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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1775/12/13/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 26th October 2026

Before:

The Honourable Lord Young
Sir Ian Forrester KC
Professor Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

McGill's Bus Service Limited

Appellant

v

The Scottish Ministers

Respondent

A P P E A R A N C E S

Jonathan Barne KC (Instructed by DLA Piper Scotland LLP) on behalf of McGill's Bus
Service Limited

Mark SH Lindsay KC (Instructed by Morton Fraser MacRoberts LLP) on behalf of The
Scottish Ministers

Monday, 26 October 2026.

(10.30am).

THE CHAIRMAN: Good morning. I do not know if the parties have had a discussion between themselves about the order here. We were rather anticipating that you would start, Mr Lindsay, given you have got the substantive argument, but if the parties think there is a better order I am happy to hear.

MR BARNE: No, my Lord. Discussed matters with Mr Barne and we have come to the same conclusion that it would make sense for me to speak first and deal with the time-bar issue and then, depending on the outcome of that, we can move to procedural matters going forward --

THE CHAIRMAN: I think it probably easiest if you deal with the time bar and then give us your views on further procedure, assuming that you are unsuccessful with the time bar today.

MR LINDSAY: Yes.

THE CHAIRMAN: Then we will hear from Mr Barne after that.

Submissions by MR LINDSAY

MR LINDSAY: Yes, my Lord. A skeleton

1 argument has been lodged on behalf of the
2 respondent and I adopt that as part of my
3 submissions to the Tribunal this morning and
4 the point advanced on behalf of the respondent
5 is a simple one. The subsidy register was
6 modified on 3 September and that made clear
7 that the ScotZEB scheme was going to be
8 extended in time and that further money was
9 going to be available under the ScotZEB scheme.

10 THE CHAIRMAN: Mm-hm.

11 MR LINDSAY: That starts the clock
12 ticking. No information request was made
13 within a period of one month and therefore it
14 time-barred a month after 3 September.

15 THE CHAIRMAN: Yes.

16 MR LINDSAY: That is not accepted by the
17 appellants who if I understand -- if
18 I understand their note of argument correctly
19 really take two points against that. It may be
20 best if I deal with the points taken against
21 the respondent, rather than just simply reading
22 out what the Tribunal can see in black and
23 white in the respondent's note of argument.

24 Two points seem to be taken against that
25 analysis. The first is the appellant says that

1 it is a new subsidy scheme, it is not a
2 permitted modification. Therefore, there
3 should have been a separate entry in the
4 subsidy register in respect of the new subsidy
5 scheme, rather than a modification to the
6 existing entry in the subsidy register for the
7 ScotZEB scheme.

8 THE CHAIRMAN: Mm-hm.

9 MR LINDSAY: They say that should have
10 been done, if that had been begun it would have
11 generated its own transparency date. I suppose
12 the logical outcome of all of that is that the
13 timeous raising of the appeal on the
14 appellant's analysis is inextricably tied up
15 with the underlying merits of the appeal, is it
16 a permitted modification or not?

17 The second point that is taken relates to
18 what are really said to be disputed facts.
19 Does the entry on 3 September relate to
20 ScotZEB3, the third round of funding under the
21 ScotZEB scheme or does it relate to further
22 funding under ScotZEB2? Those, if I have
23 understood the notes of argument correctly, are
24 the points taken against the respondent's
25 analysis.

1 On behalf of the respondent, it is
2 respectfully submitted that both of those
3 points are incorrect and that as a matter of
4 law, even if the appellant is correct as a
5 matter of law, the appeal is out of time. To
6 summarise why that is the case before looking
7 at each point in a little bit more detail,
8 there are two points that the respondent takes.
9 The first is that the issues raised relating to
10 the content and validity of the entry in the
11 subsidy register on 3 September are immaterial
12 for present purposes and have no impact on its
13 validity when considering the time-bar
14 provisions in the rules.

15 The second point taken by the respondent
16 is a fallback position, an esto position,
17 even if the appellants' critique of the
18 3 September entry are correct, running
19 alongside the issue of time bar is the issue of
20 undue delay in raising proceedings and that
21 the Tribunal has a discretion to refuse an
22 appeal if there has been undue delay in raising
23 it.

24 MR BARNE: At the risk of interrupting,
25 can I say that undue delay is not part of the

1 pleadings, is not part of the note of argument
2 and I do not want to be seen to acquiesce in my
3 learned friend proposing this argument which is
4 the first that I have heard of it. The defence
5 is premised on the issue of the transparency
6 date. Undue delay does not feature either in
7 the defences or in the note of argument.

8 THE CHAIRMAN: Yes, Mr Lindsay.

9 MR LINDSAY: This is simply a rebuttal of
10 what is in the appellant's note of argument.
11 It is incorrect to suggest that no notice was
12 given of this point. In the authorities which
13 were included in the joint bundle of documents
14 which came from the respondent, one of
15 the authorities, which is at tab 12, the
16 *New Lottery Company Limited v The Gambling*
17 *Commission*, deals with the interaction between
18 undue delay and the time-bar provisions.
19 Although it is a lengthy judgment --

20 MR BARNE: Where is the minute of
21 argument?

22 MR LINDSAY: -- the relevant paragraphs
23 are highlighted there at paragraphs 168 through
24 to 181.

25 THE CHAIRMAN: Can you give us the page

1 number of the joint bundle for that?

2 MR LINDSAY: Yes, it is at PDF 627.

3 MR BARNE: If I may observe, and I do not
4 want to make this a tit for tat, while that
5 authority was produced, it is not referenced in
6 the note of argument at all.

7 THE CHAIRMAN: Yes.

8 MR BARNE: I think this a very different
9 point, my Lord.

10 THE CHAIRMAN: We will hear from
11 Mr Lindsay about this. I should say,
12 Mr Lindsay, when you were just reading out that
13 second proposition, it was new to me, it was
14 not something that occurred to me that I had
15 come across reading the skeleton that there was
16 a fallback of undue delay. I understood
17 there was a fallback in terms of other
18 potential dates, but not in the context of
19 undue delays, I mean separate from time bar.

20 MR LINDSAY: This is simply a rebuttal to
21 what is in my learned friend's skeleton
22 argument.

23 THE CHAIRMAN: Okay.

24 MR LINDSAY: A notice was given by
25 lodging the relevant authority with the

1 highlighted passages which speak for
2 themselves, and the issues of time bar and
3 undue delay are really two sides of the same
4 coin. Because if my learned friend's argument
5 is correct, there was no valid entry made in
6 the subsidy register and in his analysis the
7 clock never started to run.

8 THE CHAIRMAN: Yes.

9 MR LINDSAY: But the balance in
10 the Tribunal rules is that if it does not start
11 to run under the time-bar provisions because
12 there has been no entry made in the subsidy
13 register, then the underlying thrust is that
14 challenges should be made promptly in the
15 interests of good administration to prevent
16 other tenderers spending a lot of money on a
17 scheme that is subsequently found to be
18 unlawful. So that the check and balance in the
19 procedural rules is that if there is undue
20 delay, notwithstanding the failure to make the
21 required entry in the subsidy register, there
22 is that longstop date provided by undue delay.
23 Undue delay here is highly relevant because we
24 have the very unusual factual circumstances of
25 the appellant being fully aware of what was

1 proposed under ScotZEB3, not raising any
2 challenge at all, participating in the ScotZEB3
3 round of applications and only after the
4 appellant was unsuccessful did it seek to
5 challenge the lawfulness of the ScotZEB3 round
6 of funding under the ScotZEB scheme.
7 Presumably if it had been successful none of us
8 would be here today.

9 So it is simply a rebuttal point that
10 arises out of the arguments taken by my learned
11 friend in his skeleton argument and notice was
12 given by the authority and the highlighted
13 passages which only deal with undue delay in
14 the context of a dispute about whether an entry
15 was made in the subsidy register.

16 MR SMITH: You moved on a bit from
17 3 September date, but can I go back to
18 3 September date.

19 MR LINDSAY: Yes.

20 MR SMITH: And ask whether it really is
21 the correct date for the ScotZEB3 scheme. As
22 I understand the timetable, the Minister
23 announced a third round in August. The
24 database was changed on 3 September, there was
25 evidently some unhappiness among various people

1 and on 14 November the Government seemed to
2 take a somewhat different line and in November
3 announced what is now called the ScotZEB3
4 scheme saying this was in response to the new
5 Bus Services Act.

6 The announcement in November is clearly
7 different from what the Government said it was
8 going to do in August and 3 September is in
9 between those two dates. I am not clear how
10 you can argue that 3 September was the relevant
11 entry for the scheme that was announced --
12 properly announced after that date.

13 MR LINDSAY: Yes, it is the relevant
14 entry, because it makes clear that the existing
15 ScotZEB scheme is being extended in time and
16 that more money will be made available under
17 the existing ScotZEB scheme.

18 Now, whether that was through ScotZEB2 or
19 through a third round of funding under ScotZEB3
20 is wholly immaterial for present purposes,
21 because the appellants case is this was a
22 new -- could never have been a permitted
23 modification because ScotZEB was limited to two
24 rounds of funding, ScotZEB2 had closed, so it
25 could not be reopened and ScotZEB3 was not a

1 permitted modification in terms of the
2 legislation because ScotZEB was limited to two
3 and could not be extended to a third round.

4 So the point at issue is -- as far as the
5 appellants are concerned it should be a new
6 subsidy scheme, starting at the beginning,
7 looking at all of the subsidy principles. It
8 could never have been a permitted modification.
9 So that is why 3 September is the relevant
10 date, because that is the date that it is
11 published and made clear that the existing
12 ScotZEB scheme will be extended in time and
13 more money will be made available. The subject
14 matter of this appeal is not whether it had to
15 be ScotZEB2 or ScotZEB3, so the discussions
16 that came after 2 September relating to whether
17 it should be ScotZEB2 or ScotZEB3 are
18 immaterial, because the dispute between the
19 parties is can it be a permitted modification
20 or does it have to be, you know, a new subsidy
21 scheme with all that that would entail.

22 MR SMITH: But is it not the case that all
23 the players in this industry need to know the
24 details of this scheme, of the new scheme
25 before they can decide whether this is

1 something that is legally acceptable or
2 something that they should challenge and they
3 did not -- the timeline says there may have
4 been a later date at which they did know what
5 was involved. The 3 September they knew there
6 was going to be a new scheme that evidently
7 some of them were unhappy with, but they did
8 not know the details of the new scheme on
9 3 September.

10 MR LINDSAY: Yes, now -- no, what was
11 known on the 3 September was that there would
12 not be a new subsidy scheme, it would just be a
13 modification -- a permitted modification of the
14 existing ScotZEB scheme and that is all that is
15 in issue in this appeal. There is no secondary
16 argument about, well, you could not do it as a
17 third-round ScotZEB3, you should have opened
18 ScotZEB2 again. There is no fallback position.
19 It is a very stark position the appellants
20 adopted. It is there could be no permitted
21 modification of ScotZEB, it had to be a new
22 subsidy scheme with the subsidy principles
23 being applied and so on and so forth. That was
24 what was made clear on 3 September. It would
25 not be a new subsidy scheme, it would be a

1 permitted modification of the existing ScotZEB
2 theme.

3 THE CHAIRMAN: But even on 3 September
4 when the database is changed or updated, they
5 are still at that point talking about "we only
6 accept consortia -- applications from
7 consortia." So it is not all out in the open
8 for people who are thinking about bidding or
9 not. They do not know what all the rules are
10 at that point, do they?

11 MR LINDSAY: That is the purpose of the
12 pre-action information request to flush out
13 what exactly is going on, but they would know
14 that the point that is relevant for this
15 appeal, that it was going to be a permitted
16 modification of an existing scheme, ScotZEB,
17 rather than a new subsidy scheme. That is the
18 argument between the parties. So on
19 3 September the appellant knew that the
20 respondent was going down the permitted
21 modification route and not the new
22 subsidy-scheme route. That is the point that
23 is taken in this appeal. That point was made
24 clear by the entry into the register of
25 subsidies on 3 September.

1 All the secondary issues, for example the
2 point raised by my Lord Young about whether it
3 could be consortia or individual bidders, none
4 of that forms the subject matter of this
5 appeal. What forms the subject matter of this
6 appeal is the logically prior question of is it
7 a new subsidy scheme or is it a permitted
8 modification? And that the entry on
9 3 September made clear that it was going to be
10 a permitted modification. The appellant's
11 position is it could never have been a
12 permitted modification, it always had to be a
13 new subsidy scheme.

14 If one thinks about the purpose of the
15 entry in the subsidy register was to give it
16 advance warning to interested parties that a
17 subsidy scheme has been made or modified for
18 them to consider issues of lawfulness and to
19 make the pre-action information request, that
20 purpose emerges very, very clearly if one looks
21 at Rule 98A of the Tribunal rules, which is at
22 tab 15, PDF page 145. It is perhaps five and
23 six of the bottom of the page if one reads them
24 together, you know the whole purpose of what
25 the entry in the subsidy register is designed

1 to do becomes apparent.

2 "(5) In determining for the purposes of
3 paragraph (4) (b) the date on which an entry is
4 made on the subsidy database in accordance with
5 the duty under section 33(1) or (5),
6 the Tribunal may direct that a minor omission
7 or error in the making of the entry is to be
8 disregarded.

9 "(6) An omission or error is 'minor' for
10 the purposes of paragraph (5) if it appears to
11 the Tribunal that it had no prejudicial impact
12 on the interested party in assessing whether to
13 make a pre-action information request."

14 Here any error or infelicity of expression
15 in the entry on 3 September had no prejudicial
16 impact on the appellant in assessing whether to
17 make a pre-action information request, because
18 the sole point taken in the appeal is, it
19 cannot be a permitted modification, it has to
20 be a new subsidy scheme. That was made clear
21 by the entry on 3 September. Therefore, if
22 the Tribunal took the view that perhaps some of
23 the other changes that were made on 3 September
24 were inaccurate, the test of whether that is a
25 problem or not is did it have a prejudicial

1 impact on the interested party in assessing
2 whether a pre-action information request should
3 be made? It is submitted that it could not
4 have had a prejudicial impact because the point
5 at issue is that a new scheme or a permitted
6 modification was made clear by the entry on
7 3 September.

8 THE CHAIRMAN: Mm-hm.

9 MR LINDSAY: So that is the first point.
10 If the Tribunal considers that the entry on
11 3 September does contain errors or infelicities
12 of expression, they can disregard it. Because
13 if one applies the sort of yardstick test of
14 was there a prejudicial impact on the
15 appellant's ability to assess to make a
16 pre-action information request, the answer to
17 that can only be "no". Because it is all about
18 new scheme permitted modification of an
19 existing scheme and that is made clear on
20 3 September.

21 MR FORRESTER: And just looking at 6, "no
22 prejudicial impact on the interested party".
23 You would concede that there was a prejudicial
24 impact?

25 MR LINDSAY: Not for the purposes of this

1 appeal. If we were arguing about whether it
2 had to be ScotZEB2 or ScotZEB3 or if we are
3 arguing about the rule of consortia, then, yes,
4 I think I would have to accept there was
5 prejudice, but the only point raised in this
6 appeal is it should be a new subsidy scheme
7 rather than a permitted modification of an
8 existing one. That was made clear on
9 3 September that it would be a permitted
10 modification. So there is no prejudice on the
11 sole point that is taken.

12 THE CHAIRMAN: I suppose it might be said
13 issues of prejudice are quite difficult for us
14 to judge without potentially hearing some
15 evidence from the appellants. What would you
16 say in relation to that as a general
17 proposition?

18 MR LINDSAY: Sometimes that may be the
19 case. Here, because the entry on 3 September
20 makes clear that it is going to be a permitted
21 modification, not a new subsidy scheme and that
22 the point taken in the appeal is it could never
23 have been a permitted modification, it would
24 always have to be a new subsidy scheme and
25 various things done before the new subsidy

1 scheme could be lawful, which were not done,
2 but it is clear enough to be dealt with today
3 without hearing evidence.

4 THE CHAIRMAN: I think Professor Smith's
5 point was really just to tease out, do you say
6 3 September is undoubtedly the date? Let us
7 say the applicants are correct here that this
8 had to be a new scheme, do you say if it had to
9 be a new scheme, even on that basis 3 September
10 would always be the date here just because of
11 the fact at that point something was done on
12 the data mentioned in the database?

13 MR LINDSAY: Yes, because you know that
14 was when it was made clear on the subsidy
15 database that there was going to be a permitted
16 modification of ScotZEB and not a new subsidy
17 scheme. So at that point if the appellant had
18 any concerns about the lawfulness of that, what
19 was on the register on 3 September would have
20 been sufficient to trigger the pre-action
21 information request, which would have stopped
22 the clock and then when the answer was given,
23 that is when the 28 days would have -- sorry,
24 the month would have commenced.

25 THE CHAIRMAN: Yes.

1 MR LINDSAY: So that is the first rebuttal
2 point. The second rebuttal point relates to
3 the issue of undue delay which of course
4 the Tribunal are hearing under reservation.

5 THE CHAIRMAN: Mm-hm.

6 MR LINDSAY: The Tribunal already has my
7 introductory remarks that undue delay is really
8 the other side of the time-bar coin and
9 provides a longstop date in circumstances where
10 there would not otherwise be one if there was
11 no entry made in the subsidy register. There
12 is quite an interesting discussion of the sort
13 of interplay between time bar and undue delay
14 in the statutory guidance. The statutory
15 guidance is tab 16 in the joint bundle. The
16 relevant PDF page is 307 of the PDF bundle. It
17 is paragraph 13.27.

18 THE CHAIRMAN: 13.27, yes.

19 MR LINDSAY: Paragraph 13.27 on page 307.

20 THE CHAIRMAN: Yes. I certainly have not
21 looked at this bit yet, Mr Lindsay. Can you
22 take us through this, what you say we should be
23 taking from this.

24 MR LINDSAY: The purpose of going to this
25 guidance -- I apologise for sitting down to

1 view my screen -- is to demonstrate the
2 relationship between the time-bar provisions
3 arising out of the time limits which are all
4 tied into when an entry was made in the subsidy
5 register and the Tribunal's underlying
6 discretion to refuse an appeal if there is
7 undue delay in raising it.

8 THE CHAIRMAN: Just to be absolutely clear
9 on this, your response does not say anything
10 about this, does it?

11 MR LINDSAY: No, it is a rebuttal point to
12 my learned friend's note of argument.

13 THE CHAIRMAN: Not in the pleadings.

14 MR LINDSAY: There is quite a lengthy
15 discussion starting at paragraph 13.27 of all
16 the applicable time limits and so on and so
17 forth. For present purposes where the guidance
18 made clear the close relationship between undue
19 delay and time bar, if the Tribunal go to the
20 bottom of the following page, which is PDF page
21 308, just above paragraph 13.32 where it comes
22 immediately after the discussion "inaccurate,
23 absent or incomplete uploads to the subsidy
24 database". After that bullet point the
25 paragraph beginning "for example":

1 "For example, this means that if a subsidy
2 is wrongly claimed to come under the protection
3 of a scheme or streamlined route, it may
4 potentially remain open to review for as long
5 as its status is incorrectly recorded on the
6 database up until one month after its status is
7 correctly recorded (unless an extension above
8 applies). However, the Tribunal has discretion
9 to refuse applications where there has been
10 delay without a justified reason."

11 There the guidance is making the point if
12 there is no entry or a problem with the entry,
13 then the clock does not start running under the
14 time-bar provisions but, nevertheless, there is
15 an underlying discretion to refuse an appeal if
16 there has been undue delay.

17 MR SMITH: So when would the clock start
18 running? If the database entry is incorrect or
19 incomplete and therefore it does not -- so this
20 comes into play, so the clock does not start
21 running. When does it start running?

22 MR LINDSAY: I think on my reading of
23 Rule 98A, it would have started running when
24 the pre-action information request was made by
25 the appellant that that would start the clock

1 running from that point. If that is correct
2 then everything was done timeously, subject to
3 the undue delay point.

4 MR SMITH: Remind me, when was that
5 request made? That was April, was it?

6 MR LINDSAY: Yes, it was.

7 THE CHAIRMAN: Some point in April and
8 then I think the Government responded in
9 probably mid-May because --

10 MR LINDSAY: Yes.

11 THE CHAIRMAN: -- I think the application
12 came in on 10 June.

13 MR LINDSAY: Yes, that is correct,
14 my Lord.

15 THE CHAIRMAN: Yes.

16 MR LINDSAY: That is the relevant
17 timeline. So turning to a judgment of
18 the Tribunal where there is a helpful
19 discussion of the interplay between undue delay
20 and the time-bar provisions, that is the case
21 of the *New Lottery Company Limited v The*
22 *Gambling Commission* neutral citation [2026] CAT
23 14. It is tab 20 in the joint bundle and it is
24 PDF page 627 where the discussion of undue
25 delay and how it relates to the time-bar

1 provisions is set out by the Tribunal.

2 MR FORRESTER: A silly question, you
3 highlighted it and I can see its relevance, did
4 you refer to the highlighting in the pleadings
5 or did we miss it?

6 MR LINDSAY: No, it was upon reading my
7 learned friend's skeleton argument and thinking
8 about the relevant authorities and how to
9 respond to it that I identified this authority
10 as being relevant and identified the relevant
11 paragraphs, highlighted them and put them in
12 the joint bundle.

13 MR FORRESTER: Okay.

14 MR LINDSAY: Prior to today, nobody raised
15 any issue about the inclusion of this authority
16 in the joint bundle, it was not objected to,
17 indeed the joint bundle was prepared by the
18 appellant's solicitors as I understand it. So
19 until my learned friend got to his feet, nobody
20 had objected to the inclusion of this authority
21 or otherwise made me aware there was going to
22 be any issue in relying upon it.

23 MR FORRESTER: We should attach no
24 importance to the fact that some of the
25 highlighting is yellow and some of the

1 highlighting is orange?

2 MR LINDSAY: I think that is a user error
3 on my part.

4 MR FORRESTER: All right.

5 MR LINDSAY: Mr Forrester is correct there
6 is no significance to the slightly different
7 shading.

8 The factual background to this particular
9 judgment was that funding had been made
10 available only for advertising and business
11 development purposes for the
12 *National Lottery* and the dispute was
13 whether that was a subsidy or not.

14 The Tribunal came to the conclusion it was not
15 a subsidy and therefore there was no need to
16 make any entry in the subsidy database. So
17 this is an esto discussion, it is not part of
18 the ratio, but I submit it is nevertheless
19 helpful. Reading from paragraph 168:

20 "Given the conclusion we have reached that
21 the Decision did not confer a subsidy on any of
22 the Interveners as a consequence of the
23 application of CMO principle, it is not
24 strictly necessary to consider the issues
25 between the parties relating to relief.

1 However, the facts of these proceedings raise a
2 question about delay and the appropriate
3 conduct of challenges under the SCA, so we will
4 add some observations on that subject.

5 "Two separate questions about delay arise:

6 (1) When did or should the Applicants
7 have become aware of the Decision?

8 "(2) Once the Applicants were or should
9 have been aware of the Decision, how quickly
10 were they required to issue their proceedings?"

11 Now, the first question is very fact
12 specific about when particular applicants
13 became aware of the payments that they
14 complained of so it is perhaps not helpful to
15 go through those paragraphs and I propose
16 simply to move to the second topic over the
17 page at paragraph 176:

18 "How quickly were the applicants required
19 to issue proceedings?"

20 At 176.

21 "It is common ground that the Applicants
22 did not contact the Respondent for over two
23 months after becoming aware of the Decision.
24 Their first contact concerning this matter was
25 on 19 March 2025 when they sent a pre-action

1 information request. Proceedings were not then
2 issued until 8 May 2025. The Respondent and
3 Intervenor submitted this constituted undue
4 delay in making the application, such that
5 relief should be refused by the Tribunal under
6 s. 72(8)(a) of the Subsidy Control Act. The
7 Applicants responded that they had acted
8 sufficiently promptly and that there was no
9 real evidence of prejudice arising from any
10 delay."

11 Just pausing there. The undue delay
12 that follows on from the appellant's analysis in its
13 skeleton argument is at the very latest it found out
14 all of the details about on ScotZEB3 on 5 December
15 when the guidance was published. There was an
16 earlier announcement in November about ScotZEB3 but,
17 taking the appellant's case at its highest,
18 5 December, the guidance is published, everything is
19 known about the scheme. Notwithstanding that, no
20 challenge was made, no pre-action information
21 request was made, rather what the appellant did was
22 submit its own application for ScotZEB3 funding.
23 And only after it found out there it was
24 unsuccessful did it make the pre-action information
25 request and then proceed with this challenge and,

1 ultimately, I will be submitting that the "having
2 your cake and eat it" approach of, well, we will
3 make an application and if we get the money, we will
4 not challenge it, but if we do not get the money, we
5 will challenge it is the very essence of undue delay
6 in the context of subsidy control. As will see,
7 there is interest in good public administration, but
8 also the interests of third parties who have
9 incurred the expense of putting their own bids in,
10 have been awarded subsidy and the impact that such
11 very late challenges to the lawfulness of ScotZEB3
12 have in all of that.

13 Now, paragraph 176 refers to the
14 English legislation, well, the section dealing with
15 the courts' -- the Tribunal's powers on review in
16 England and Wales of course. This tribunal is
17 sitting as a Scottish tribunal. So I think it would
18 be helpful to look at section 72(8)(a) just to
19 understand what is being referred to there and then
20 to look at the equivalent Scottish section which is
21 section 73. Now, unfortunately these provisions
22 were not included in the joint bundle, but I have
23 provided the Tribunal with a hard copy.

24 THE CHAIRMAN: Yes. Yes, okay.

25 MR LINDSAY: It is 72(8)(a), which is the

1 second page of the hard copy. These are the
2 provisions insofar as they applied to England
3 and Northern Ireland:

4 "The Tribunal may refuse to grant any
5 relief sought on an application if the Tribunal
6 considers:

7 "(a) There has been undue delay in making
8 the application."

9 So that was what was founded upon in the
10 lottery case.

11 If we turn now to look at section 73 which
12 deals with the Tribunal's powers on review in
13 Scotland. They do not set out the discrete
14 powers that section 72 does. What is relevant
15 for present purposes is section 73(4), which
16 says:

17 "In deciding how to exercise its powers,
18 the Tribunal would apply principles that
19 the Court of Session would apply in deciding an
20 application to the supervisory jurisdiction of
21 that court."

22 Now, when the Court of Session is
23 exercising its supervisory jurisdiction, the
24 Scottish equivalent of "undue delay", as it is
25 referred to south of the border, is of course

1 mora, taciturnity and acquiescence. So
2 although when we look at section 72 dealing
3 with procedure in England it makes express
4 provision in respect of undue delay, the same
5 applies in Scotland because of 73(4) which
6 really imports all of the principles that apply
7 when exercising the supervisory jurisdiction,
8 which includes the concept of mora,
9 taciturnity and acquiescence.

10 THE CHAIRMAN: Mm-hm.

11 MR LINDSAY: So moving on to paragraph 177
12 of the *Lottery* case and just reading from
13 it:

14 "As was set out at paragraph 62 above,
15 s.71 of the SCA Control Act amending;
16 the Tribunal Rules sets a 'relevant date' after
17 which subsidy challenges must be lodged within
18 one month. That relevant date is either the
19 'transparency date' or, where an applicant
20 seeks information within one month of the
21 transparency date, the date on which the
22 requested information is provided. The
23 transparency date is in turn either the date on
24 which the subsidy is entered into the public
25 subsidy database pursuant to section 31(1) or

1 (5) of the SCA or, in particular circumstances
2 where the duty to make an entry in the subsidy
3 database 'does not apply' to a subsidy or
4 scheme, the date on which the applicant knew or
5 should have known of the Decision... "

6 Then reference is made to 98A(4)(b) and
7 then there is reference to when there is no
8 obligation to make an entry in the subsidy
9 database and that is not relevant for present
10 purposes, because both parties had an agreement
11 that for a permitted modification an entry did
12 require to be made.

13 Then reading on at paragraph 178:

14 "None of that appears to apply to the
15 situation where the public authority does not
16 consider that it has made a subsidy decision
17 and there is therefore no entry in the subsidy
18 database. The Subsidy Control Act gives no
19 express guidance as to what time limits might
20 be appropriate in such circumstances."

21 Now, the present circumstances are broadly
22 analogous where you have the respondent say: it
23 is a permitted modification, so all I need to
24 do is alter the existing entry in the subsidy
25 register relating to ScotZEB. The appellant

1 say: no, no, that is incorrect, it is a new
2 subsidy scheme, so you have to put a new
3 separate entry in the subsidy register. Just
4 like the lacuna before the Tribunal, there is
5 no express provision in the legislation or in
6 the Tribunal rules about what happens in those
7 circumstances.

8 So I would submit we are in the same
9 general line of country here where there is no
10 express provision for what should happen when
11 the respondent says: All I need to do is
12 change the entry in the subsidy register for an
13 existing subsidy scheme and the appellant says:
14 no, no, it is a new scheme, so there has to be
15 a new separate entry with a new subsidy number.

16 So reading on from 178:

17 "Nevertheless, in our view the time limits
18 set out in s.71 and the new Rule 98A provide a
19 useful guide as to the expectations of the
20 legislature in relation to challenges of this
21 sort. These provisions make it plain that
22 subsidy challenges are required to proceed on a
23 tight timetable. That is understandable, as
24 there would otherwise be uncertainty for all
25 those involved and the risk of undue

1 interference with good administration. We do
2 not consider that a materially different
3 approach is justified for a case where the
4 applicant challenges a measure which it regards
5 as being a subsidy, but which has not been
6 recognised by the public authority as such."

7 Here it is all about whether the
8 respondent should have recognised ScotZEB3 as a
9 new scheme, rather than just a permitted
10 modification. It is respectfully submitted
11 this tribunal should follow the guidance given
12 by the Tribunal in the new lottery case of, you
13 know, applying the same approach, recognising
14 that a challenge does require to proceed on a
15 tight timetable and that it is inherently
16 undesirable to allow an appellant to adopt the
17 "have their cake and eat it" approach of: well,
18 we will make an application and if we get the
19 money, that is fine and if we do not get the
20 money, at that stage, we will challenge the
21 lawfulness of the subsidy scheme.

22 That is inherently undesirable. It really
23 undercuts everything that the tight timetable
24 for the time-bar provisions sets out to achieve
25 and you know one can readily recognise in this

1 particular case the risk of undue interference
2 with good administration.

3 Then reading on at 179:

4 "In principle, therefore, we consider that
5 challenges to decisions where the public
6 authority has not treated the assistance as a
7 subsidy should be subject by analogy to the
8 expectation that proceedings should normally be
9 issued within one month of the date on which
10 the applicant was or should have been aware of
11 the decision, unless within that one month
12 period a request is made for the provision of
13 information."

14 Here, the date of the decision about the
15 subsidy which is challenged and the note of
16 appeal is said to be November last year, but
17 even if we are generous and extend it to
18 5 December when the guidance was published,
19 applying what we see here at 179 by analogy,
20 the pre-action information request should have
21 been issued within a month. It was not. Then
22 reading on:

23 "Where information is requested, the
24 proceedings should normally be issued within a
25 month of the information being provided. If

1 proceedings are not issued within those
2 timescales, that will in our view normally
3 constitute grounds for the refusal of relief on
4 the basis of undue delay, absent exceptional
5 circumstances."

6 Nothing is said about exceptional
7 circumstances by the appellant and reading over
8 the page to 180:

9 "In the present case there has been no
10 explanation given for the delay."

11 Here, the only explanation for the delay
12 can be that the appellant was content to
13 participate in ScotZEB3, would not have
14 challenged ScotZEB3, if it had been successful
15 and had been awarded a subsidy under ScotZEB3.
16 That can be the only reason for not making the
17 pre-action information request in November or
18 December and it can be the only reason why
19 nothing was said by the appellants about the
20 lawfulness of ScotZEB3 at that time because it
21 was willing to participate in this scheme and
22 would have been perfectly happy with the scheme
23 if it had been successful.

24 THE CHAIRMAN: Mr Lindsay, I wonder --
25 this may be more of a technical point, but is

1 there a difference between a time bar, which is
2 really a preliminary matter often, not all, but
3 often a preliminary matter and a refusal of
4 relief, which might be thought to be something
5 at the end after you have had a substantive
6 hearing? A tribunal or a court would hear all
7 the arguments and might say: in this case, we
8 are not going to give you the relief sought
9 because of a reason such as undue delay. Is
10 there a difference in when these arguments come
11 into play?

12 MR LINDSAY: My Lord in the Chair is
13 correct that they are conceptually different
14 although very closely related, as we have seen
15 from the statutory guidance and the approach
16 taken by the Tribunal in *New Lottery*. So
17 they are related, but it has to be accepted
18 that the legal basis is separate. Sometimes
19 you know it may be necessary to delay an undue
20 delay argument until all the merits have been
21 considered.

22 THE CHAIRMAN: Mm-hm.

23 MR LINDSAY: I think that would probably
24 have been the case in the *New Lottery* one,
25 but here where the facts are so stark where in

1 my experience of subsidy work I have never come
2 across a case where somebody has participated in
3 the subsidy scheme.

4 THE CHAIRMAN: You say the cake and eat it
5 point makes it crystal clear on the facts that
6 really we do not need to hear any more
7 evidence.

8 MR LINDSAY: Yes. You know that is it.
9 It is black and white. Of course, as the
10 appellants make clear, these are not the only
11 proceedings they have got underway, there is
12 also a judicial review. That sort of reflects
13 the --

14 THE CHAIRMAN: We do not have the
15 pleadings for that in the bundle, do we?

16 MR LINDSAY: No. Now, why it is competent
17 to have two proceedings, it reflects the
18 limited nature of the Tribunal's jurisdiction,
19 they cannot challenge individual awards under a
20 subsidy scheme, you can just challenge the
21 scheme itself and if you want to challenge the
22 individual award, you have to do that on public
23 law grounds by way of a petition for
24 judicial review and that is exactly what the
25 appellant has done. So that is the remedy for

1 the appellant, having decided not to challenge
2 this scheme, to participate in the scheme, make
3 an application for subsidy, it is now too late
4 to challenge the scheme itself and if they are
5 unhappy with how their application for an award
6 or subsidy was dealt with, their remedy is to
7 continue with their petition for
8 judicial review, permission has been granted
9 and the procedural hearing is either this week
10 or next week.

11 So that is the remedy, the die is cast,
12 they had a chance to challenge the scheme, they
13 failed to do so.

14 THE CHAIRMAN: Yes.

15 MR LINDSAY: Those are the two points on
16 behalf of the respondent and the related issue
17 of time bar and undue delay and why it can be
18 dealt with by the Tribunal this morning.

19 THE CHAIRMAN: Yes.

20 MR LINDSAY: Unless the Tribunal have any
21 questions for me.

22 THE CHAIRMAN: Is there anything? I do
23 not think there is anything on this particular
24 point. Do you want to outline how you -- if we
25 were against you and we were to be proceeding

1 to a substantive hearing, are there any
2 particular issues you want to raise from a case
3 management point of view?

4 MR LINDSAY: No, if -- no, if the Tribunal
5 is not with me on the time-bar point and the
6 undue delay point and takes the view that it
7 just cannot be decided this morning on the
8 basis of submission alone without hearing some
9 evidence, then I think the respondent's
10 position would be there would be some benefit
11 in this particular appeal in dealing with both
12 as preliminary issues, particularly the undue
13 delay point could be dealt with quite briefly
14 indeed. It might even be possible to do it by
15 way of affidavit. So that would be the only
16 observation on further procedure. If
17 the Tribunal takes the view it just cannot
18 decide time bar and undue delay this morning,
19 then for the reasons --

20 THE CHAIRMAN: You are asking for
21 effectively a preliminary proof on these issues
22 of time bar and undue delay.

23 MR LINDSAY: Yes, I will just doublecheck
24 my instructions on that.

25 THE CHAIRMAN: Yes. (Pause).

1 MR LINDSAY: Yes, that is the position of
2 the respondent. If the Tribunal takes the view
3 that there may or may not be merit in time bar
4 and undue delay, it cannot be decided today
5 without evidence, then an early preliminary
6 hearing in dealing with both points would be
7 sought by the respondent on the grounds that
8 they are properly quite distinct from the
9 underlying merits.

10 THE CHAIRMAN: I am just wondering if that
11 is going to really save much time though
12 because a substantive hearing on all the issues
13 here, there does not look to be an awful lot of
14 evidence in any event. It may well largely be
15 done by documents and a few affidavits, maybe
16 with some oral evidence. I mean if there was a
17 hearing on the dispute as a whole, we are only
18 looking at what a couple of days, do you think,
19 for a hearing on all issues?

20 MR LINDSAY: Yes, certainly if it could be
21 done by way of affidavits. I am not sure if my
22 learned friend would wish oral evidence and the
23 opportunity to cross-examine. If we get into
24 oral evidence and cross-examination, then it
25 could be four days.

1 THE CHAIRMAN: Mm-hm.

2 MR LINDSAY: But if it makes no difference
3 to when the hearing is fixed, you know
4 sometimes in the Court of Session if you go for
5 a shorter hearing as a preliminary hearing,
6 that can be accommodated much, much more
7 quickly than a --

8 THE CHAIRMAN: I do not know the answer to
9 that it in terms of the timetable of the CAT.

10 MR LINDSAY: Yes.

11 THE CHAIRMAN: Mr Lindsay, we will give
12 you an opportunity to respond to anything
13 new Mr Barne raises after we have heard from
14 him.

15 MR LINDSAY: Thank you.

16 THE CHAIRMAN: Thank you very much. Yes,
17 Mr Barne?

18 Submissions by MR BARNE

19 MR BARNE: Thank you. I reflect the
20 shifting grounds that I am being asked to
21 address is very much brought into focus if one
22 looks at the draft order that was agreed
23 between the parties. If one goes to
24 paragraph 1, it says this:

25 "In the event that the Tribunal concludes

1 that the Notice of Appeal was filed timeously
2 for the purposes of section 1 of the 2022 Act
3 and the Competition Appeal Tribunal Rules 2015
4 and does not strike out the appeal at today's
5 hearing, a substantive hearing for evidence and
6 submissions will be fixed."

7 So the issue is whether or not it has been
8 filed timeously. The issue is not one of undue
9 delay. That was the position until my learned
10 friend got to his feet this morning. The
11 suggestion that this might take four days is
12 again an innovation, given that the agreed
13 draft directions talk about a two-day hearing.

14 THE CHAIRMAN: Mm-hm.

15 MR BARNE: But I entirely agree with
16 your Lordship's observation that the issues are
17 on a very narrow scope and two days would be
18 more than enough to cover the various matters
19 that require to be addressed.

20 THE CHAIRMAN: Yes.

21 MR BARNE: If I may then invite the court
22 to refuse the respondent's motion and to give
23 effect to the draft directions and I would also
24 make a motion for today's expenses, but
25 obviously they can be held over --

1 THE CHAIRMAN: Yes.

2 MR BARNE: -- pending your Lordship's
3 decision on -- sorry, the Tribunal's decisions
4 on the issue that has been raised.

5 May I first of all as a preliminary
6 observation invite my learned friend to
7 identify what rule or power is that he is
8 inviting the Tribunal to exercise today,
9 because that will give us the idea of what the
10 applicable test is? Today's hearing was fixed
11 on the respondent's insistence and the language
12 in the draft order is one of there being a
13 strikeout.

14 Now, a strikeout is something that is
15 available under the Tribunal rules, rule 11,
16 which has not been produced, but rule 11, on my
17 reading, does not give rise to any particular
18 power in these circumstances to give -- to have
19 a strikeout. My learned friend referred to the
20 more general powers under section 73 of the
21 2022 Act that the Tribunal should exercise its
22 powers that the Court of Session would exercise
23 when exercising the supervisory jurisdiction.

24 In that circumstance, one is then looking
25 at possibly today's hearing being effectively a

1 hearing on the relevancy of the appeal. If one
2 approaches this as a relevancy argument, then
3 the court must take as fact that ScotZEB3 was a
4 new subsidy scheme, those are the pleadings,
5 they are taken pro veritate in the Scottish
6 approach, but of course Mr Lindsay has given us
7 no idea and no notice of what power is that he
8 is asking the Tribunal to exercise.

9 But he has come up with a new argument
10 this morning based on undue delay and I will
11 address that. In fact may be it is as well to
12 address to now. The power that the court
13 exercised in the *New Lottery* case was, as
14 your Lordship pointed out, one to withhold
15 relief. That was exercised at the end of an
16 evidential hearing. It is not a power that is
17 conferred when sitting as a Scottish Tribunal.
18 The powers there, as I have already mentioned,
19 are powers that could be exercised by
20 the Court of Session exercising its supervisory
21 jurisdiction.

22 Now, the rule that was exercised in the
23 *New Lottery* case is a procedural rule as
24 I read it. The rule that my learned friend is
25 inviting the court to exercise today is a rule

1 of substantive law based on the law of mora,
2 taciturnity and acquiescence. As the Tribunal
3 will be aware, in Scottish proceedings, delay
4 is never enough on its own. The plea of mora,
5 taciturnity and acquiescence is a plea to the
6 merits. It is one that has to be pled and it
7 has to be the subject of specific averment.
8 There is none of that in the respondent's
9 statement of defence.

10 I do take exception to the idea that this
11 is a rebuttal of the argument. As the Tribunal
12 will be aware, draft notes of argument were
13 exchanged so my learned friend knew fine well
14 what my argument was. He had seen it in draft
15 and yet one will do very well to identify the
16 word "delay" or "undue" or mora, taciturnity
17 and acquiescence anywhere in my learned
18 friend's pleadings or in his note of argument.
19 This is not a rebuttal. This is an entirely
20 new argument.

21 My learned friend makes the quip around
22 having the cake and eat it, the John Soney
23 position, as one might put to. It is not the
24 appellants' fault that the subsidy database was
25 not updated as it should have been. Nor the

1 subsidy control principles were not applied as
2 they should have been. The petitioner is to be
3 entitled to take things as they arrive, as they
4 present themselves, excuse me.

5 If I may respond to the *New Lottery*
6 case itself. Again, I do point out that I am
7 responding on my feet, to an argument that has
8 not been made, but what is said in the *New*
9 *Lottery* case on this particular issue is
10 obiter, which I think was conceded. It was
11 after evidence. It is in exercise of English
12 procedural order -- sorry, procedural power.
13 I would also question whether it is in fact
14 entirely correct. If one goes to paragraph
15 179, which is at PDF 630, what the Tribunal
16 says there is this:

17 "In principle, therefore, we consider that
18 challenges to decisions where the public
19 authority has not treated the assistance as a
20 subsidy should be subject by analogy to the
21 expectation that proceedings should normally be
22 issued within one month of the date on which
23 the applicant was or should have been aware of
24 the decision, unless within that one month
25 period a request is made for the provision of

1 information."

2 Now, there is a real difficulty with that,
3 because in terms of the way the subsidy
4 database provision operates, the subsidy
5 database has to be updated within three months.
6 So taking 179 at face value, if a decision is
7 made on 1 January, according to this, the time
8 starts to run, but then, three months later,
9 shy of one day, the subsidy database is updated
10 and thereby generating a transparency date,
11 thereby generating a new timeframe. So on this
12 approach there appears to be potentially two
13 timeframes that the putative appellant may have
14 to contend with: one when they became apparent
15 of it, the decision and, secondly, when one day
16 shy of three-month period the public authority
17 updates the subsidy database. That just cannot
18 be right.

19 So without undertaking a detailed analysis
20 of what is said in this particular case, which
21 I thought was being relied upon to emphasise
22 the point that has been made in all the other
23 cases that have been prepared which is you
24 cannot push out the dates within which appeals
25 are to be brought unless there are exceptional

1 circumstances, which is an extension of the
2 time, which is a different argument, in my
3 submission this case is one that the Tribunal
4 may require to receive detailed and full
5 submissions on and I am not in a position to do
6 that today.

7 THE CHAIRMAN: Yes, Mr Barne?

8 MR BARNE: Turning to the merits of the
9 argument as I have prepared to address
10 the Tribunal, I adopt the skeleton argument
11 which sets out in detail the position on behalf
12 of the appellant. I summarise the matter in
13 this way: The key issue is whether the entry
14 that was made on 3 September 2025 was an entry
15 made in respect of ScotZEB3, that is the first
16 issue; secondly, was it a permitted
17 modification in terms of section 81(4) of the
18 2022 Act. It is the appellant's position that
19 the changes made on 3 September 2025 were
20 patently not in respect of ScotZEB3 and the
21 establishment of ScotZEB3 was a new subsidy
22 scheme that should have generated its own entry
23 on the UK subsidy database under section 33(1)
24 of the 2022 Act.

25 One of the -- just to take a step back --

1 one of the important points is that if it was
2 dealt with as a new subsidy scheme, it would
3 have had to have gone through the subsidy
4 control principles, an assessment against
5 those. This would have happened in the context
6 of a new statutory regime established by the
7 Bus Services Act 2025. So this is not an
8 academic argument about whether or not there
9 should have been a new entry on the subsidy
10 database, this does have real world
11 implications for how these subsidies should
12 have been assessed.

13 THE CHAIRMAN: Can you just say what those
14 real-world implications are in terms of that?

15 MR BARNE: All I am saying is there would
16 have been an assessment of subsidy control
17 principles against the Bus Services Act 2025,
18 which I understand introduces issues that would
19 be relevant to an assessment against the
20 subsidy control principles.

21 The respondent's position on this is that
22 the transparency date is 3 September 2025.
23 That is what is clearly pled. Now, just to be
24 clear, if that is correct, then the appellant
25 accepts that the notice of appeal was too late.

1 As matters stand, no application is made to
2 extend the statutory time limits.

3 The background to this is all set out in
4 some detail in the skeleton argument. Just to
5 take an overview, the ScotZEB scheme was set up
6 and phase one delivered subsidies to various
7 operators. Then phase two was set up and that
8 was designed to only be available to consortia.
9 Towards the end of the phase two competition,
10 there were only two consortia still in the
11 competition: one was Zenobe and the other was
12 Rock Road. Ultimately, Zenobe was successful
13 and Rock Road was unsuccessful. What happened
14 at that stage was that the respondent announced
15 that they were going to make a new phase of
16 phase two, let us call to ScotZEB2B. The
17 purpose of that was to make subsidy available
18 to Rock Road in the event that they could be
19 found to meet the relevant criteria.

20 As the Tribunal is aware, it was at that
21 stage that various other participants more
22 generally expressed their unhappiness and their
23 willingness to challenge a subsidy approach
24 that excluded every one, other than one
25 unsuccessful bidder. At that stage, the

1 respondent treated and announced ScotZEB3.

2 MR FORRESTER: Just to understand the
3 context better, the grounds for disqualifying
4 or not admitting Rock Road, could you give us a
5 hint as to what these problems were?

6 MR BARNE: Well, that was matter of the
7 subsidy assessment. So I -- if I understand
8 the question, no doubt an application was put
9 in and was assessed against this published
10 criteria and the Rock Road application was
11 found to be wanting. Were you meaning why were
12 other participants complaining about the
13 proposal?

14 MR FORRESTER: I was curious.

15 MR BARNE: There is a letter. If I could
16 direct the Tribunal to -- no, I do not.

17 THE CHAIRMAN: Mr Barne, if to helps at
18 all, I am being reminded we need to be give the
19 transcribers a break. So you can maybe find
20 that document, and we will just take a short
21 10, 15-minute break now and you can refer us
22 to --

23 MR BARNE: I regret to say I do not think
24 the document is not there, but I will come up
25 with the answer nonetheless.

1 THE CHAIRMAN: We will just take a short
2 break and we will let you know when we are
3 ready.

4 (11.48 am)

5 (Short break)

6 (12.00 pm)

7 THE CHAIRMAN: Yes, Mr Barne?

8 MR BARNE: Thank you. I was, just before
9 we rose, discussing the letter which has not
10 been lodged but which was sent on behalf of the
11 appellant. There was a similar letter sent on
12 behalf of the other members of the Zenobe
13 consortia complaining about the prospect of
14 Rock Road being effectively allowed to also
15 participate in the ScotZEB2 but without a
16 formal competition. The grounds of complaint
17 were really that this was not what was in the
18 documentation for ScotZEB2, public law grounds
19 of fairness, procedural impropriety.

20 Interestingly enough, given something that was
21 said this morning, a request under section 76
22 was made at that time for documentation,
23 vouching that a Subsidy Control Assessment had
24 been undertaken and seeking the relevant
25 documents that would show that ScotZEB2B had

1 been properly contemplated by the
2 constitutional documentation that underlined
3 the ScotZEB subsidy scheme.

4 THE CHAIRMAN: Was that your clients?

5 MR BARNE: Both McGills and the
6 disappointed Zenobe. That I understand --
7 again, we are going slightly off what is
8 available to the Tribunal for which
9 I apologise. This is just really to respond in
10 more detail to the bigger picture. That
11 request was never responded to because, in the
12 meantime, the respondent abandoned the
13 intention to proceed with ScotZEB2B and then
14 announced ScotZEB3.

15 THE CHAIRMAN: Thank you.

16 MR BARNE: If -- on this issue and the key
17 proposition on which the appellant relies on is
18 that the ScotZEB3 was never part of what had
19 been in contemplation in terms of, if one could
20 put it this way, the constitutional
21 documentation that lies behind the ScotZEB
22 scheme. One can see that in the letter -- this
23 is at PDF13 -- the letter from the Cabinet
24 Secretary for Transport Fiona Hyslop.

25 MR FORRESTER: What was the reference?

1 MR BARNE: It is PDF13 and that would be
2 document 5, if you are working from a hard ...
3 (Pause). This is a letter from the Cabinet
4 Secretary to the Convenor of the Net Zero
5 Energy and Transport Committee in the Scottish
6 Parliament. It starts:

7 "Dear Edward.

8 "Kevin Stewart, then Minister for
9 Transport, wrote to this Committee in May 2023
10 to announce the opening of a second and final
11 phase of the Scottish Zero Emission
12 Bus Challenge Fund (ScotZEB2). Today I am
13 writing to inform you of my intention to make
14 available up to £40 million of additional
15 capital funding to Scotland's buses and coach
16 sector through that same fund."

17 So just pausing there, we do see "second
18 and final phase". So certainly that was what
19 was understood by the Cabinet Secretary at that
20 stage. Then reading on:

21 "As this phase of ScotZEB2 is the final
22 time subsidy that has been made available to
23 large operators to transition to zero emission
24 vehicles, the Scottish Government hopes to
25 maximise the return on investment [etc]."

1 So this was the letter that was sent to
2 effectively announce Phase 2B.

3 Then when the complaints had been made
4 that this was unlawful -- an unlawful approach
5 that was being contemplated, one can see at PDF
6 page 15, in document 6, the response that
7 ultimately came. This is on behalf of
8 The Scottish Ministers.

9 THE CHAIRMAN: Mm-hm.

10 MR BARNE: It says:

11 "Further to the statutory enquiries made
12 within your Letters, this letter serves to
13 inform you that after careful and thorough
14 consideration, our clients will not be making
15 an award for further funding to the Rock Road
16 consortium (or any other parties) under
17 ScotZEB2."

18 The "statutory enquiries" is a reference
19 to the section 76 request. Then reading on:

20 "As regards your client's interest in
21 ScotZEB, recognising the need for collaborative
22 and innovative approaches to decarbonise the
23 heavy-duty vehicle sector,
24 the Scottish Ministers plan to take forward a
25 new phase of ScotZEB funding -- ScotZEB3 -- to

1 introduce the additional funding to the market.
2 This new phase will build directly on ScotZEB2,
3 and will take the form of a fair and open
4 competition focused on operators of public
5 service routes."

6 Then the next paragraph:

7 "The new scheme ..."

8 The wording there is perhaps -- well, so
9 far as the respondents are concerned,
10 unfortunate, because the whole point that the
11 appellants make is that this was a new scheme:

12 "The new scheme will extend the benefits
13 of ScotZEB2 by continuing to reduce emissions
14 [etc]."

15 It may be of some benefit to look at the
16 Act in terms of time limits. I do not think my
17 learned friend took the court in detail to
18 section 81. That can be found at PDF page 126.
19 I am afraid I do not have the bundle number for
20 that, but it is where all the legislation is.
21 81(1) is the important section:

22 "The modification of a subsidy or a
23 subsidy scheme is to be treated for the purpose
24 of this Act as the giving of a new subsidy, or
25 the making of a new subsidy scheme, for the

1 purposes of the application of the subsidy
2 control requirements."

3 If it is a modification, which it clearly
4 was, it is to be treated as a new scheme
5 unless, this is 2B, "if the modification is
6 only a permitted modification", applies to a
7 permitted -- sorry, it does not apply --
8 section 1 does not apply if the modification is
9 on permitted modification, but it should be
10 noted that section 33(5) does apply. So even
11 if it is a permitted modification, the database
12 needs to be updated.

13 Subsection (3), 81(3) says:

14 "A modification to a subsidy or subsidy
15 scheme is a 'permitted modification' if it is a
16 modification of any of the following kinds ..."

17 The only relevant one for the present
18 purposes is a legacy subsidy modification.

19 Then that is defined at subsection (4):

20 "In subsection 3(a) 'legacy subsidy
21 modification' means the modification of a
22 legacy subsidy, or a legacy scheme, as
23 permitted under the subsidy or scheme in
24 accordance with its terms as they had effect
25 before the coming into force of this section."

1 There is no dispute that this is a legacy
2 scheme. So the issue really comes down to the
3 very narrow point of whether or not ScotZEB3 is
4 a modification that is in accordance with its
5 terms as they stood at the date that the Act
6 came into force.

7 Just for the Tribunal's note, it may be
8 worth turning up section 33 of the 2022 Act and
9 that is at PDF113. This is the duty to include
10 information in the subsidy database:

11 "A public authority must ensure that an
12 entry in the subsidy database is made in
13 respect of ..."

14 And it is (b) .

15 "a subsidy scheme made by the authority."

16 Then subsection (3):

17 "An entry in the subsidy database must be
18 made in respect of a subsidy or scheme --

19 "..

20 "if given or made in any other form,
21 within three months of confirmation of the
22 decision to give the subsidy or make the
23 subsidy scheme."

24 That is the provision that I suggest means
25 that the *New Lottery* case cannot be quite

1 given effect to in terms that it suggests,
2 because there is that three-month window within
3 which the database requires to be updated. So
4 the relevant date cannot be the date of
5 knowledge.

6 Just for completeness, subsection (5)
7 deals with modifications, and this also applies
8 in relation to permitted modifications:

9 "Where a subsidy or subsidy scheme is
10 modified, the public authority must ensure that
11 the modification is entered in the subsidy
12 database --"

13 And at (c) again:

14 "... within three months of the date of
15 modification in respect of a subsidy given, or
16 a subsidy scheme made, in any other form."

17 If I may just finish this section by
18 looking at the statutory guidance that was
19 referred to by my learned friend at PDF page
20 259. This says at paragraph 9.26:

21 "Public authorities may modify legacy
22 subsidies or legacy subsidy schemes in a way
23 that is consistent with the terms of the
24 subsidy or scheme that were in effect before
25 the Act came into force."

1 Then going to the third of the three
2 bullet points which is on the next page:

3 "Where a subsidy or subsidy scheme was
4 created between 1 January 2021 and
5 3 January 2023 [which is the case here] under
6 the provisions of the Trade and Cooperation
7 Agreement, then any legacy subsidy or scheme
8 modifications must have been contemplated in
9 appropriate detail as part of the original
10 principles assessment for the subsidy or
11 scheme."

12 The original principles document, so far
13 as one is available, is found at item 8. It is
14 the first of the documents in that group. In
15 terms of PDF number, it is PDF 18. This is
16 the original Subsidy Control Assessment
17 I think. This is the response that was given.

18 THE CHAIRMAN: It is a carbon copy because
19 the dates -- ...

20 MR BARNE: This is the response that was
21 given in response to request by appellant for
22 documents under section 76.

23 THE CHAIRMAN: Yes.

24 MR BARNE: One can see the documents that
25 are listed as providing the rules, guidance,

1 constitutional documents for ScotZEB are
2 documents 1 to 6. Document 1 is the document
3 I meant to go to, apologies, is the subsidy
4 control checklist. That can be found at PDF 20
5 which is the immediately next document. If one
6 goes to PDF page 22, there is a paragraph
7 there, starting "Phase 1." It says:

8 "Phase 1 of ScotZEB, (£50 million) should
9 provide sufficient funding for at least 210
10 more zero emission buses depending on the
11 levels of funding per bus that are applied for.
12 The responses to Phase 1 will help shape the
13 design of Phase 2 where more funding will be
14 provided but the ceiling for funding per bus
15 will be reduced, as bus operators demonstrate
16 and gain confidence with buses and models
17 suited to zero emissions rather than diesel."

18 So that is Phase 1.

19 I am sorry, yes. The point I wanted to
20 make is the response to Phase 1 will help shape
21 the design of phase two. The point I am making
22 is it is clearly identifying two phases there.

23 THE CHAIRMAN: Mm-hm.

24 MR BARNE: Just for completeness, if one
25 goes to PDF page 24, the very last paragraph

1 there, it says:

2 "This document will be the starting point
3 for the granting authority should a legal
4 challenge be brought in relation to a subsidy."

5 So clearly this is as much of a
6 foundational document as we have of the ScotZEB
7 scheme and it is two phases.

8 MR SMITH: You are arguing that is somehow
9 a foundational principle of the scheme?

10 MR BARNE: Yes.

11 MR SMITH: That was too -- that the
12 Government had allocated £120 million to spend
13 in two phases and if the Government
14 subsequently decided to find some more money,
15 then that has to be a new scheme because it
16 does not fall within the two phases and the two
17 phases is part of the foundation.

18 MR BARNE: Yes, because phase two was
19 supposed to be informed by Phase 1. That was
20 very much you are going to have an initial
21 scheme, Phase 1, and then phase two would be
22 built on that.

23 MR SMITH: Yes. If you had a phase three,
24 built on the experience of Phase 1 and two,
25 that is somehow a completely new scheme --

1 MR BARNE: It is a scheme --

2 MR SMITH: -- necessarily?

3 MR BARNE: It is a new scheme, but it is
4 one that would have to be applied by the
5 statutory provision that were then in force.
6 The problem with having a scheme like this and
7 just being table to just say "we are going to
8 have a new phase, a new phase, a new phase" is
9 that permitted modifications you could just
10 sort of -- there could be emission creep.

11 MR SMITH: Is this a financial cap?

12 MR BARNE: Indeed, I accept that. So in
13 terms of drawing these points together, I have
14 taken the Tribunal in a little bit more detail
15 than perhaps I need to in relation to the
16 argument that is being presented by the
17 petitioners -- sorry, excuse me, by the
18 appellants.

19 If the Tribunal is here only looking at an
20 issue of relevancy, then the pleadings that are
21 set out in the notice of appeal are sufficient
22 and need to be taken as accurate and that this
23 was a new scheme, but if we are looking at some
24 other test, then I have put before the Tribunal
25 material that would satisfy at least there is

1 an arguable case here, depending on what the
2 test is I am being asked to meet, I do not
3 know.

4 THE CHAIRMAN: Could you take us through
5 how you would say -- if you are right here that
6 this is a new scheme, how do the time-bar
7 provisions work on the scheme as you categorise
8 it?

9 MR BARNE: Well, there was a failure to
10 update the subsidy database with a new entry
11 and, therefore, there has not been a
12 transparency date so time is not, on one view,
13 running until they do update the subsidy
14 database, but that comes in a context where
15 there is the issue of the potential plea of
16 mora, acquiescence and taciturnity.

17 THE CHAIRMAN: So there would never -- if
18 the argument was always whether it was a new
19 scheme or a modification scheme, just simply by
20 stating it is a new scheme, there is no time
21 bar triggered effectively. Am I understanding?

22 You are saying this is a new scheme, and
23 because it is a new scheme there has to be a
24 particular entry put on the database and
25 because you say that that entry was not made

1 properly, there is no transparency date and,
2 therefore, the time bars --

3 MR BARNE: Yes.

4 THE CHAIRMAN: -- simply have never
5 started to run.

6 MR BARNE: Well, subject to, you know,
7 certainly undue delay in England and the common
8 law defence of delay, acquiescence, etc.

9 I mean otherwise -- I mean the difficulty
10 is that if the database requirements are not
11 met, then it does give rise to this issue in
12 the way the scheme operates and that this is
13 not a transparency phase, but that is not the
14 appellant's fault. That is how the scheme
15 works.

16 THE CHAIRMAN: No.

17 MR BARNE: The transparency date is
18 fundamental, it triggers a number of different
19 right, including the right to seek a disclosure
20 under section 76.

21 MR SMITH: In November the appellant had
22 all the information of the ScotZEB scheme.

23 MR BARNE: I think December the 5th,
24 I think.

25 MR SMITH: How would the position have

1 been different if, in November, the Government
2 had said: well, actually although we put an
3 entry in the database in September, things have
4 moved on since then and we should have put an
5 entry in -- we should have revised the entry,
6 put a new entry in for this -- for the revision
7 to the scheme, but it is still a permitted
8 modification of a legacy scheme? How would the
9 appellants -- the information available to the
10 appellants to enable them to challenge those
11 decisions have been different if the database
12 had been modified rather than not modified?

13 MR BARNE: Well, if I understand the
14 question correctly, back in September the
15 appellants and others were saying: we want to
16 know more about this, we think this might be a
17 new scheme, we want the documentation. Then
18 come December: we do not know whether they are
19 saying this is a permitted modification or
20 whether this is a new scheme because they still
21 have three months to do that, to make the entry
22 on the database. Nowhere is it said, as far as
23 I am aware, that ScotZEB3 is proceeding on the
24 basis that the entry on the database as at
25 5 September -- 3 September was wide enough to

1 capture ScotZEB3.

2 MR SMITH: But if -- sorry, I will try --

3 MR BARNE: Sorry, I have not answered your
4 question.

5 MR SMITH: It is a problem with economists
6 asking questions. If the Government, say, in
7 December had modified the database, while
8 maintaining its position that this was a
9 permitted modification of the scheme, and now
10 you are saying: oh, now a clock starts
11 clicking. But what extra information would
12 have been available to the appellants in
13 December that was not available to them in the
14 actual case with the way the database was
15 modified?

16 MR BARNE: I think the key point, so far
17 as the appellant is concerned, is that if this
18 is a new scheme, it had to be subjected to the
19 statutory controls. So in terms of
20 information, I am not suggesting there is an
21 absence of information at that time. But what
22 we did not have was -- well, first of all, we
23 did not know what the view was in terms of
24 whether or not this was a permitted
25 modification or a new scheme. It was not --

1 there was not no, as far as I can recall,
2 indication one way or the other but, more
3 importantly, it had not been subjected to
4 the control principles.

5 MR SMITH: But you -- the appellants knew
6 in December that there was this -- whether you
7 call it a new scheme or not -- the scheme, the
8 Phase 3 scheme was known in all the detail and
9 if you wished to say: well, this is actually a
10 new scheme and we are going to appeal -- we are
11 going to appeal against it, the fact that this
12 it has been treated as a legacy scheme, in
13 December all that information was available.

14 How would the -- a fresh entry in the
15 subsidy database, which the Government would
16 have said "This is not an entry for a new
17 scheme, this is a revised entry for Phase 3 of
18 the old scheme", how would that have changed
19 the reality of the information available to
20 enable the Government's decision to be
21 challenged?

22 MR BARNE: I am hoping I am working on the
23 right hypothesis here, but if in December a new
24 entry had been made that said: this is entry on
25 the existing subsidy for ScotZEB3, then that

1 would have triggered the information. Well,
2 no, the information was there, I accept that,
3 but the point is that is not the hypothesis we
4 are working on. That is not the hypothesis we
5 are working on. This is a statutory scheme,
6 and so correct and timeous updating of the
7 subsidy database is what interested parties,
8 such as the appellants, are allowed to rely on
9 and look at. Although the decision was made,
10 in let us say 5 December, to proceed with the
11 scheme, at that stage, it was not stated
12 whether this was being proceeded with as a
13 permitted modification of the legacy scheme or
14 whether it is a was new scheme. So the
15 appellant had the right to wait and see, the
16 three-month period.

17 MR SMITH: Okay.

18 THE CHAIRMAN: But the appellant was happy
19 to bid in the new scheme, presumably knowing
20 that there would be no review of the subsidy
21 control principles.

22 MR BARNE: I am not aware that we were
23 aware of that at the time.

24 THE CHAIRMAN: You would have known, for
25 example, there was no reference to the CMA.

1 That was one of your complaints. You must have
2 known that.

3 MR BARNE: Well, yes, that would have been
4 known I think.

5 THE CHAIRMAN: I mean everything must have
6 looked from the applicants' point of view that
7 this was -- you were not entering into that bid
8 under any misapprehension, were you, as to what
9 the terms were and that this was a bid for more
10 money on very similar terms as before but
11 subject to the more funding but that is --

12 MR BARNE: I do not accept, if this is the
13 point, that by entering into the bid one is
14 somehow precluded from making a challenge under
15 the 2022 Act.

16 THE CHAIRMAN: I am just trying to
17 understand what the applicants understood at
18 the time. That may or not be relevant. I am
19 just trying to understand.

20 MR BARNE: I would need to check.

21 THE CHAIRMAN: Yes.

22 MR BARNE: I think if the proposition is
23 going to be advanced that one can, for
24 instance, work out timings, I would accept
25 which do not apply here, where one is left with

1 the position one has to make the
2 application, because in due course you may come
3 and make a challenge within all the relevant
4 time limits, but you cannot assume that your
5 challenge under the Subsidy Act will be
6 successful, in which case you do not want to
7 miss out on the opportunity of at least bidding
8 for the new subsidy.

9 So there is no -- this takes us back to
10 the point of, you know, in the absence of a
11 transparency date, I am not suggesting that
12 this is an open-ended opportunity for anyone to
13 come along and say "now is the time". The
14 question is have the respondents identified and
15 pled a substantive defence on the basis of the
16 common law defence of mora, acquiescence and
17 taciturnity. On the basis this morning was the
18 first time there was any hint of this, now is
19 not -- today is not the day that this should be
20 determined.

21 THE CHAIRMAN: Yes.

22 MR BARNE: Yes. Unless there was anything
23 else the Tribunal wishes me address, in terms
24 of further procedure, there was the draft
25 agreed directions and I am content to sit with

1 those. Even if issues of delay were to become
2 relevant and pled, then I still think two days
3 would be sufficient for evidence and
4 submissions.

5 THE CHAIRMAN: Yes, thank you. Anything
6 else?

7 MR SMITH: No.

8 THE CHAIRMAN: Thank you very much,
9 Mr Barne.

10 Yes, Mr Lindsay, I said we would give you
11 an opportunity to come back if there was
12 anything you have not anticipated or anything
13 you want to sweep up on.

14 Reply submission by MR LINDSAY

15 MR LINDSAY: Yes, at the start of my
16 learned friend's submissions, he said that the
17 respondent had not identified the statutory
18 provisions of the rules that were being relied
19 upon. When it comes to time bar, it is Rule
20 98A that is the relevant provision. If
21 the Tribunal want to look at an example of
22 the Tribunal sitting as a Scottish Tribunal
23 dealing with time bar as a preliminary issue,
24 then the case of *Aramark v CMA* is a recent
25 example. It was published --

1 THE CHAIRMAN: Very recently.

2 MR LINDSAY: -- last week or the week
3 before in the Scots Laws Times, so there is no
4 procedural difficulty in dealing with time bar
5 as a preliminary issue.

6 THE CHAIRMAN: I think Mr Barne's point
7 was: are you saying this is a strike-out
8 application or not? I think that was his
9 answer. What was the actual test? What was
10 the rule: is it relevancy, strike out, what?

11 MR LINDSAY: Yes. I presented my
12 submissions on the basis of relevancy, you
13 know, taking the appellant's case at its
14 highest, which is why I defaulted to the date
15 5 December when all of the guidance in ScotZEB3
16 was published, which made clear it was a third
17 round of funding under the existing ScotZEB
18 scheme and both of the submissions I advanced
19 were relevancy, taking the appellant's case at
20 its highest, and the undue delay point, well
21 that is section 73(4) that provides the basis
22 for that.

23 THE CHAIRMAN: Mm-hm.

24 MR LINDSAY: With regard to undue delay
25 and Scottish equivalent, mora, taciturnity and

1 acquiescence being a rebuttal point, I think
2 that was made very clear at the end of my
3 learned friend's submissions when response to
4 questions from the Chair that on his analysis
5 all that an appellant had to do to defeat the
6 time bar was say: it is a new scheme, not a
7 permitted modification. Because if it is a new
8 scheme and there should be a separate entry for
9 that, then on the appellant's analysis, the
10 clock never starts and his response to my Lord
11 and the Chair was: Oh, no, there is the
12 longstop date of mora, taciturnity and
13 acquiescence. It is part and parcel of my
14 learned friend's analysis of how the time-bar
15 provisions work.

16 It is a necessary part of my learned
17 friend's analysis to avoid the absurdity of
18 time never beginning to run and years later an
19 interested party being able to come along and
20 say: you did not put anything in the subsidy
21 register about it being a new subsidy scheme,
22 the clock has not started to run, I am going to
23 challenge it years later. So a necessary
24 component of my learned friend's submissions to
25 avoid absurdity, so that is why it is a

1 rebuttal point. That is why the *Lottery*
2 case was lodged with the passage only dealing
3 with undue delay highlighted. So notice was
4 given and it is a rebuttal part -- submission
5 because it is an integral part of my learned
6 friend's legal analysis. It has to be there to
7 avoid absurdity.

8 I do not think there is anything else that
9 I consider it necessary to respond to unless
10 the Tribunal have questions for me.

11 THE CHAIRMAN: No, I do not think we have
12 anything else for you, Mr Lindsay.

13 MR LINDSAY: Thank you, my Lord.

14 THE CHAIRMAN: So can I thank the parties
15 very much for their submissions. There is
16 quite a lot for us, these tricky little points
17 which we will take away and we will give our
18 judgment in writing. Thank you very much.

19 (12.39 pm)

20 (Hearing concluded)

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