can
17 put it that way, is the wrong one. Parliament thought section 74 was the remedy. It
18 leaves it to the tribunal's discretion, a departure from the position under EU state aid
19 law, as to whether to remedy the anti competitive effects that an unlawful subsidy
20 gives rise to.

21 My learned friend says, as well, at 66 of her skeleton, that it can't be the case that
22 a respondent can just defer scrutiny by delaying what she calls formal completion. But
23 we say there is simply no need for scrutiny under the Act until the point of no return is
24 reached.

25 So those are my submissions on the provisions of the Act and the wording and why
26 the scheme of the Act supports our construction. I have a few more points about the

1 | legislation and then I will come to *Weis* but I think I should do that after the
2 | adjournment.

3 | **MRS JUSTICE BACON:** Yes. Am I right in thinking that the practical consequence
4 | of if the tribunal were to decide that the relevant decision is made, what you call the
5 | point of no return, as in a final decision even if that isn't signing on the dotted line.

6 | **MR HOWELL:** Yes.

7 | **MRS JUSTICE BACON:** The practical consequence of that being the moment of
8 | crystallisation would mean that the tribunal -- that a claim could then be brought at that
9 | stage even if there hasn't been a signing on the dotted line and an application for
10 | an injunction could be made. But of course if there hasn't been a signing on the dotted
11 | line, if there hasn't been a transfer of funds, there would be obviously no recovery but
12 | at least at the point of final decision you could then bring your Subsidy Control Act
13 | appeal and if necessary seek an injunction.

14 | **MR HOWELL:** Yes. So in the case -- of course in some cases the decision to confer
15 | financial assistance may for instance -- the minister does it for example and he says
16 | a senior civil servant can execute the department seal and it is done for reasons of
17 | urgency, let's say 3 hours later. So there is not a gap.

18 | **MRS JUSTICE BACON:** There is not going to be a -- but if there is a gap.

19 | **MR HOWELL:** If there is a gap it is no part of my case to say that you can't challenge
20 | the decision provided it is a decision of the type I have described. You can then come
21 | to the tribunal, assuming you are quick enough, and say please suspend the effect of
22 | the decision, so it has an express power to do that under the Act. If the tribunal grants
23 | that the effect of the decision being suspended would be take no steps to implement
24 | this. That would include don't sign on the dotted line. And then assuming that was
25 | granted the final relief you could seek would be either an injunction or on order of
26 | a prohibition saying don't execute it.

1 **MRS JUSTICE BACON:** That would meet the claimants' point about gaming the
2 system by deferring implementation until some later date.

3 **MR HOWELL:** Yes. And of course we say that there is no plausible suggestion of
4 gaming the system here and the reality is most public authorities, including my client,
5 take their obligations under this Act very seriously. They do a lot of work, they take
6 legal advice. Their interest is in substantive questions, like how do we improve
7 Bishop Auckland consistently with our legal obligations. It is not can we game the
8 system on a subsidy control challenge.

9 **MRS JUSTICE BACON:** Yes. All right. Thank you very much. So we will return at
10 2 o'clock.

11 **(1.03 pm)**

12 **(The Short Adjournment)**

13 **(2.00 pm)**

14 **MRS JUSTICE BACON:** Yes Mr Howell, you were going to wrap up your submissions
15 on the Subsidy Control Act.

16 **MR HOWELL:** Yes. Just before lunch we saw the provisions on relief and they were
17 part of a piece of what we had seen before.

18 The final point is really the inferences, having now been taken through the Act as
19 a whole, that you should draw from the absence of a permission stage under
20 section 70 and what we say the reasons of legislative policy may have been.

21 In the Administrative Court, where there is a permission stage, claims for advisory
22 declarations, even in the absence of a decision, can be entertained. You can
23 challenge in some circumstances preliminary decisions, but in most such cases
24 permission will be refused to proceed to a substantive hearing in the exercise of the
25 court's discretion on the grounds of prematurity.

26 There is no permission stage under this Act at all. So there is a prima facie right to

1 bring the proceedings where a subsidy decision has been taken. My submission is it
2 would be highly surprising if Parliament had intended to create an unqualified right to
3 challenge inchoate decisions without permission. No such ability exists in general
4 claims for judicial review. We say that supports the inference that we invite you to
5 draw from the wording of the statute, that Parliament did not intend to allow premature
6 challenges, and it wanted to draw hard edged lines so that there aren't cases in which
7 an authority's assessment of the subsidy control principles may change, because it
8 was provisional, or an authority may go on to give a different subsidy or a subsidy for
9 modified policy reasons.

10 We say that strongly supports harder edged rules in this context that exists in the
11 context of claims for judicial review.

12 In practice, if I am wrong on the primary point, we can come to the alternative
13 submission in due course. In most of these cases, this one being a prime example,
14 *Weis* being another, if the tribunal does have jurisdiction over these earlier stages of
15 the process, it really will be impossible fairly to determine the proceedings until the lie
16 of the land has become clearer. Perhaps there might be an exceptional case, where
17 it was possible to address a clean point of law, but this certainly isn't one.

18 We say this is also a telling indication that there is no jurisdiction, because the tribunal
19 has rightly identified, in nearly every case to date, that this jurisdiction is intended to
20 be fast, simple and efficient. And not, in my submission, characterised by repeated
21 stays and an inability to progress the proceedings once they are issued.

22 So that is my positive case. Having set it out, I think I can deal with this tribunal's
23 reasoning in *Weis* relatively briefly.

24 If we could turn up *Weis*, that is at 590 of the authorities. The procedural
25 background -- and I should say we have agreed the relevant extracts, because much
26 on the substance isn't relevant at this point. So the procedural background starts at

1 paragraph 6, and the tribunal will see that the notice of appeal was filed on 7 June
2 and, at that point, the Combined Authority had taken the decision in principle to make
3 loan facilities available to Renaker. But that was subject to due diligence and
4 finalisation. So at that stage the authority contended a subsidy decision hadn't been
5 taken and it sought a stay until the loans were completed.

6 There is then various further elements of the procedural history, and we see at 8 again
7 the challenge defended in the defence on the basis that no subsidy decision had yet
8 been taken.

9 Then, at 9 we see that there was a case management conference before the then
10 acting president. The effect of its directions, we see in the bottom four lines, is that
11 a stay was granted essentially to allow the relevant loan documents to be completed.

12 Then at paragraph 10, we see that that occurred and there was disclosure.

13 At paragraph 13, over the page at 592, we see that the amended notice was filed on
14 6 May 2025. So, after the execution of the documents. It is perhaps worth noting that
15 the amended pleading was actually the first time that the appellant was able to actually
16 set out why the CMO principle wasn't satisfied, which we say would be a feature of
17 cases of this kind.

18 So that was the procedural background. So by the time of the hearing, the loan
19 documents had been executed. There was a finalised decision, the case had been
20 repleaded.

21 Moving on to the tribunal's substantive treatment of the point. At 613 we see the
22 tribunal's identification of the issues in the case, at paragraph 137. Now, the tribunal
23 identifies the first issue as whether a subsidy decision had been made by the
24 respondent within the meaning of section 70, and if so when the decision was taken.

25 Now, just as a preliminary point, the reality is, by the stage of the tribunal's substantive
26 judgment, there was no dispute at all that a subsidy decision had been taken, because

1 the loan documents had been executed. So plainly the tribunal did have jurisdiction
2 under section 70. We say that the timing, as we will come on to see in the tribunal's
3 reasons, the timing of precisely when that decision was made has no bearing on the
4 tribunal's substantive disposition of matters. For that reason we do say that the
5 tribunal's brief reasoning on this issue is obiter. It is really unclear what it went to.

6 So it is not part of the ratio. This just goes to one point my learned friend makes in her
7 skeleton. She says at paragraph 58 that *Weis* is binding authority. I say that is wrong
8 for two reasons. Firstly, this tribunal isn't bound by its own decisions anyway; but even
9 if I was wrong about that, it can plainly depart from obiter dicta that don't form part of
10 the ratio.

11 We see a summary of the various of the submissions, starting at 139 and the
12 authority's submissions.

13 Then the tribunal's analysis is contained in four paragraphs, starting at 150. So no
14 criticism made about 150 at all on my part. The tribunal rightly notes that the Act draws
15 a distinction between subsidies and subsidy schemes and it is not concerned in that
16 case with the question of subsidy schemes, and you are not concerned with that either.

17 Paragraph 151 records the essential facts of the case. So, 22 March 2024, the
18 committee decision, subject to due diligence and the actual wording, and then
19 delegating authority to sign and enter into them.

20 Then, the dispositive reasoning on the jurisdictional point is contained in 152. Perhaps
21 the tribunal would just read that to remind itself and then I will make submissions
22 arising out of it.

23 **MRS JUSTICE BACON:** Yes.

24 **(Pause)**

25 That on its face is not inconsistent with the position that you are putting forward that
26 the principle, the point of principle -- I mean you are not saying that it's, that the only

1 challengeable decision is effectively the grant or the giving of financial assistance. You
2 are saying that, in the examples we looked at earlier, you can make a decision which
3 is then implemented.

4 **MR HOWELL:** Yes. I don't need to go further than that. But I think the difficulty I have
5 with this is that it elides a number of different things. So I think it is worth addressing
6 it in stages.

7 So the tribunal accepts that what must be reviewed is a decision to give a subsidy. It
8 then says it is a requirement -- not a requirement rather under section 70 that the
9 subsidy must actually be given.

10 But the point we say it doesn't address is that what has to have occurred is not simply
11 a decision to give financial assistance in the abstract, which we say is the decision
12 taken on 22 March 2024, there must be a decision to confer an enforceable right to
13 financial assistance and it is impossible to characterise the decision of 22 November
14 as such a decision. Not least because it was subject to due diligence. So it is at most
15 a decision in principle to enter into a loan.

16 Of course, as we have discussed, there may be cases where a decision to execute
17 the documents is taken a few days before. I think that was actually the facts in *Weis*,
18 and then they are executed a few days later. But that is not what the tribunal is actually
19 saying here. It is saying you can go after the earlier in principle decision taken months
20 before.

21 **MRS JUSTICE BACON:** Yes. In March 2024.

22 **MR HOWELL:** Yes. So we say that ignores the key wording in section 2(5). The
23 tribunal was referred to it.

24 With respect, the rather cursory analysis also I think overlooks the scheme of the Act
25 as a whole as I have sought to develop perhaps in greater detail than counsel were
26 able to develop given this really wasn't the premier issue, if I can put it that way, in

1 Weis.

2 **MRS JUSTICE BACON:** It is not clear there were any developed submissions of the
3 type that you have given us today.

4 **MR HOWELL:** Yes. In fairness to the tribunal - I didn't read them out in the interests
5 of time - but one can read the submissions as recorded between 139 and 149. With
6 no disrespect to anyone I think I have tried to give a slightly more developed account
7 of the scheme. One understands no doubt submissions were made under time
8 pressure on this point. You have greater latitude today.

9 **MRS JUSTICE BACON:** Yes.

10 **MR HOWELL:** So that is where we say things go wrong.

11 We also say the tribunal's error in 152 is then really rather exposed in 153. So perhaps
12 the tribunal will read 153.

13 **MRS JUSTICE BACON:** Yes. What is said in 153 is that you then do need to consider
14 the stages leading up to the final decision. So the tribunal is actually, in its review it's
15 not just reviewing the 22 March decision it is reviewing the final decision in November.

16 **MR HOWELL:** Yes. And of course we say given this jurisdiction works on judicial
17 review principles, of course whether there is a subsidy may be a question of
18 jurisdictional fact but the CMO principle the tribunal is familiar with, is judged according
19 to a rationality standard based on what was before the authority at the time.

20 We say that this reasoning simply doesn't account for the general principle in claims
21 for judicial review. You are not entitled to look at post decision evidence. You may be
22 on a question of jurisdictional fact but on the CMO principle or where you are looking
23 at things on a rationality standard, if you are actually reviewing the decision of
24 22 March 2024, that turns on the material before the authority at that date.

25 And this tribunal obviously in *New Lottery* confirmed that was the position in relation
26 to the CMO principle.

1 So we agree respectfully with what the President just said, that what is actually being
2 reviewed in *Weis* is not the decision of 22 March 2024. Rather it is the decision to
3 grant authority to execute the loan documents. But of course the decision in principle
4 forms a crucial part of the decision-making context to which the tribunal can properly
5 have regard.

6 We see a similar analysis in the other cases. Decision-making often works in this way.
7 It did in the *New Lottery* case, a series of phased decisions. But again, we would say,
8 for instance on the facts of that case, it is the decision to actually grant approval to
9 withhold the funds rather than an in-principle decision made by a committee at
10 an earlier date.

11 **MRS JUSTICE BACON:** Yes.

12 **MR HOWELL:** So, for all of these reasons, we say that the tribunal did err in these
13 passages and we would invite you respectfully to depart from it.

14 If that is the position, then on the undisputed facts in this case, there are no decisions
15 in respect of either proposed grant to confer an enforceable right to financial
16 assistance. If that is so you have no jurisdiction and you are in my submission bound
17 to strike proceedings out for want of jurisdiction.

18 **MRS JUSTICE BACON:** We wanted just to explore that with you. Does one
19 inexorably lead to the other? In other words, if there is no jurisdiction right now, is the
20 only course open to us to strike out? Or would it be possible to stay as a matter of
21 case management, which is effectively what up until today you were asking us to do?

22 **MR HOWELL:** Yes.

23 **MRS JUSTICE BACON:** Acknowledging that it is being said that a decision will be
24 made at least in one case in the next few months, even if it's not imminent as in the
25 next couple of weeks. Is that not a course that you say is open to us? Are you saying
26 that the only permissible course open to the tribunal would be to strike out in its entirety

1 for want of jurisdiction?

2 **MR HOWELL:** Perhaps I will take that in stages. Perhaps we might look at what the
3 tribunal's powers under the rules are about jurisdiction and then I will develop them by
4 reference to that. So it is rule 11 on page 80.

5 So we see at 11(1):

6 "The tribunal may, after giving the parties an opportunity to be heard, strike out
7 an appeal in whole or in part at any stage if (a) the tribunal considers it has no
8 jurisdiction to hear and determine the appeal".

9 **MRS JUSTICE BACON:** That is a may not a must.

10 **MR HOWELL:** Precisely. So I accept that is a discretionary power. However the
11 power does have to be exercised judicially and the tribunal, we didn't end up including
12 these in the bundle but the tribunal will be well familiar both with its own jurisprudence
13 and other cases that jurisdiction in a statutory sense can't be conferred by agreement.
14 The tribunal if necessary has to take the point itself.

15 So if there is no jurisdiction, we would say there is a may but in nearly every case, if
16 you conclude there is no jurisdiction, the proper exercise of that power will be to strike
17 out.

18 We accept that, in certain cases there may be prudence in granting a stay. As
19 an example, let's say that the challenge as formulated is filed a couple of days before
20 the operative decision and the jurisdiction point is taken immediately. So you know
21 an operative decision is really imminent. I don't think that is the position in this case.
22 And then so you also know the ground of challenge is a clean point of law and so you
23 can look at the pleadings and say, well, okay, we don't have jurisdiction now but we
24 will have jurisdiction imminently and the issues are clear and settled. Those might be
25 the sorts of exceptional circumstances where, if you were satisfied you didn't have
26 jurisdiction now, you could decline to exercise your power.

1 What we say would not be an appropriate exercise of this discretion would be where
2 a decision is several months off but then the issues as defined in the pleadings are
3 obviously ones that will need to change and be refined in light of for example the
4 finalisation of our assessment under the subsidy control principles.

5 Perhaps I could just show you, so this is not an abstract submission in this case, the
6 nature of the current pleading.

7 **MRS JUSTICE BACON:** If a stay would not be appropriate in that situation, why did
8 you apply for a stay?

9 **MR HOWELL:** The reason we applied for a stay was a purely pragmatic one.

10 The reason we did that was we were faced with an incredibly wide ranging claim.
11 Initially it has points of state aid, procurement law, that the actual allegations in the
12 subsidy control proceedings extended to decisions that had in fact been taken. So
13 extended to the 2023 STACK arrangements and also The Auckland Project artist's
14 hub grant.

15 Sorry, Madam President.

16 **MRS JUSTICE BACON:** You say you took that decision because of the wide ranging
17 grounds but your original application was to, at least in one alternative, to strike out
18 the subsidy proceedings. And then you said that you weren't pursuing that because
19 of the change in position of the claimants no longer claiming for compensation.

20 **MR HOWELL:** Yes. What I will say is we took a pragmatic -- we have always
21 recorded throughout the proceedings that we have difficulties with what was said in
22 *Weis*. That is true of a number of other local authorities and public authorities. What
23 we pragmatically sought to do was to say, look, this point about *Weis* is going to
24 occupy substantial time in argument and at this point we thought we were going to
25 have be going through every paragraph of the claimant's pleading. So we thought
26 pragmatically, let's try to park this for the time being. Also we thought some of the

1 grants would be made sooner than they have in fact been. So of course one could
2 criticise us in the sense of you can't confer jurisdiction by agreement, so our pragmatic
3 approach in that sense could be faulted. But I can only say we were trying to proceed
4 proportionately and pragmatically. The issue today, however, is you need to decide
5 how to proceed from where we are.

6 **MRS JUSTICE BACON:** Yes.

7 **MR HOWELL:** And in my submission in circumstances where it is simply inevitable,
8 if you are with me that there is no jurisdiction, it is inevitable the claims are going to
9 have to be repleaded as soon as one looks at the current state of the pleadings.

10 And no doubt my learned friend would wish to reflect on whether she could actually
11 advance certain allegations that are put in the notice of appeal as matters stand.

12 But in those circumstances the question is really do we sort of keep things in a zombie
13 state and then potentially we have to decide because one -- the grants aren't going to
14 be made simultaneously, do we maintain the stay over one part of the claim and then
15 allow a partially stayed claim or do we wait for a very long time, potentially it could be
16 a couple of months, before combining them. All of that is rather difficult. My
17 submission is the sensible approach is, if you conclude you have no jurisdiction, is
18 draw a line, the council is absolutely clear that if it does make these grants it is going
19 to make entries on the subsidy database. It is not disputed either of them are subsidies
20 so that is a public document. The claimants can then review it with the assistance of
21 their legal advisers. They can send a pre-action request under section 76 within
22 a month. We will be able to then say here is our assessment which we base on the
23 finalised reasoning of the council. Then what can happen is proceedings can be
24 brought in respect of each grant but actually engage with that reasoning. Again we
25 may want to go to the pleading but they will have to engage with that reasoning and
26 then disclose if counsel can identify any arguable errors of public law in our

1 assessment of the principles.

2 **MRS JUSTICE BACON:** Yes.

3 **MR HOWELL:** We say that is how the scheme of the legislation is supposed to work.
4 It is not supposed to work by staying potentially for many months. I mean these
5 proceedings were issued in September last year and potentially the grant, at least in
6 respect of STACK, might not be made for a year after they were issued. So we say
7 the statutory scheme should perhaps save in the sort of exceptional case I have given
8 be followed.

9 **MRS JUSTICE BACON:** Yes, that is very helpful. Thank you.

10 **MR HOWELL:** So that is if you are on the view there is no jurisdiction should we strike
11 out or stay.

12 The final question is if you are against me on the jurisdiction point, so you are satisfied
13 you do have jurisdiction, what should you do with these proceedings? In those
14 circumstances we do very strongly maintain our application for a stay. I have obviously
15 developed that at length in my skeleton so I don't propose to repeat that and some of
16 the submissions I have just made about the need to replead are obviously relevant to
17 that.

18 **MRS JUSTICE BACON:** Just let me just check. I don't think you need to say anything
19 more about that. You set it out very clearly in your skeleton argument and as you say
20 some of the reasons you have just developed go to the same point.

21 **MR HOWELL:** Precisely. If I could just check there isn't anything else behind me,
22 I think those are probably the points I wanted to make.

23 No, Madam President. Those are the council's submissions on the jurisdiction and
24 stay question, unless I can assist any further.

25 **MRS JUSTICE BACON:** Thank you very much.

26 Right, no thanks. Thank you very much. That is all we need on that point.

1 Yes Ms Hayward.

2 **Submissions in reply by MS HAYWARD**

3 **MS HAYWARD:** Yes, Madam President, thank you.

4 At the outset I wonder whether or not it would assist the tribunal firstly to deal with the
5 question of whether or not, what to do effectively with my learned friend on the question
6 of jurisdiction, what to do in respect of the notice of appeal, whether to stay or strike
7 out. The listing today from the appellants' perspective was to deal with strike out in
8 relation to the Competition Act claim. I appreciate that it has been referenced
9 previously that there is an extant application to strike out the notice of appeal,
10 however, as Madam President did point out, that wasn't -- it was indicated that wouldn't
11 be pursued at that point. In fairness to my learned friend he did inform me that they
12 may indeed pursue it, however insofar as what we were listed for today, our position
13 is that the alternative, and I will take you through the points, our submissions in relation
14 to why you do have jurisdiction and also the points my learned friend made in respect
15 of the question of whether or not the statutory interpretation supports it, as well as the
16 question of whether or not interim relief would be appropriate.

17 **MRS JUSTICE BACON:** I think that there are essentially three issues. The first is
18 whether the tribunal in paragraph 152 of the *Weis* decision was correct. And tied in
19 with that point the question of whether -- to be a reviewable decision under section 70
20 the decision must be essentially a final decision to grant an enforceable financial
21 assistance rather than a decision at an earlier stage in principle.

22 So that is question one.

23 Question two is if Mr Howell is correct on the first question, whether the correct form
24 of relief is one of strike out rather than stay, for the reasons that he has just given.

25 And then the third question is whether if we are against him on the jurisdictional point
26 then there should in any event be a stay for the reasons given in his skeleton

1 argument. Three questions and perhaps you can address them in that order.

2 **MS HAYWARD:** Certainly, Madam President. I will start with the first question of
3 whether or not -- it is a question of whether jurisdiction bites effectively.

4 **MRS JUSTICE BACON:** Yes.

5 **MS HAYWARD:** Whether or not the respondent collapses the two together or whether
6 or not they should be taken in stages and whether or not as we submit, *Weis* reflects,
7 that it has to be the whole decision taken together and that doesn't necessarily require,
8 to borrow Madam President's phrasing, ink on the dotted line has materialised.

9 **MRS JUSTICE BACON:** Yes. I think Mr Howell was quite analytical about this. He
10 doesn't say that there has to be ink on the dotted line, but he said there must be a final
11 decision to grant the subsidy and that in this case we are nowhere near that. All there
12 is is a provisional indication that the council is minded to grant the two forms of subsidy
13 in due course. But he said in both cases they are some way away from reaching
14 a final decision. So that is the first question. He is not saying that there needs to be
15 ink on the dotted line and he says he doesn't need to.

16 **MS HAYWARD:** So effectively what we say is the result of that puts the appellants in
17 a position where we say the subsidy, although it is not as far along as it is in the
18 authorities cited, it will effectively be locked in and we say the tribunal's supervisory
19 function would be significantly weakened and this is precisely what *Weis* attempts to
20 remedy, without collapsing the two together, which was our primary submission, as
21 my learned friend developed in his submissions. Instead, the question is: what role is
22 the tribunal being asked to play here? What role, read purposively, does the SCA
23 confer to you in terms of your jurisdiction to deal with it?

24 And perhaps, if I may, it is sort of in tandem with my response on interim relief --

25 **MRS JUSTICE BACON:** No let's deal with the questions separately. So there are
26 three questions I have outlined. The jurisdictional question, which brings with it

1 whether *Weis* is correctly decided and whether there is in this case a reviewable
2 decision under section 70.

3 Question 2, consequences if Mr Howell is correct on the jurisdictional question.

4 Question 3, consequences if he is wrong.

5 **MS HAYWARD:** So the only issue I have with that and I am very happy to take it in
6 that order, is simply how we view the statutory interpretation is at odds with how my
7 learned friend characterises it. We say for all intents and purposes the decision -- all
8 of the points of the decision that are required before it is made has already occurred,
9 in effect, in terms of that funding has been not assigned to but effectively in our terms
10 earmarked. It is a question as to whether or not the public authority could take all
11 those substantive decisions, as to beneficiary, quantum and structure, take them
12 together, progress internal approvals and commit in principle to the subsidy at that
13 point. As my learned friend concedes it is not to do with the question of whether or
14 not that is something that is not capable of challenge in entirety, it is the effect of it,
15 which we do accept however. But to avoid review would simply be -- would facilitate
16 a review by delaying execution of it. Although we are earlier on in the proceedings the
17 effect of it is still the same. What the appellants struggle with is how although we are
18 earlier on how that effectively distinguishes it from where they were at the latter stages
19 in terms of the effect on other participants or other putative beneficiaries. So in terms
20 of whether or not point that is consistent with public law principles, I think that first
21 question has to be read in tandem with that, the approach in *Weis* I think does take us
22 to that point insofar as it is concerned with the substantive decision-making. When we
23 look at judicial review, and it is not contested here that we are looking at judicial review
24 principles, we are challenging or questioning whether or not the authority has
25 committed itself in principle to the provision of funding, be that at an earlier stage than
26 in *Weis* for example as is being advanced at the moment, where a decision has been

1 taken in substance, even further steps may remain and we may be let's say two steps
2 prior to and we accept that point, it still must be capable of review at that juncture.
3 The material question is whether or not then or what the effect is of it, we say there is
4 a close analogy between subsidy control review and judicial review, for precisely this
5 reason, to give it that flexibility. And I do accept my learned friend's submissions in
6 relation to the fact that the SCA was intended to be a quick way of resolving points for
7 proceedings and challenges subsidy decisions. However the fact of these matters as
8 we have seen is that they are a moving feast and they do take time to resolve. There
9 are questions as to what relevant authorities need to be consulted, whether or not in
10 order to determine that question of whether or not it is in line with the CMA principles.
11 In terms of the -- let me check for one moment -- we say on that point then, if we turn
12 to the question of even if it is early on in proceedings, if it has been made effectively,
13 what really -- is it an artificial distinction? Is that gap that distinguishes our facts from
14 the input from the facts in *Weis* and other decisions of its ilk, the question is whether
15 or not the effect is the same and time is merely an artificial factor and what *Weis* did
16 was give us that flexibility. Although it didn't necessarily challenge and collapse the
17 two together, the question of whether or not a substantive decision is made or whether
18 or not it has been -- so sorry, forgive me, what the actual nature of a substantive
19 decision for the purposive review is, what is the effect on the appellants in this case?
20 So in terms of where we stand on that, if jurisdiction arose later down the line, it could
21 be argued that review could only occur -- forgive me sorry, the tribunal's supervisory
22 function on that score would be significantly weakened because ultimately, although
23 these cases seem to exclusively address a latter point, what we submit *Weis* does is
24 provide that flexibility for looking at the totality, and that includes the earlier stage, not
25 simply the stage in which -- on the instant facts --

26 **MRS JUSTICE BACON:** Mr Howell doesn't say that you can't look at the totality. He

1 is just saying that the reviewable decision, the trigger point, is a point at which you
2 have a final decision to grant enforceable financial assistance.

3 **MS HAYWARD:** I am grateful for that. Ultimately, what our position is is that is in
4 effect the same thing in terms of what the effect on the appellants could putatively be.

5 **MRS JUSTICE BACON:** So why then would be the tribunal's supervisory function
6 weakened because the tribunal is going to be able to look at everything leading up to
7 the decision anyway?

8 **MS HAYWARD:** No, it is simply a question of timing. And that speaks to the question
9 again, which is why I wanted to reference if I may, in tandem with this point, the
10 question of whether or not interim relief would be appropriate. I am not going to
11 diverge there now as the tribunal has indicated that would not be helpful. We say it
12 would be weakened because at this juncture there may indeed be a negative effect,
13 which there has been in the appellants' case, in relation to the delay in the possible
14 funding that they could have in fact received at that point. The question is whether or
15 not if the tribunal intervened earlier, at a point where the majority of the material has
16 been determined, quantum in terms of the amount of the subsidy in question et cetera,
17 then in terms of when jurisdiction bites it should simply be whether or not there is
18 an appreciable effect on the appellant. Which is what he submits, you will forgive me,
19 they submit has occurred in this case.

20 So the question is your supervisory role as the tribunal would be to assist at any point
21 along that life cycle. I completely accept -- the appellants completely accept that my
22 learned friend was making clear that it is not simply a question of not looking at the
23 totality. We accept that. However, what we are trying to define is what that totality
24 looks like and the question as to what the actual effect on the appellant would be in
25 those circumstances.

26 **MRS JUSTICE BACON:** But that is not the primary question.

1 **MS HAYWARD:** Forgive me.

2 **MRS JUSTICE BACON:** That is not the primary question under the subsidy control
3 scheme. The question is whether there is a subsidy and whether the subsidy control
4 principles have been complied with. I am not sure that you can answer either of those
5 until you have the final terms of the agreement in front of you. And indeed, *Weis* didn't
6 say anything different, because in paragraph 153 the tribunal made clear that it was
7 necessary to look at the final terms of the agreement. So in *Weis* on any basis the
8 decision had been given by the time that the tribunal came to consider the matter.
9 So what is there that you say the tribunal could do in the exercise of its supervisory
10 function if it doesn't have the final terms of the agreement in front of it?

11 **MS HAYWARD:** Well insofar as what we say -- we say that the actual points in relation
12 to what are required to make that decision are arguably there. What remains to be
13 determined is a question -- is slightly in flux in terms of when that challenge can
14 actually be brought. We say that all of the elements of that decision have effectively
15 been realised.

16 **MRS JUSTICE BACON:** They haven't, because the council has said in terms it has
17 given an indication in principle but it will then have to go on and consider specifically
18 the subsidy control principles. So how are we to even make a decision, given that it
19 is not disputed here that there is a subsidy. So what is in play is the subsidy control
20 principles. How on earth can the tribunal make a decision on that if there isn't before
21 it any reasoning and decision in respect of the subsidy control principles? There is
22 nothing that we can review.

23 **MS HAYWARD:** That's accepted to an extent. However, in terms of the language of
24 the statute itself we say a decision to give a subsidy, we are not dealing with the latter,
25 so make a subsidy scheme, the decision to give a subsidy, the language of that, the
26 giving of a subsidy itself, my learned friend's submission and indeed what the tribunal

1 is asking is effectively that involves a signed agreement or an agreement -- not
2 necessarily a signed agreement but an agreement that has been put together such
3 that it is capable of review. However we say, yes, there are extant points that need to
4 be dealt with, however in terms of the key tenets of it, bar the challenge to the actual
5 whether or not they have complied with the Subsidy Control Act principles, that does
6 remain to be established and that is completely accepted. And our alternative position
7 would be that a stay would be appropriate in the circumstances if the tribunal is of the
8 view that they need to take that time to assess that point in order for us to advance a
9 positive case in relation to what those breaches are in effect.

10 However, we would argue then, if the tribunal is not of the view that -- is of the view
11 that we need to wait until those points are made --

12 **MRS JUSTICE BACON:** But how could we possibly proceed with a challenge on the
13 subsidy control principles if the council hasn't made its assessment under the subsidy
14 control principles?

15 **MS HAYWARD:** We say there then possibly -- insofar as how could that be the
16 scheme in the event -- insofar as where we are with the subsidies in terms of how they
17 have been as we say awarded in principle but not finalised or in effect that nothing
18 was signed. We say --

19 **MRS JUSTICE BACON:** No, no, that is not the case. It is not that it hasn't been
20 signed, the subsidies haven't been signed, it is the case that no decision has been
21 made. So the council hasn't made any assessment under the subsidy control
22 principles.

23 Now, if that is the case, how can we consider an application, your appeal, which would
24 put in issue, if anything, the subsidy control principles?

25 **MS HAYWARD:** Insofar as the challenge as it stands, the question would be then
26 whether or not there would be utility in preserving the challenge until, as you say, the

1 appellants do accept that it is a difficult situation because you are being asked to
2 review in a vacuum by virtue of the fact that the challenges that we say have
3 occurred -- the issues forgive me -- are made at a point before the principles have
4 actually been considered substantively by the council.

5 However, we say the effect of where we are with the subsidy decision and the intention
6 of looking at the matter as a whole, speaks to the fact that there is still an appreciable
7 effect on the beneficiary in the interim. It has been quite some time since the decision
8 in principle was given and the question is how long that is effectively a moving feast
9 for. So in terms of what this would do if we were to stay the proceedings, pending
10 resolution, pending the final decision being made, either they fall away and the
11 decision isn't given or we proceed on the basis of the case as it stands, which we do
12 accept will require substantial amendment because it will require responding to
13 what -- the actual decision-making process. We accept that.

14 However, it is effectively a question as to whether or not at this point, so in terms of
15 jurisdiction biting, we still say that, taken together, bar the actual consideration of the
16 Subsidy Control Act principles, which indeed are entirely relevant to the proceedings
17 in themselves, if they were to reach fruition, we say that in effect and the appreciable
18 effect on the appellant is such that it should give rise to jurisdiction for challenge at the
19 earlier stage.

20 **MRS JUSTICE BACON:** Sorry, what part of the jurisdictional test in the statute
21 provides that you can bring a challenge if there is not yet a decision but there is
22 an effect on the appellant from an earlier?

23 **MS HAYWARD:** It is more a question of how it follows. Insofar as the decision to give
24 a subsidy, again it goes back to the question of whether or not that decision is
25 a decision capable of review. But quite. Insofar as the effect, we would say it would
26 be more purposively, to read the statute purposively and what Parliament's intention

1 was with developing a scheme whereby the structure would need to be considered
2 from start to finish, and looking at it as you say in stages, which I appreciate we are
3 earlier in the stages as opposed to the current authorities. It is a question as to what
4 Parliament would have intended. We do accept they would need to assess it against
5 what the council's finding was in terms of whether or not the Subsidy Control Act
6 principles were abided by. But it is also a question of whether or not, if we are to
7 consider Parliament's intention and the structure of the Act itself, of the statute, the
8 construction of the statute, it can't be right that even at this juncture, where
9 we -- although there has not been an executed agreement or rather that it hasn't
10 actually considered certain points in the review process, we suggest a substance
11 based approach is more consistent with the statutory regime insofar as section 2
12 supports a functional interpretation, whereby it provides that financial assistance is
13 treated as given where an enforceable right to the financial assistance.

14 So insofar as that point is concerned, we say that indicates the concept of a subsidy
15 is not confined to let's say the moment every point has been considered but extends
16 to the point at which the beneficiary acquires a legally and practically meaningful
17 entitlement. We say it is meaningful on that reading by virtue of the fact that the
18 appellants can't develop their (inaudible) point insofar as the grant funding that is
19 currently challenged and the relief that is sought may indeed resolve that at some point
20 or other. But the question is instead, we say, the tribunal has to consider what the
21 effect is in terms of looking at the statute as a whole, particularly as I say at section 2.
22 In terms of transparency and timing -- we say transparency and timing also would
23 require earlier review. I think transparency is also another point to consider here. We
24 talk about section 71 and the transparency date, which is linked to when a decision
25 becomes known or is entered on the subsidy database. We say that reflects a regime
26 in which review is intended to occur shortly after the decision is made in substance,

1 and disclosed. Which it has been. The decision has been disclosed. We are at a point
2 whereby the decision gets disclosed, as it should be, and the question is whether or
3 not this timing at which it has been disclosed, does that trigger a question of whether
4 or not it needs to be challenged. So the question is whether or not that can be
5 deferred, practically, in terms of the effect on putative appellants in general and indeed
6 in the instant case, until final implementation or indeed until the Subsidy Control Act
7 principles have been considered. So in terms of we say that would justify the stay in
8 the proceedings, in the alternative, and allowing time for that decision to either be
9 made or not. And at that point we would completely accept amended pleadings would
10 be required insofar as notice of appeal is concerned to respond to those points.
11 In terms of prematurity, I think that speaks to my learned friend's point in terms of
12 prematurity, because we are talking about the stage in proceedings realistically.
13 In terms of your case management discretion, we say it is broader than the respondent
14 is purporting it is. It is an ability to stay proceedings, which is this, which is not in
15 dispute, but also to control the timing and take into account subsequent developments.
16 We say it is wider than that. Any risk of reviewing a moving target is addressed
17 through these case management tools, for instance the stay itself. Which is effectively
18 what we have here. A moving target. Which we do accept to an extent. If the
19 interpretation in Weis is in principle that we no longer have to look at it -- forgive me,
20 that it doesn't ameliorate the question of whether or not it is a split decision, it is
21 effectively the decision as a whole. When jurisdiction bites, forgive me.
22 So we say that the advisory adjudication, so the prematurity rests on the question of
23 whether or not the tribunal is being asked to adjudicate on hypothetical or contingency
24 decisions. Which we say we are not, in effect. You are not being asked to arbitrate
25 on something that doesn't exist. It is effectively the question of whether or not the
26 stage in proceedings we are at without a finding, that it doesn't contravene the CMA

1 principles, is the question as to whether or not, with properly defined parameters and
2 identified beneficiary and real world economic effects, impact, we say that that could
3 not be right and it could not be what Parliament intended. We say that the statutory
4 regime does anticipate review at the early stage for that reason, insofar as, as we have
5 said in section 2, read together with the structure of, if I may take you to that. Because
6 it comes to a question of whether or not the decision is operative in substance or not.
7 The question is at the stage we are at now, although it is not exactly -- it doesn't mirror
8 the facts of Weis whether or not where we are in proceedings, taken together, we need
9 to -- as Madam President pointed out we don't have an explicit reference to the
10 appreciable effect on a putative appellant in the statute itself but in certain instances
11 these things must be read purposively.

12 Insofar as whether or not the stay is allowed or rather -- forgive me, if the tribunal is of
13 the view that it does have jurisdiction, the question is whether or not -- or the effects
14 on proceedings that would have, in terms of staying the proceedings in the alternative.
15 We say that would be far more appropriate -- forgive me, I want to address the other
16 question that the tribunal has asked.

17 Forgive me, Madam President, you did ask me to address a third question, a third
18 issue.

19 **MRS JUSTICE BACON:** Well I think you have more or less addressed the first two.
20 The first question is the jurisdictional question; the second question is if Mr Howell is
21 right on the jurisdictional question, whether the correct form of relief is to strike out or
22 to stay, and I understand your submission is that a stay would be the correct outcome
23 rather than a strike out; and the third question is if he is wrong on the jurisdictional
24 question, what should we then do? He says a stay is appropriate. I have written down
25 your submission that you have just made that if the tribunal does have jurisdiction,
26 then a stay is also appropriate.

1 **MS HAYWARD:** We would accept that.

2 **MRS JUSTICE BACON:** So at the moment, I don't understand you to be arguing for
3 anything other than a stay at this point. Is that correct or are you saying that we need
4 to go on and decide something without a stay?

5 **MS HAYWARD:** By virtue of how my learned friend developed his submissions our
6 understanding in principle is that their view of *Weis* was, as we submitted at the
7 beginning, before prior to hearing them elucidated was that it was collapsing those two
8 principles together. However appreciating that point and seeing where we are, we
9 wouldn't oppose the stay any more. However we would say that striking out the claim
10 in its entirety would not be appropriate in the circumstances.

11 One point to raise I think is that the respondent relies again when we think about
12 section 12, we don't necessarily say that undermines -- or rather we say that *Weis*
13 supports that principle. The fact that compliance with section 1(b) is assessed at the
14 point of giving the subsidy doesn't mean that the decision-making process leading to
15 that point is insulated from review. So the question is where do you draw that line.
16 The question is where you draw that line in relation to whether or not the subsidy
17 principles have to have been discussed and determined. At which point we would in
18 effect have a decision. We would in effect have a decision for the purposes of review
19 as a whole. However, the question is whether or not instead the role under section 70
20 is to review whether the decision to give the subsidy was lawful, which necessarily
21 encompasses, in our view, the process and the reasoning leading to that decision.
22 Which is also captured by earlier points in the decision-making process. I do
23 appreciate that is a reiteration of my previous point but it adds flesh to bone because
24 as my learned friend referenced section 12, in terms of latter points, and, Madam
25 President, you have indicated you don't want to hear from me in relation to why the
26 points offered in relation to interim relief would not be appropriate --

1 **MRS JUSTICE BACON:** No, I didn't say that. I was trying to get you to address the
2 issues in the order in which I had suggested. I am not saying I don't want to hear from
3 you on any point. I was suggesting that you make your submissions on jurisdiction
4 first and then under the second and third questions, the questions of relief, depending
5 on the outcome of the jurisdictional question.

6 Now, my understanding is that you say, number one the tribunal does have jurisdiction;
7 you say there is a reviewable decision at this point and Weis was correct; number two,
8 if we are wrong on -- if we are against you on question number one or in favour of
9 Mr Howell on question number one, if the tribunal doesn't have jurisdiction, you say
10 that the correct form of relief in the circumstances of the present case is still to stay;
11 and if we are with you on the jurisdiction point you also accept now that a stay is
12 appropriate. So you came into this hearing in your skeleton argument opposing a stay.
13 You are now accepting that a stay would be appropriate, if we are with you on the
14 jurisdiction point. But you say that, ultimately, you oppose the idea of a strike out in
15 any circumstances.

16 What I would like you to do is let us know if there is any other point in relation to any
17 of the three points that I started out with, that you want to make? I am not precluding
18 you from saying anything on any of those points.

19 **MS HAYWARD:** Of course. I am grateful.

20 I think insofar as jurisdiction is concerned, which I think is the critical question, and just
21 to clarify in relation to the stay, our primary position is that the proceedings shouldn't
22 be stayed.

23 **MRS JUSTICE BACON:** Shouldn't be stayed?

24 **MS HAYWARD:** However -- well it has developed in such a way that now we
25 understand what my learned friend's point was insofar as they are not collapsing the
26 two issues together but instead we are at a point whereby once the final decision has

1 | been made, we can review it in full.

2 | **MRS JUSTICE BACON:** Okay. But we are not at that point yet. So are you saying
3 | right now, are you saying that anything can proceed in relation to your subsidy claim,
4 | or are you accepting that a stay is now appropriate whatever we decide on jurisdiction?

5 | **MS HAYWARD:** Yes of course. No, we are. We accept that a stay would be
6 | appropriate.

7 | In addition to that, if I may, to add a little more flesh to bone in terms of the question
8 | of jurisdiction, because I do think you have to be with us in terms of jurisdiction to
9 | an extent otherwise we have the question of strike out which I also have to address
10 | briefly.

11 | Firstly in terms of that first question on jurisdiction, that is where the question of
12 | whether or not there is anything in the regime that actively captures that earlier stage
13 | in the Subsidy Control Act context, in the review process, that actively allows for it in
14 | the event that section 70 only bites at this latter stage. Once the principles have been
15 | considered and we have a final decision, in effect, and in the alternative my learned
16 | friend submitted interim relief may be a substitute for jurisdiction, insofar as
17 | an injunction was concerned. The trouble with that point is that the availability of
18 | interim remedies presupposes that the tribunal has already seized of a justiciable
19 | decision in a way that it cannot expand or defer that point --

20 | **MRS JUSTICE BACON:** I don't understand. The availability of interim remedies, what
21 | then?

22 | **MS HAYWARD:** Presupposes, in our understanding of my learned friend's
23 | submissions, that the tribunal has already seized of a justiciable decision.

24 | **MRS JUSTICE BACON:** Has already?

25 | **MS HAYWARD:** I can change my phrasing. Has already let go of the notion that
26 | there hasn't been an appropriate decision made.

1 **MRS JUSTICE BACON:** Can you reformulate that sentence.

2 **MS HAYWARD:** Absolutely.

3 **MRS JUSTICE BACON:** The availability of interim remedies presupposes that what?

4 **MS HAYWARD:** Effectively that there is already a question. It speaks to where we

5 are in the challenge process, in terms of the question of whether or not interim relief

6 would be appropriate in the alternative --

7 **MRS JUSTICE BACON:** Start again.

8 **MS HAYWARD:** Forgive me.

9 **MRS JUSTICE BACON:** The availability of interim remedies presupposes what?

10 **MS HAYWARD:** Presupposes that the tribunal only has jurisdiction to hear Subsidy

11 Control Act challenges at an earlier stage, before, in this context before the Subsidy

12 Control Act principles have been considered, or the CMA principles, forgive me, have

13 been considered --

14 **MRS JUSTICE BACON:** I am lost. I am sorry.

15 **MS HAYWARD:** Okay. Maybe I can reformulate the submission entirely. I can break

16 down the points. Forgive me if you have not followed.

17 We say it cannot expand or defer effectively the point at which the substantive

18 decision --

19 **MRS JUSTICE BACON:** Sorry, what is the "it"?

20 **MS HAYWARD:** Sorry, forgive me. The respondent's position cannot --

21 **MRS JUSTICE BACON:** Which position?

22 **MS HAYWARD:** The position that interim relief is an effective approach to the issues

23 in question as opposed to the section 70 jurisdiction, which is what is in issue now,

24 whether or not you have jurisdiction to hear the matter.

25 **MRS JUSTICE BACON:** No, Mr Howell wasn't saying that interim relief was

26 an alternative. He was saying that the tribunal has no jurisdiction at all until the point

1 at which there is a final decision of some kind.

2 **MS HAYWARD:** Forgive me. I will reform it. It speaks to what Parliament intended
3 when they structured the Act in the way that it is structured. The way that section 70
4 is structured, from my understanding of my learned friend's submissions, it was that
5 instead the interim relief possibility was contemplated to allow for that period of time
6 prior to the decision being made. Which I say prior to the decision made for all intents
7 and purposes if I may.

8 **MRS JUSTICE BACON:** I am sorry, I am lost. What interim relief possibility are you
9 talking about?

10 **MS HAYWARD:** We mention an injunctive relief for example at one point.

11 **MRS JUSTICE BACON:** Are you talking about any provision in the Act or not?

12 **MS HAYWARD:** In terms of interim relief. It was more -- my understanding was it
13 was in relation to the (inaudible) restriction. I can triple check. As I say if I have
14 misunderstood my learned friend on that point I am happy to address you on the other
15 points.

16 **MRS JUSTICE BACON:** Well, at the moment I can't understand what you are saying
17 about interim relief.

18 **MR HOWELL:** Would it be helpful if I clarified what my submission on interim relief
19 was so my learned friend can address it?

20 **MRS JUSTICE BACON:** Yes.

21 **MR HOWELL:** My submission is directed to the argument made against us that our
22 construction meant, well, authorities can just get on and unlawfully do things. The
23 point was that Parliament had dealt with that in section 70(6), once a final decision
24 had been taken, by the availability of interim relief, and if interim relief were granted
25 final relief in the form of an order for prohibition or an injunction can be granted. It is
26 no part of my case that there be any jurisdiction to grant interim relief before a final

1 decision had been taken.

2 **MS HAYWARD:** Yes, that is understood. My apologies. That is understood insofar
3 as we understood it was a question of whether or not that was existed in its stead
4 effectively. I can move on.

5 It was more a question of whether or not, then, the statutory language gives you
6 jurisdiction at this juncture and we have already made our points in relation to the
7 pre-given decisions, the pre-giving decision stages which we say is reinforced by
8 section 12, which requires a public authority to consider the subsidy control principles
9 before deciding to give a subsidy. But we say ultimately the question there is then
10 whether or not that necessarily contemplates that that is part of that process and that
11 ultimately the consideration of the subsidy control principles, which we don't deny
12 needs to occur at some point, but the question is whether or not staying proceedings
13 until that point would allow us to review it at that stage or whether or not striking out
14 the claim in its entirety doesn't necessarily accommodate the fact that we are still at
15 a stage whereby a decision is being made in principle. I appreciate that I am
16 reiterating a similar point --

17 **MRS JUSTICE BACON:** Yes. I think I have that. Is there anything different that you
18 want to say on this part of the case?

19 **MS HAYWARD:** I will keep it very brief. One or two points.

20 It is also a question, I think, finally, Madam President, whether or not section 2, which
21 refers to an enforceable right to -- forgive me, financial assistance is treated as given
22 where an enforceable right to financial assistance arises.

23 Now, indicating that the statutory concept of a subsidy is not confined to effectively the
24 latter points in the decision-making process but a question is what practical or
25 meaningful entitlement is at that point. So it is a question of substance over form and
26 Madam President asked me earlier in my submissions where in the Act it suggests

1 that we need to consider the effect on putative claims, on claimants -- forgive me,
2 appellants in these cases. We say that ultimately it is a question as to whether or not
3 where we are in proceedings now has given rise to effectively that enforceable right to
4 financial assistance at this point. In effect. We appreciate the fact is that where we
5 are, the principles have not been considered and we are at a much earlier stage in
6 proceedings. However it has been effectively in principle allocated to STACK and
7 there would be possibly questions and extant challenges if it wasn't later approved,
8 whether or not that was appropriate, which can be dealt with in relation to whether or
9 not the principles were complied with.

10 Insofar as the final points I wanted to make. Time limits are a question. I have
11 addressed you on the points in relation to whether or not these are premature. The
12 transparency dates, which is linked to when the decision becomes known, or is
13 entered on the subsidy database. We say that that reflects a regime where review is
14 intended, we say, to occur shortly after the decision is made in principle and disclosed.
15 It has been disclosed at this point. Not deferred until the latter half of the
16 decision-making process. Not least -- no longer is it the position from my
17 understanding that it is not put a point the subsidy is given. It is the question as to
18 where we are in the decision-making process. We say that the publishing of the
19 subsidy, the agreement in principle, is in effect a question capable of review at that
20 point.

21 I think I have addressed you on the other points in relation to prematurity.

22 One final point in relation to the strike-out question. In terms of that point, Madam
23 President, there are points in relation to -- we came prepared today to deal with the
24 stay application. However, the question of striking it out in the alternative, in terms of
25 challenging effectively the substance of where we are in the proceedings, grappling
26 with that question, we say is a difficult one based on what we were understanding we

1 were here today to do, which was to deal with that question.

2 Although I do accept that my learned friend did say that they would possibly be
3 proceeding with that if the stay were --

4 **MRS JUSTICE BACON:** And I think more importantly, we asked both of you to deal
5 with the jurisdictional point head on.

6 **MS HAYWARD:** Yes. Exactly.

7 **MRS JUSTICE BACON:** And Mr Howell has said, well, okay I will deal with the
8 jurisdiction point. The consequence he says, if I am right on jurisdiction, is that,
9 inevitably the tribunal will have to strike out in this case, because there no basis on
10 which a stay could properly be the consequence of him being right on jurisdiction.

11 Now, that is what he says. You have said that a stay would be more appropriate. Can
12 you address us on whether there is any reason why we cannot strike out at this point?
13 Or why you haven't had the opportunity to make your submission in response to the
14 strike out application now made by Mr Howell?

15 **MS HAYWARD:** It would come ultimately down, Madam President, to dealing with
16 this case effectively substantively. Which is the very nature of the review process
17 itself, which I accept is contingent on jurisdiction. However in terms of a better, more
18 developed understanding, of why the stay in proceedings is appropriate, where we
19 are, would involve an engagement with the material quite substantively in terms of
20 a response to a strike-out application, and yes I do accept that jurisdiction is one limb
21 of that and I do accept that there are points that we can deal with and have dealt with
22 today, I say dealt with, we can respond to today. However, in our view, we are here
23 today under the impression that either the stay was allowed or the stay was denied.
24 The question of strike-out didn't necessarily follow by virtue of the fact that, although
25 the question of -- in terms of how we understood the tribunal's direction to deal with
26 those paragraphs of Weis, it was a question as to whether or not the stay was

1 appropriate rather than whether or the claim should be struck out in its entirety.

2 **MRS JUSTICE BACON:** Now that Mr Howell has raised it though, what is your
3 response to the question of whether, if he is right on the jurisdiction point, whether the
4 tribunal can strike it out and indeed should strike it out as the main form of relief? He
5 says that there would be only very exceptional cases where the tribunal found it didn't
6 have jurisdiction but nevertheless stayed. He gave the example of a case where the
7 decision was imminent in the next couple of days, so he said he could see it in that
8 case the tribunal might not immediately strike out. But he said in any other case, and
9 particularly in this case where there is no imminent decision, it inexorably follows from
10 him being right on jurisdiction that the tribunal should strike out.

11 Could you respond to that? We have time to hear your submissions on that.

12 **MS HAYWARD:** It is more a question of being prepared to grapple with it
13 substantively on that specific point. But in terms of -- in the absence of being able to
14 do that at a latter stage, it would be a question of whether or not firstly section 70 in
15 and of itself confers a jurisdiction as we thought to give a subsidy, as recognised in
16 Weis. That concept is not confined again to the moment of legal commitment and we
17 accept that the principles have not been considered yet. But we say read explicitly,
18 and effectively purposively, extends to that entire process. So the question is -- and
19 I accept that we don't have any definitive idea of when those principles will be
20 considered when the decision will be made, it is contrasted from the existing
21 authorities on that basis. We say instead, if I may -- just bear with me for one moment,
22 my Lady.

23 **(Pause)**

24 The question is whether or not in striking out the notice of appeal, the public authority
25 could take all substantive decisions as to what we say are beneficiary, quantum,
26 structure, internal discussions, internal approvals effectively, and commit in principle

1 to the subsidy yet avoid review simply by deferring the final stage, which is reviewing
2 it against the principles. Does that not in this case then permit the substance of
3 a decision, which are those points I have listed before, from being insulated from any
4 scrutiny and that all matters would have to wait until that point. It is a moving feast
5 ultimately as my learned friend has conceded. We don't know when this decision is
6 going to be made. So it is a question would Parliament have intended at that juncture
7 for jurisdiction to bite only if and when, in the moving feast that is this decision which
8 is yet to be made, at what point practically does section 70 cover that question of
9 whether or not, in cases where it is a moving feast, in questions where we have no
10 clear view, as my learned friends accepted, of when that decision will be
11 made -- forgive me, it may not be known clearly but it is not a few days from that date
12 as was distinguished by the previous authority. It is a question of whether or not this
13 is a premature or advisory adjudication of the issues. We say it must overstate that
14 point because ultimately we have a question here as to that substance -- the challenge
15 to the notice of appeal is already filed. The question is if we submit to the moving feast
16 that is this in any event, if it's struck out, then it would mean bringing a fresh subsidy
17 challenge at that point, in which case we incur the costs of the same and we don't
18 have any confirmation as to when that decision will be made in substance. Not even
19 in substance but in totality, such that it is capable of review. I do appreciate that we
20 are at the point where we elected to bring the challenge, however we elected to bring
21 the challenge because there is an appreciable effect because the appellants at this
22 point cannot continue their development at this stage because the grant funding they
23 challenge is still tied up and allocated to one particular beneficiary, a third party
24 beneficiary.

25 So we say that that is precisely what the SCA regime is for --

26 **MRS JUSTICE BACON:** But your SCA appeal doesn't refer to the effect on you and

1 your client and indeed, the relief sought doesn't require anything to be given to your
2 client. The relief sought relates to the decision in relation to the 9 to 11 Newgate Street
3 project and The Auckland Project.

4 **MS HAYWARD:** Let me just pull this up, my Lady.

5 **MRS JUSTICE BACON:** It is page 77 and 78 of the hearing bundle.

6 On any basis, this is nothing to do with the financing of your client.

7 **MS HAYWARD:** Well ultimately that goes to the question again if we are to stay
8 proceedings and allow for the -- it is already accepted that at this point it would require
9 an amendment in any event, if we do accept that the proceedings should be stayed
10 such that we can amend the proceedings and respond directly to those challenges.

11 **MRS JUSTICE BACON:** What do you mean respond directly?

12 **MS HAYWARD:** Forgive me. Respond to how the decision was made, respond to
13 the finding in relation to those principles at that point. Forgive me.

14 **MRS JUSTICE BACON:** All right. Let's return to the question. If you are wrong on
15 jurisdiction, is there any particular reason why the tribunal should not or cannot strike
16 out the proceedings? Mr Howell has clearly said today that he is applying for
17 a strike-out. The tribunal could strike out of its own initiative in an appropriate case,
18 so it doesn't even have to be on the application of a party. But here he is putting this
19 squarely in issue.

20 Now, is there any particular reason that you think we should take into account that you
21 haven't referred to already on the question of whether we should strike out or as you
22 say in the alternative stay? If you needed more time to consider it, what is it that you
23 have yet to consider, because I appreciate that your client is a litigant in person, you
24 have been instructed quite recently, Mr Howell has raised the point today. If you are
25 saying that you haven't been able to respond to it, why and what further investigation
26 do you need to make in order to respond to it?

1 **MS HAYWARD:** It would be insofar as what we suggested on that score. We would
2 need to investigate further or I would need to reflect further on the question of what
3 exactly has been agreed. We have accepted certain points of the respondent's case
4 in terms of where we are, in terms of the fact that we are at the point where the
5 principles need to be considered, however there are other extant questions that are
6 required in order to bring an SCA challenge, an SCA appeal, specifically in relation to
7 a strike-out application and review of the relevant authorities in respect of the same.
8 Opportunity to do -- and I appreciate --

9 **MRS JUSTICE BACON:** No, I am not following you. If we are with Mr Howell on the
10 jurisdiction point, and if we therefore conclude that there has been no reviewable
11 decision made yet, so there is no jurisdiction for you to apply under the SCA in relation
12 to whatever decisions have now been taken, if that is what our conclusion is, what else
13 do you want to say about the question of whether your SCA claim should now be struck
14 out? Is there anything that you want to say now or if you are unable to formulate your
15 submissions on that, can you explain why and what further investigation you would
16 need to make? But this is on the footing that Mr Howell is right on jurisdiction.

17 **MS HAYWARD:** It would be a question as to -- I am very grateful for the
18 clarification -- it would be a question as to what would be available, exactly speaking
19 to your question, in the alternative, insofar as what we have considered thus far is the
20 question of whether or not the appeal is stayed or not.

21 **MRS JUSTICE BACON:** The alternative is, as Mr Howell has made quite clear, is
22 that you would then wait until the decision is made, if it is struck out, and file your claim
23 at that stage. So that is the consequence of striking out.

24 What else do you need to consider and is there any reason why you can't now put
25 forward any remaining submissions on the strike-out point?

26 **MS HAYWARD:** It would be insofar -- as I say although my learned friend has made

1 submissions in relation to what follows, it may not necessarily be the case that that is
2 the only option open to the tribunal. As we hadn't -- for all intents and purposes I hadn't
3 been instructed to advise or deal with that point initially. Although I appreciate that it
4 does putatively follow that strike out would be an option open to the tribunal, but
5 indeed what is being advanced is that it is the only option open to the tribunal. What
6 I would suggest, subject to the tribunal's view, is that written submissions are made in
7 respect of the same, if that is at all -- and I would request that the tribunal exercise
8 their case management powers under rule 4 in order to do so to give the appellants
9 whose counsel and solicitors were instructed at relatively late stages to adequately
10 respond and offer a possible alternative route that would be in the interests of dealing
11 with this matter justly. Effectively at proportionate cost insofar as if the notice of appeal
12 were to be struck out we would incur costs of the same.

13 **MRS JUSTICE BACON:** All right, so look you have addressed on the question of
14 jurisdiction and that was always in issue. You addressed the jurisdiction point or the
15 correctness of Weis in your skeleton argument. You have come to the tribunal today
16 on notice from the tribunal, you have addressed us on the jurisdiction point fully. We
17 have invited you both to make submissions on the correctness of Weis. You have
18 both done that so we don't need further submissions on that.

19 You have addressed us on the question of whether a stay is appropriate if you are
20 correct on jurisdiction, and I understand your submission to be that you no longer, in
21 that case, oppose a stay, because you accept that the tribunal will have to wait until
22 a final decision has been taken. That's correct, is it?

23 **MS HAYWARD:** Well, it is ultimately. If we were to accept that in its entirety then the
24 question falls away as to whether or not we can actually review that process in and of
25 itself. Jurisdiction is sort of the challenge as you say.

26 **MRS JUSTICE BACON:** No, no, if you are right on jurisdiction.

1 **MS HAYWARD:** We say a stay is appropriate, yes.

2 **MRS JUSTICE BACON:** You say a stay is appropriate. Thank you. So you no longer
3 oppose a stay in that instance.

4 **MS HAYWARD:** No.

5 **MRS JUSTICE BACON:** All right. Thank you. So the only outstanding question is if
6 you are wrong on jurisdiction and the tribunal does not have jurisdiction to review the
7 decision as at this stage, the question is then whether the correct relief is to strike out,
8 or whether, as you I think are saying, the tribunal should simply stay in that case. You
9 are saying you would like the opportunity to put in further written submissions on the
10 point.

11 **MS HAYWARD:** That is correct.

12 **MRS JUSTICE BACON:** Is that what you are saying?

13 **MS HAYWARD:** Insofar as what the relief available is.

14 **MRS JUSTICE BACON:** Insofar as what the relief available is, if we conclude with
15 Mr Howell that we don't have jurisdiction.

16 **MS HAYWARD:** Quite.

17 **MRS JUSTICE BACON:** All right. Just let me discuss that.

18 **(Pause)**

19 **MR HOWELL:** Can I briefly just address that point and that point only?

20 **MRS JUSTICE BACON:** Yes.

21 **MR HOWELL:** Which is simply we are here today and obviously this arose out of our
22 application to stay which has been vigorously opposed several times, including in the
23 skeleton argument with a single paragraph. Most of it was directed in the skeleton to
24 the jurisdictional question. One paragraph on the discretionary question of a stay. So
25 that has fallen away and that goes solely to costs.

26 The issue is: do you decide the point today or adjourn it for still further written argument

1 and costs. I do really invite you not to do that if we are in this situation. I have some
2 other points on what my learned friend says.

3 The position is the tribunal raised squarely the issue of *Weis* on Monday, I immediately
4 took instructions in light of that and I informed my learned friend in terms, I am not
5 going to read out the email but I informed my learned friends that we would be inviting
6 the tribunal to strike out under rule 11(1)(a) at 1 o'clock on Monday.

7 **MRS JUSTICE BACON:** Sorry, this is news to us. Are you saying that as soon as
8 you received the tribunal's message on this point --

9 **MR HOWELL:** I informed my learned friend.

10 **MRS JUSTICE BACON:** -- you informed Ms Hayward that you would be asking for
11 a strike out?

12 **MR HOWELL:** Yes.

13 **MS HAYWARD:** Forgive me.

14 **MR HOWELL:** I think she adverted to that but in rather qualified terms. We didn't
15 write to the tribunal because I considered it appropriate to raise it orally if I had given
16 notice.

17 My submission is simply this. She has had a full opportunity to address the
18 jurisdictional arguments. There is no dispute about that.

19 **MRS JUSTICE BACON:** Sorry, can you just tell us at what time did on you Monday?

20 **MR HOWELL:** I mean I can read it, I normally don't do this --

21 **MRS JUSTICE BACON:** You don't have to read it out.

22 **MR HOWELL:** At 12.53, so that is 7 minutes to 1 at lunchtime on Monday. So she
23 had the entirety of Tuesday and Monday afternoon for a substantive hearing that both
24 counsel were obviously preparing for. And I said in light of the indication I will be
25 inviting the tribunal to depart from paragraph 152 of *Weis* and if it does so to strike out
26 the notice of appeal under rule 11(1)(a) for want of jurisdiction. If the tribunal holds it

1 does have jurisdiction we maintain our application for a stay in the alternative. So my
2 point is simply this. My learned friend and her clients had ample notice of this point
3 before the hearing and it goes to a very short question of essentially discretion under
4 that rule. She has had ample opportunity to simply, you know, I can't say more than
5 that.

6 **MRS JUSTICE BACON:** Yes all right. Hang on.

7 **(Pause)**

8 **MS HAYWARD:** My Lady, if I may clarify. I do apologise if it wasn't made clearly.
9 There was no intention to provide that obliquely. As my learned friend pointed out we
10 did reference it and I should have referenced it in more explicit terms. It was more
11 a question of what we were listed here for today in terms of what the extant
12 applications were in the fact that it had been indicated previously they wouldn't
13 proceed with it. I completely accept the point we were given some notice but what we
14 argue is insufficient. Although a day and a half is substantive in some contexts we say
15 that it wasn't for our purposes. However --

16 **MRS JUSTICE BACON:** We are -- not in light of those circumstances which we
17 weren't aware of --

18 **MS HAYWARD:** Forgive me, my Lady.

19 **MRS JUSTICE BACON:** -- we are not going to I think go down the route of further
20 written submissions. We are here today and you were given notice that the point
21 would be raised. And it is a very short point. The jurisdiction point was always going
22 to be an issue in some form and you had addressed it already in your skeleton
23 argument. It was Mr Howell who hadn't addressed it and the purpose of us sending
24 the message was to alert both of you to the fact that we did want to deal with it properly
25 if we could. And as time has permitted we have been able to hear full submissions
26 from Mr Howell on the point.

1 So the question about strike out is a very short point that follows from what he said on
2 jurisdiction, and you have had enough time, we think, to deal with that point as
3 a consequential issue if you wanted to deal with it.

4 So I think the question is then whether there is anything else that you want to say on
5 his strike out application?

6 **MS HAYWARD:** I think we have made -- I am very grateful for that and again all due
7 apologies for the lack of clarity. I made the point I think too obliquely that my learned
8 friend had very rightly let us know about his intention to.

9 In terms of whether or not there are any extant points that we want to make in relation
10 to jurisdiction, I think insofar as our skeleton argument makes those points, that we do
11 adopt what is in our skeleton argument subject to the points I have made thus far,
12 which effectively in essence is we say it would undermine -- to decline jurisdiction
13 would be to undermine the preventative function of the SCA regime because we say
14 that for all intents and purposes the decision has been made and it has been a moving
15 feast for some time. Although we accept that we made the application as in it was our
16 notice of appeal -- to bring the notice of appeal at the material time. We say that in
17 effect that is already happening and in terms of the question that the tribunal has to
18 consider is whether or not effectively how long can we permit delay, how long can we
19 permit delay before a decision can be rightfully challenged and it has been some time
20 now. It has been quite a significant period of time and whether considering where we
21 are, although the timeline is distinguished from the cases my learned friend cited, from
22 Weis as well, the question is whether or not even though it is an earlier stage in
23 proceedings set against the background of the fact that this decision has been ongoing
24 for a very long period of time, at what point can it be -- at what point effectively, what
25 is the alternative to prompt them to undertake that exercise in considering the review
26 principles? Which we say that is what the regime exists to do. In effect what it would

1 do is prompt them into considering those points and I accept would require
2 an amended notice of people ex post facto however the real issue is ultimately what
3 the tribunal is being asked to do is indulge that delay. Indulge that lengthy period of
4 time whereby the appellants have no insight and indeed other market operators have
5 no insight into when this subsidy decision will be made. When the principles will be
6 considered effectively.

7 **MRS JUSTICE BACON:** Yes all right. Thank you. We have that point.

8 **MS HAYWARD:** That is the crux of the issue, Madam President. I do apologise for
9 the reiteration but it is the critical one in our view that ultimately the regime cannot
10 have intended to accommodate that indulgence to that degree whereby in this
11 circumstance --

12 **MRS JUSTICE BACON:** Yes. We have that point, thank you.

13 **MS HAYWARD:** Are there any other points that I can assist you with in relation to
14 that, Madam President?

15 **MRS JUSTICE BACON:** I think not. I think we have heard from you and we
16 understand your submissions so far as you have advanced them.

17 All right. Does that conclude your submissions on the SCA claim?

18 **MS HAYWARD:** If I can just quickly review and then I think we are there.

19 **(Pause)**

20 Only one final point, my Lady, if I may. It is the final point. I appreciate I have laboured
21 it somewhat. We submit as we say in our skeleton at paragraph 64 one final point
22 which I haven't elaborated on in all the submissions is rule 98A of the 2015 rules,
23 which we say reinforces that point insofar as the time limit concerned. It speaks
24 directly to whether or not you have jurisdiction, in relation to whether or not it is
25 premature. It may run from the point at which an interested party knew or ought to
26 have known of the making of the subsidy decision. So this is the question as to

1 whether or not -- forgive me, just for completeness it is 98A(4)(B)(1) for completeness.
2 What we say is that necessarily contemplates that pre-ward or in principle decisions,
3 even at the earlier stage that is distinguished from Weis, ought to be challenged. Sorry
4 ought to be capable of challenge. Ought to be capable of scrutiny. Because effectively
5 it would lack the practical effect in cases where publication is not required. In effect
6 the respondent's approach would render that aspect of the procedural regime
7 impossible. That is what distinguishes it from the circumstances in Weis. We say that
8 ultimately the regime did contemplate that the time limit for bringing that subsidy
9 control challenge may indeed run from the point at which the party, the interested
10 party, knew or ought to have known of the making of the substantive decision.
11 I will no longer labour the point, Madam President. I think I won't go further. But if
12 there is anything else I can assist you with.

13 **MRS JUSTICE BACON:** Thank you very much. I suggest that we rise for five
14 minutes.

15 **(3.33 pm)**

16 **(a short break)**

17 **(3.46 pm)**

18 **MRS JUSTICE BACON:** Yes, Mr Howell.

19 **MR HOWELL:** Very briefly, by way of reply. The first is just a point of factual
20 clarification. At various points in my learned friend's submissions, she appeared to
21 say, actually, we hadn't done any assessment of the principles at all. Just for clarity,
22 that is not correct. Obviously the council has done preliminary assessments, it has to
23 do that for instance as part of the CMA report, and it did so in its case to the North
24 East Combined Authority.

25 **MRS JUSTICE BACON:** A preliminary assessment but not a final assessment.

26 **MR HOWELL:** Precisely. That is just so the facts are clear.

1 Her next point was a sort of overarching one which was, can the tribunal allow this
2 delay to continue? I took that to mean should it essentially allow the council some
3 time to essentially finalise its assessments and take its decisions.

4 If the complaint is one of unlawful delay in taking a decision, that can be put to the
5 council in pre-action correspondence. The appropriate relief would be to seek
6 a mandatory order in the Administrative Court requiring us to take a decision. There
7 is no proper complaint to that effect and it is not a matter for you.

8 The next point. There were various stages where my learned friend sought to gloss
9 the words in 2(5) saying there ought to be a meaningful entitlement. The words are
10 "enforceable right to financial assistance", and those are to be given effect.

11 The final point is the one about the time limit. My learned friend repeated the point in
12 her skeleton that the part of the time limit that runs from the date where you knew or
13 ought to have known was intended to cater for these cases. Now, I addressed you in
14 opening as to why it doesn't deal with that. It deals with subsidies given under
15 schemes that don't have to be put on the database, as this tribunal concluded in *New*
16 *Lottery*, but if for whatever reason you were against me on that and that time limit did
17 apply in this case, then you would have to strike out the appeal for a different reason,
18 which is that it would have been brought out of time. The appeal was brought at the
19 start of December, that is when this notice was filed, and the decisions in principle
20 have been in the public domain and known for vastly longer than a month before that.

21 You have the CMA report and referral in February and March about the Auckland
22 project and the hotel, and obviously you have the public comments of the mayor of the
23 combined authority about STACK in July. These were all mentioned in the first
24 iteration of the original claim form in the Competition Act proceedings.

25 So if she were right on that point, and she isn't, it would actually be a further fatal
26 objection to her case.

1 Unless there is any further points, I can assist with?

2 **MRS JUSTICE BACON:** No. We don't have any further questions for you. Thank
3 you very much, Mr Howell.

4 We will reserve judgment. We have already given you the result of our decision on
5 the CA98 claim. We will set out our reasoning in our reserved judgment. We will
6 reserve judgment on the SCA claim and that will form part of the written reasoning in
7 due course.

8 That leaves the question about what to do on the costs of the CA98 claim. Given that
9 we are reserving judgment on the subsidy claim, and given that we haven't provided
10 our reasoning in relation to the Competition Act claim, our suggestion would be that
11 we deal with costs in the usual way, after judgment is handed down. Are you both
12 content with that?

13 **MR HOWELL:** I think there is no other alternative in the circumstances.

14 **MRS JUSTICE BACON:** All right. Thank you very much.

15 Is there any other housekeeping that it we need to deal with, or have we dealt with
16 everything?

17 **MR HOWELL:** One point we didn't deal with at the start but, for good
18 order -- I understand it is common ground -- although we have been going on for
19 nearly 7-months, the question of forum hasn't been dealt with. It is common ground,
20 given where these events are concerned with, that the proper forum is England and
21 Wales. I would therefore invite you to make a direction for the purposes of both
22 proceedings that, for all purposes, forum be treated as England and Wales.

23 **MRS JUSTICE BACON:** Is that agreed, Ms Hayward?

24 **MS HAYWARD:** It is agreed, my Lady. There is no opposition.

25 **MRS JUSTICE BACON:** Thank you very much. All right, so you will receive our
26 judgment in draft in due course.

1 **MR HOWELL:** Do you want us to settle an order for the Competition Act claim or shall
2 we wait until after --

3 **MRS JUSTICE BACON:** I think it would be appropriate for to you wait until after our
4 judgment is delivered, and then settle an order in relation to everything at that point.

5 **MR HOWELL:** Yes, I assumed that was the position.

6 **MS HAYWARD:** Insofar as costs are concerned, Madam President, we have filed
7 a costs schedule. Insofar as determining, of course costs will follow depending on
8 what your judgment is. Obviously the Competition Act claim has been dealt with
9 already, but insofar as whether or not we can expect from the defendant respondent
10 their cost schedule in due course.

11 **MRS JUSTICE BACON:** Well, if an application for costs is made, then that would
12 follow. I would suggest that, given that we have had a hearing that has lasted less
13 than a day, that if an application for costs is made, then the tribunal should assess
14 summarily. So I will expect a full schedule of costs to be provided if the defendant is
15 asking for them.

16 **MR HOWELL:** Yes. I anticipate, obviously, it is on the Competition Act we will be
17 seeking our costs. Quite what the order will be will, I suspect, depend a bit on what
18 you decide about the subsidy question. I think our ordinary approach, unless the
19 tribunal would want to tell us otherwise, would to be to put in a schedule once we know
20 what application we are actually making.

21 **MRS JUSTICE BACON:** I agree. I am just putting you on notice that you should
22 expect that there be summary assessment of costs rather than sending this off for
23 detailed assessment, given the length of the hearing.

24 **MR HOWELL:** Yes. We would fully support summary assessment in this case.

25 **MRS JUSTICE BACON:** All right. Thank you very much.

26 **(3.48 pm)**

1 (The hearing concluded)
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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?