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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1775/12/13/26

Court of Session
Supreme Courts
11 Parliament Square
Edinburgh
EH1 1RQ

Monday 26th October 2026

Before:

The Honourable Lord Young
Sir Ian Forrester KC
Professor Alasdair Smith

(Sitting as a Tribunal in Scotland)

BETWEEN:

McGill's Bus Service Limited

Appellant

v

The Scottish Ministers

Respondent

A P P E A R AN 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

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

THE CHAIRMAN: Mm-hm.

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

THE CHAIRMAN: Yes.

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

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

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

THE CHAIRMAN: Mm-hm.

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

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

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

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

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

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

THE CHAIRMAN: Yes, Mr Lindsay.

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

MR BARNE: Where is the minute of argument?

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

THE CHAIRMAN: Can you give us the page

number of the joint bundle for that?

MR LINDSAY: Yes, it is at PDF 627.

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

THE CHAIRMAN: Yes.

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

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

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

THE CHAIRMAN: Okay.

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

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

THE CHAIRMAN: Yes.

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

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

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

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

MR LINDSAY: Yes.

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

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

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

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

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

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

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

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

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

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

permitted modification of the existing ScotZEB theme.

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

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

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

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

to do becomes apparent.

"(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 the 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."

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

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

THE CHAIRMAN: Mm-hm.

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

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

MR LINDSAY: Not for the purposes of this

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

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

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

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

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

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

THE CHAIRMAN: Yes.

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

THE CHAIRMAN: Mm-hm.

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

THE CHAIRMAN: 13.27, yes.

MR LINDSAY: Paragraph 13.27 on page 307.

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

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

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

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

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

THE CHAIRMAN: Not in the pleadings.

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

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

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

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

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

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

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

MR LINDSAY: Yes, it was.

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

MR LINDSAY: Yes.

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

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

THE CHAIRMAN: Yes.

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

provisions is set out by the Tribunal.

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

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

MR FORRESTER: Okay.

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

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

highlighting is orange?

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

MR FORRESTER: All right.

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

The factual background to this particular judgment was that funding had been made available only for advertising and business development purposes for the *National Lottery* and the dispute was whether that was a subsidy or not. The Tribunal came to the conclusion it was not a subsidy and therefore there was no need to make any entry in the subsidy database. So this is an esto discussion, it is not part of the ratio, but I submit it is nevertheless helpful. Reading from paragraph 168:

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

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

"Two separate questions about delay arise:

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

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

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

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

At 176.

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

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

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

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

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

THE CHAIRMAN: Yes. Yes, okay.

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Mm-hm.

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

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

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

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

Then reading on at paragraph 178:

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

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

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

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

So reading on from 178:

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

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

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

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

particular case the risk of undue interference with good administration.

Then reading on at 179:

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Mm-hm.

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

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

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

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

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

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

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

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

THE CHAIRMAN: Yes.

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

THE CHAIRMAN: Yes.

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

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

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

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

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

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

THE CHAIRMAN: Yes. (Pause).

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

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

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

THE CHAIRMAN: Mm-hm.

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

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

MR LINDSAY: Yes.

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

MR LINDSAY: Thank you.

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

Submissions by MR BARNE

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

"In the event that the Tribunal concludes

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

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

THE CHAIRMAN: Mm-hm.

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

THE CHAIRMAN: Yes.

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

THE CHAIRMAN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

information."

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

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

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

THE CHAIRMAN: Yes, Mr Barne?

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

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

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

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

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

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

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

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

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

respondent treated and announced ScotZEB3.

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

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

MR FORRESTER: I was curious.

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

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

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

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

(11.48 am)

(Short break)

(12.00 pm)

THE CHAIRMAN: Yes, Mr Barne?

MR BARNE: Thank you. I was, just before we rose, discussing the letter which has not been lodged but which was sent on behalf of the appellant. There was a similar letter sent on behalf of the other members of the Zenobe consortia complaining about the prospect of Rock Road being effectively allowed to also participate in the ScotZEB2 but without a formal competition. The grounds of complaint were really that this was not what was in the documentation for ScotZEB2, public law grounds of fairness, procedural impropriety. Interestingly enough, given something that was said this morning, a request under section 76 was made at that time for documentation, vouching that a Subsidy Control Assessment had been undertaken and seeking the relevant documents that would show that ScotZEB2B had

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

THE CHAIRMAN: Was that your clients?

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

THE CHAIRMAN: Thank you.

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

MR FORRESTER: What was the reference?

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

"Dear Edward.

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

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

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

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

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

THE CHAIRMAN: Mm-hm.

MR BARNE: It says:

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

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

"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 focused on operators of public service routes."

Then the next paragraph:

"The new scheme ..."

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

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

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

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

purposes of the application of the subsidy control requirements."

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

Subsection (3), 81(3) says:

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

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

Then that is defined at subsection (4):

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

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

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

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

And it is (b).

"a subsidy scheme made by the authority."

Then subsection (3):

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

"..

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

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

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

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

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

And at (c) again:

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

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

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

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

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

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

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

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

THE CHAIRMAN: Yes.

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

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

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

So that is Phase 1.

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

THE CHAIRMAN: Mm-hm.

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

there, it says:

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

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

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

MR BARNE: Yes.

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

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

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

MR BARNE: It is a scheme --

MR SMITH: -- necessarily?

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

MR SMITH: Is this a financial cap?

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

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

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

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

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

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

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

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

MR BARNE: Yes.

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

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

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

THE CHAIRMAN: No.

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

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

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

MR SMITH: How would the position have

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

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

capture ScotZEB3.

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

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

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

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

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

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

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

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

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

MR SMITH: Okay.

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

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

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

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

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

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

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

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

MR BARNE: I would need to check.

THE CHAIRMAN: Yes.

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

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

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

THE CHAIRMAN: Yes.

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

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

THE CHAIRMAN: Yes, thank you. Anything else?

MR SMITH: No.

THE CHAIRMAN: Thank you very much, Mr Barne.

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

Reply submission by MR LINDSAY

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

THE CHAIRMAN: Very recently.

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

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

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

THE CHAIRMAN: Mm-hm.

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

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

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

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

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

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

MR LINDSAY: Thank you, my Lord.

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

(12.39 pm)

(Hearing concluded)

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