

Neutral citation [2026] CAT 90

Case No: 1775/12/13/26

IN THE COMPETITION APPEAL TRIBUNAL

Court of Session
11 Parliament Square
Edinburgh
EH1 1RQ

27 November 2026

Before:

THE HONOURABLE LORD YOUNG
(Chair)
SIR IAN FORRESTER KC
PROFESSOR ALASDAIR SMITH

Sitting as a Tribunal in Scotland

BETWEEN:

MCGILL'S BUS SERVICE LIMITED

Applicant

- v -

THE SCOTTISH MINISTERS

Respondents

Heard at the Court of Session on 26 October 2026

JUDGMENT

APPEARANCES

Jonathan Barne KC (instructed by DLA Piper Scotland LLP) appeared on behalf of the Applicant.

Mark Lindsay KC (instructed by Morton Fraser MacRoberts LLP) appeared on behalf of the Respondents.

A. INTRODUCTION

1. This is the Tribunal's judgment following a case management hearing held on 26 October 2026 (the **Hearing**). The principal issue discussed at the Hearing was the Respondents' submission that the Applicant's application for review under s. 70 of the Subsidy Control Act 2022 (the **SCA**) had been raised out of time.

2. By a notice of appeal dated 10 June 2026, the Applicant sought to review the decision to establish a third phase of the Scottish Zero Emission Bus Challenge Fund (**ScotZEB**) (**ScotZEB3**) which was announced by the Respondents in November 2025 (the **Decision**). In essence, the Applicant contends that this amounted to a new subsidy scheme and that the Respondents failed to comply with various requirements set out in ss. 12, 13, 33, 52 of, and Schedules 1 and 2 to, the SCA. The Respondents lodged **Answers** which contend that ScotZEB3 is a permitted modification of an earlier legacy scheme and is not subject to most of the subsidy control requirements set out in Part 2 of the SCA. In addition, the Answers contend that the application is time-barred in terms of s. 71 of the SCA and Rule 98A of the Competition Appeal Tribunal Rules 2015 (the **Rules**) and seeks to have that matter determined as a preliminary issue.

B. FACTUAL BACKGROUND

3. The factual background is compiled from averments in the notice of appeal as supplemented by reference to various documents placed before this Tribunal.

4. In August 2021, the Respondents, acting through Transport Scotland, established a subsidy scheme referred to as ScotZEB. This pre-dated the SCA and falls to be regarded as a legacy scheme under that Act. ScotZEB was entered into the subsidy database under reference SC10357 with a budget amount of £120m and a duration until 31 March 2024. The aim of the scheme was to assist bus companies transition their fleets of buses to zero-emission buses. The Applicant applied to the first phase of ScotZEB and was awarded a subsidy of £9.01m. In total, approximately £61.9m was distributed to various applicants in the first phase of ScotZEB.

5. A second phase of ScotZEB (**ScotZEB2**) took place in 2023. The subsidy database was updated in December 2022 with a new reference number SC10759. The overall budget amount remained at £120m, but the duration was extended to 31 December 2026. Guidance issued for ScotZEB2 advised that only consortia could bid. The successful bids would be drawn down in financial years 2023/24, 2024/25 and 2025/26. A FAQ document for ScotZEB2 stated that the scheme opened for applications from 15 May 2023 and that up to £58m would be available. The Applicant was part of a consortium known as Zenobe Energy Ltd which was successful in its application to ScotZEB2, being awarded £41.7m. Only one other consortium, Rock Road, reached the shortlist for bids but it was unsuccessful.

6. On 8 August 2025, the Cabinet Secretary for Transport, Fiona Hyslop MSP wrote to the Convenor of the Net Zero, Energy & Transport Committee at the Scottish Parliament. In that letter, she referred to the "second and final phase" of ScotZEB. Ms Hyslop advised that her intention was to make a further £40m of additional capital funding available to the bus and coach sector through that same fund. Her letter advised that this phase of ScotZEB would be the final time that a subsidy would be available to large operators to transition to zero-emission vehicles. The concluding paragraphs of the letter referred to the Rock Road consortium and the possibility that it might bid for this further tranche of funding.

7. On 3 September 2025, a further update was made to the subsidy database for SC10759. The update included the following:

> "In line with permitted modifications in section 81 of the Subsidy Control Act, the overall budget of this scheme has been increased by 25% from £120,000,000 to £150,000,000, and the duration of the scheme extended with the end date being modified from 31 December 2026 to 31 December 2028."

8. As confirmed by an affidavit lodged by the Respondents from Edward Thomson dated 8 September 2026, there was no further update to this entry on the subsidy database after 3 September 2025.

9. Meanwhile, the Applicant and other bus companies took exception to the language used by the Cabinet Secretary for Transport in her letter. They were concerned that it might imply that only Rock Road could access this further funding now being made available. Following some legal exchanges, solicitors acting on behalf of the Respondents wrote to the Applicant's solicitors on 14 November 2025. That letter stated *inter alia*:

> "…this letter serves to inform you that after careful and thorough consideration, our clients will not be making an award of further funding to the Rock Road consortium (or any other parties) under ScotZEB2.
>
> As regards your client's interest in ScotZEB, recognising the need for collaborative and innovative approaches to decarbonise the heavy-duty vehicle sector – the Scottish Ministers plan to take forward a new phase of ScotZEB funding – ScotZEB3 – to introduce the additional funding to the market. This new phase will build directly on ScotZEB2 and will take the form of a fair and open competition, focussed on operators of public service routes."

10. On 5 December 2025, the Respondents issued guidance for ScotZEB3. In that guidance, the Respondents advised that ScotZEB3 "has a total value of up to £45 million" (§30). The guidance stated that the drawdown of funds would be in financial years 2026/27 and 2027/28. The criteria for funding applications were set out within the guidance document. Applications were invited from both bus operators and consortia. The last date for applications was 26 February 2026. The Applicant applied for funding from ScotZEB3 but was unsuccessful. Awards amounting to £45m were made to five other operators.

11. On 17 April 2026, the Applicant made a request for information to the Respondents in terms of s. 76 of the SCA. The Respondents responded on 15 May 2026 providing various documents to the Applicant.

C. LEGAL FRAMEWORK

12. Section 70 of the SCA on "Review of subsidy decisions" states:

> "(1) An interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal for a review of the decision.
>
> (2) Where an application for a review of a subsidy decision relates to a subsidy given under a subsidy scheme, the application must be made for a review of the decision to make the subsidy scheme (and may not be made in respect of a decision to give a subsidy under that scheme).

(3) The means of making an application is by sending the Tribunal a notice of appeal in accordance with Tribunal Procedure Rules.

(4) The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in Part 5A of the Tribunal Procedure Rules.

(5) In determining the application, the Tribunal must apply the same principles as would be applied— (a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review; (b) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court.

(6) Except so far as the Tribunal directs otherwise, the effect of a subsidy decision is not suspended by reason of the making of an application under this section.

(7) In this Part—

…

'subsidy decision' means a decision to give a subsidy or make a subsidy scheme;

…"

13. Section 72 of the SCA on "CAT powers on review: England and Wales and Northern Ireland" states:

"…

(8) The Tribunal may refuse to grant any relief sought on an application if the Tribunal considers-

(a) that there has been undue delay in making the application, or

…"

14. Section 73 of the SCA on "CAT powers on review: Scotland" states:

"…

(2) The powers of the Tribunal in respect of such applications are the same as the powers of review of the Court of Session in an application to the supervisory jurisdiction of that Court.

…

(4) In deciding how to exercise its powers, the Tribunal must apply principles that the Court of Session would apply in deciding an application to the supervisory jurisdiction of that Court."

15. Rule 98A of the Rules on "Time limits for applications" states:

"(1) An application to the Tribunal under section 70 in respect of a subsidy decision must be made by sending a notice of appeal before the end of one month beginning with the relevant date in relation to that decision.

(2) The 'relevant date' in relation to a subsidy decision is—

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

…

(c) in any other case, the transparency date for the subsidy or scheme.

(3) If both of sub-paragraphs (a) and (b) of paragraph (2) apply, the relevant date is the later of the dates given by those sub-paragraphs.

(4) In paragraph (2)—

(a) 'pre-action information request' means a request for information under section 76;

(b) 'the transparency date' for a subsidy or scheme is—

(i) in a case where the application relates to a subsidy or scheme in respect of which the duty under section 33(1) or (5) does not apply, the date on which the interested party first knew or ought to have known of the making of the subsidy decision;

(ii) in any other case, the date on which an entry in respect of the subsidy or scheme is made on the subsidy database in accordance with the duty under section 33(1) or (5);

…

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

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

(7) The Tribunal may not extend the time limits provided for in this rule unless it is satisfied that the circumstances are exceptional.

(8) For the purpose of paragraph (2)(a), a public authority must give notice to the interested party that the public authority has provided information in response to a request made under section 76(1).

(9) In this rule—

(a) references to sections are to sections of the Subsidy Control Act 2022;

(b) 'public authority', 'subsidy', 'subsidy database' and 'subsidy decision' have the same meanings as in that Act."

D. THE ARGUMENTS OF THE PARTIES

(1) The Respondents' case on time-bar

16. The primary submission was that the application was time-barred in terms of s. 71 of the SCA and r. 98A of the Rules. It became time-barred one month after the subsidy database had been modified on 3 September 2025 to reflect the further tranche of funding being made available. There were no exceptional circumstances to permit the Tribunal to extend the time limit for these proceedings in terms of r. 98A(7). The secondary submission was that, regardless of the application of statutory time periods, the Tribunal could determine that there had been undue delay in proceeding with this application.

17. On the primary submission, it was said that the relevant date from which time starts to run is the transparency date (r. 98A(2)(c)). Rule 98A(4)(b)(ii) provides the general rule that the transparency date is the date on which an entry in respect of the subsidy scheme is made on the subsidy database in accordance with the duty under s. 33(1) or (5) SCA. In determining the date on which an entry is made in accordance with s. 33(1) or (5), the Tribunal may disregard any minor omission in the entry, a minor omission being one which would have no prejudicial impact on an interested party's decision whether to make a pre-action information request. Thus, the focus was on whether an entry had been made in respect of ScotZEB3 funding. The subsidy database was amended on 3 September 2025, thereby advising the Applicant and other interested parties that funding had been increased to £150m and that the duration of the scheme was extended to the end of 2028. That amendment provided important information to interested parties and they could, if they wished to consider reviewing the scheme, make requests for further information under s. 76 SCA. Counsel for the Respondents submitted that it did not matter whether the Respondents were envisaging a modification of a legacy scheme, or the Applicant was anticipating

a new scheme, the amendment to the database on 3 September 2025 told everyone that a new phase was being embarked upon and any challenge to that new phase became subject to a strict one-month time limit.

18. Alternatively, if the Tribunal concluded that a statutory time-bar did not apply in the circumstances of this case, the application fell to be rejected because of undue delay. It was submitted that this was a rebuttal point which arose as a direct response to the Applicant's argument that there had been no transparency date and thus no starting point for any time limit.

19. Counsel referred to *New Lottery v The Gambling Commission* [2026] CAT 14 at §§168–181. In that case, the Tribunal observed that, in circumstances where the statutory time-bar period in r. 98A did not apply, it remained open to the Tribunal to deny relief if an applicant had unduly delayed in bringing a challenge to a subsidy scheme. It was recognised by counsel that the discussion in *New Lottery* was *obiter*, and that it rested, in part, on s. 72(8)(a) of the SCA which did not apply in Scotland. Nevertheless, it was submitted that s. 73(2) and (4) direct that this Tribunal sitting as a Scottish Tribunal apply the principles that the Court of Session enjoys when exercising its supervisory jurisdiction. This would include the power to dismiss an application for judicial review on the grounds of mora, taciturnity and acquiescence.

20. It was submitted that there were sound public interest reasons to ensure that any challenge to a subsidy scheme be determined at the earliest possible stage. The one-month statutory period provided helpful guidance on what would be an undue delay in the context of a subsidy challenge. If this Tribunal accepted the Applicant's argument that there was no transparency date, it was open to the Tribunal to conclude that the application had been unduly delayed. The Applicant had known by 5 December 2025, at the very latest, that ScotZEB3 was to proceed and guidance was issued in relation to bids for that funding. The Applicant did not seek to challenge the validity of ScotZEB3 within one month of acquiring that knowledge. Quite the contrary, the Applicant was content to submit a bid for further funding from ScotZEB3 and only sought to query its

validity after its bid was unsuccessful. The Applicant was seeking to "have its cake and eat it".

(2) The Applicant's response

21. Counsel for the Applicant renewed an objection taken during the course of the Respondents' oral submissions that the undue delay argument was not foreshadowed in the Answers. The Answers contained no reference to an argument based on undue delay, or mora, taciturnity and acquiescence. Nor was it highlighted in the note of argument lodged by the Respondents in advance of the Hearing.

22. The key issue was the entry made to the subsidy database on 3 September 2025. The Applicant's argument on the merits is that ScotZEB3 cannot be a modification of a legacy subsidy scheme since the original scheme only envisaged two phases. The Scottish Government Subsidy Control Checklist issued on 3 August 2021 indicated that funding would be taken forward in two phases only. Subsequently, the letter from Fiona Hyslop MSP dated 8 August 2025 referred to additional funding being made available through "the second and final phase…ScotZEB2". Following concerns expressed by the Applicant and others, the Respondents' solicitors wrote on 14 November 2025 advising that there would be no further funding under ScotZEB2 but there would be a new phase of funding known as ScotZEB3. The letter dated 14 November 2025 referred to the "new scheme". The SCA, when read along with the statutory guidance for subsidy schemes, has the consequence that the third phase of funding can only be regarded as a new subsidy scheme. A new scheme requires the public authority to go through certain additional statutory hoops. Further, a new scheme requires a new entry on the database. As a matter of relevancy, the Applicant had pled a sufficient basis for inquiry into whether ScotZEB3 was a new scheme or a permitted modification of a legacy scheme. If the Applicant is correct on the merits, it also follows that there has been no relevant entry in the database for the new scheme from which time starts to run.

23. In terms of s. 33(1) and (3)(c) of the SCA, a public authority which creates a subsidy scheme must ensure that an entry is made in the subsidy database within

three months of the decision to make that scheme. Where a subsidy scheme is modified, the public authority must ensure that the modification is entered in the subsidy database within three months of the date of the modification, (s. 33(5)(c)). The "relevant date" which marks the start of the one-month time period for a review of the subsidy scheme will be the "transparency date", or, if a pre-action information request has been made within one month of the transparency date, then the relevant date is when the public authority gives a notice responding to the pre-action information request, (r. 98A(2), (4) and (8)). In the present case, there had not been an entry "in respect of" the subsidy scheme in issue. The modifications made to the database on 3 September 2025 were made at a time when the Respondents were proposing further funding under ScotZEB2. The modification could not be "in respect of" ScotZEB3 which was announced in November 2025 only after the Respondents had changed tack. Because there was no entry made on the database in respect of ScotZEB3, it followed that there was no transparency date and the start of the time limit had not been triggered.

24. It was accepted that the Applicant did have information by December 2025 to take a decision to bid for further funding. However, it was submitted that it was entitled to believe that the subsidy database would be updated in relation to ScotZEB3 after the guidance information was made available. The Respondents could have updated the database within three months of the decision to make a subsidy scheme. It did not follow that the modifications to the database on 3 September 2025 could only relate to ScotZEB3. The last date for making a timeous entry in the database for a new scheme would have been at some point in 2026.

25. In relation to the subsidiary argument based on undue delay, the Respondents were seeking to rely on a substantive defence of mora, taciturnity and acquiescence. Delay itself was never sufficient on its own. This substantive defence required to be pled. The discussion in *New Lottery* was *obiter* and was after a hearing on the evidence. There was an express rule for England and Wales that relief could be withheld on the grounds of undue delay but there was no equivalent for Scotland in s. 73 of the SCA. Although the *New Lottery*

decision had been included within the bundle of authorities for the Hearing, counsel for the Applicant had understood that its inclusion was for a different argument. He was not in a position to make full submissions on the undue delay argument which had been raised, for the very first time, at the Hearing.

E. DECISION

26. In *New Lottery* at §178, this Tribunal observed that the time limits set out in s. 71 and r. 98A impose a tight timetable for challenges to a subsidy decision. Good administration is promoted if subsidy challenges are determined at the earliest possible stage. A tight timetable minimises wasted costs being incurred by other bidders where a scheme is defective in form, and it reduces the risk of retrospective criticism by an unsuccessful bidder. It is also in the best interests of the public authority promoting any subsidy scheme that illegalities are identified and, if necessary, corrected.

27. The initial question is whether there is a relevant date for the Decision to make a further round of funding available in ScotZEB3. The only date advanced by the Respondents is 3 September 2025 being the transparency date on which an entry was made on the subsidy database. We do not accept the Applicant's submission that the updates to the database made on 3 September 2025 were not made "in respect of" ScotZEB3. The updates extended both the level of funding and the duration of the scheme. The update stated that these were changes made in line with permitted modifications under s. 81 of the SCA. A permitted modification includes a legacy subsidy modification (s. 81(3)(a)). It was therefore clear from the update to the subsidy database on 3 September 2025 that the Respondents were envisaging a third phase of funding with an increased budget and extended duration which, in the Respondents' view, was to proceed as a permitted modification of a legacy scheme.

28. As a matter of fact, ScotZEB3 did then proceed, with the Applicant making an unsuccessful bid. The Respondents have not made any further updates to the database in respect of ScotZEB3. The only conclusion which can be drawn from the documents placed before us is that the changes made to the database on 3 September 2025 were in respect of ScotZEB3. Regardless of whether the

Respondents were correct to view this as a modification of a legacy scheme, the entry made on 3 September 2025 was in respect of the subsequent round of funding which took place in early 2026. The time limit for any challenge under s. 70 commenced running on 3 September 2025 and, unless a pre-action information request was made within the following month, any challenge required to be instituted within one month of 3 September 2025. The notice of appeal was not lodged in time. We are satisfied that, as a matter of relevancy, the notice of appeal does not disclose that this application has been made timeously.

29. We acknowledge that until 5 December 2025, there was scope for confusion as to what the Respondents' intentions were because the letter dated 14 November 2025 indicates a change in tack from that suggested in the Secretary's letter of 8 August 2025. That raises the possibility that an interested party might be unclear as to the continuing status of the database entry made on 3 September 2025. But from 5 December 2025, when the guidance for ScotZEB3 was issued, it would have been obvious to any interested party that the entry made on 3 September 2025 related to ScotZEB3 for which bids were now being invited. It is obvious because the guidance referred to up to £45m of funding being available which ties closely to the increased budget of £150m less the sums paid out on phase 1 (£61.9m) and ScotZEB2 (£41.7m). The guidance states that the funds will be drawn down in 2026/27 and 2027/28 which links with the change in the database to the duration of the scheme. If an interested party had been operating under a genuine misapprehension prior to 5 December 2025 as to the relevancy of the database entry made on 3 September 2025, it would have been open to them to ask the Tribunal to extend the time limit on the grounds of exceptional circumstances (r. 98A(7)). There has been no suggestion in the Applicant's written or oral submissions that the Tribunal should extend any time limit on the basis of exceptional circumstances. We were unimpressed by the Applicant's submission that it was entitled to wait for a period of three months to see if a further entry was made on the database. That would be an inherently risky view to take given the terms of the September database entry, particularly once the guidance documentation was available from 5 December 2025. Further, to the extent the Applicant is seeking to argue that time-bar should not

be determined as a preliminary issue on the basis that it was entitled to wait for a further three months following 5 December 2025 for time to start running, that is unconvincing. In any event, we do not accept that the Applicant held back in the belief that a further database entry was imminent. If that had been their belief, we would have anticipated that some reliance would have been placed on the exceptional circumstances' relief as a fallback.

30. We have found in favour of the Respondents on its primary submission. We do not propose to express any concluded view in relation to the secondary submission made by the Respondents. We agree with counsel for the Applicant that a defence based on mora, taciturnity and acquiescence ought to have been pled. We heard relatively brief submissions from the Respondents in relation to the interplay between a possible defence of undue delay identified in *New Lottery*, and Scottish principles of mora, taciturnity and acquiescence. We were not referred to any Scottish authorities on the application of mora, taciturnity and acquiescence in the context of the supervisory jurisdiction. It is correct that highlighted passages from *New Lottery* were in the papers for this Hearing, but we accept counsel for the Applicant's statement that he had understood this to relate to another issue. In the absence of full submissions from both parties, we consider that the best course of action is to express no view on the merits of the secondary submission.

F. DISPOSITION

31. This application for various declarators and reduction of the Decision is dismissed as being out of time.

32. This judgment is unanimous.

The Honourable Lord Young | Sir Ian Forrester KC | Alasdair Smith

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 27 November 2026