

IN THE COMPETITION APPEAL TRIBUNAL

Court of Session in Edinburgh
Parliament House
Parliament Square
Edinburgh EH1 1RQ

Monday, 16 December 2019

BEFORE:

LORD DOHERTY, Chairman
MR PETER ANDERSON
PROFESSOR ULPH

BETWEEN:

STRIDENT PUBLISHING LIMITED

-and-

CREATIVE SCOTLAND

MS MORAG ROSS QC appeared on behalf of Creative Scotland

MR CHARTERS (Director of Strident Publishing) appeared on behalf of the
Company

PROCEEDINGS

Daily Transcript by John Larking Verbatim Reporters
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No of folios: 106
No of words: 7593

1 Monday, 16 December 2019
2 (11.00)
3 LORD DOHERTY: Good morning Miss
4 Ross. Good morning, Mr Charters. We will
5 just introduce ourselves. I am Lord Doherty
6 and I will be chairing the Tribunal. I am
7 sitting with, on my right Peter Anderson,
8 who is a member of the Tribunal, and on my
9 left is Professor David Ulph, who is also a
10 member of the Tribunal. There is one
11 preliminary matter which arose in the course
12 of discussion between us when we met this
13 morning which I thought I should flag up in
14 case anyone thinks it raises an issue. Mr
15 Anderson indicated in the course of
16 conversation this morning that his daughter
17 has in the past worked for arts organisations
18 which have received funding from Creative
19 Scotland. So does that raise an issue?
20 MR CHARTERS: Not for us.
21 MS ROSS QC: I have nothing ...
22 LORD DOHERTY: Thank you. I turn then to
23 the provisional agenda. I think what we
24 propose to do is hear discussion from each of
25 you item by item. I think we envisaged that

1 there may be some discussion from us and
2 some preliminary indication of our thinking on
3 each point, but I think we will plan to adjourn
4 shortly at the end of the discussion to consider
5 our decision and then come back and deliver
6 it. So that is how we propose to proceed. So
7 perhaps we could begin with item 1, which is
8 forum. Are there any issues on that? Miss
9 Ross?
10 MS ROSS QC: My Lord, so far as forum is
11 concerned, it would appear possibly to be the
12 most straightforward of the issues raised on
13 the agenda. I do not understand it to be
14 disputed that the appropriate forum is
15 Scotland. The relevant matters are identified
16 in the Rules, and in particular, taking one of
17 them, the parties are either habitually resident
18 or have their head offices and habitual places
19 of business in this jurisdiction, and so it would
20 follow that it must be Scotland.
21 MR CHARTERS: Agreed.
22 LORD DOHERTY: The second matter, and I
23 suppose logically I should have dealt with it
24 first, is representation. Perhaps I will hear
25 from Miss Ross first to see what her

1 submission is.
2 MS ROSS QC: Thank you, my Lord. Of
3 course the question arises because of the terms
4 of Rule 8.1(b).
5 LORD DOHERTY: Yes.
6 MS ROSS QC: By which any other person is
7 allowed by the Tribunal to appear on behalf of
8 the party. I may say that of course for the
9 purposes of today's proceedings no issue is
10 taken with Mr Charters appearing and making
11 submissions on behalf of the claimants here.
12 Nevertheless, I think a number of questions do
13 arise which the Tribunal ought to have before
14 it. A starting point might be the Tribunal's
15 Guide which at paragraphs 9.36 to 9.42
16 addresses the question of representation.
17 There is one authority which is referred to in
18 the Guide which is that of Emerson Electric,
19 which was March 2007. Just to expand on that
20 a little, that did not concern a company
21 director; it rather concerned legal
22 representation by somebody who was not
23 qualified to act in the jurisdiction, so an
24 advisor who did not have rights of audience
25 rather than a company director.

1 I may say also that the Guide also points
2 unrepresented parties to sources of advice,
3 albeit those other sources of advice are in
4 England, and it is for Mr Charters of course to
5 indicate whether he would find it helpful to
6 seek advice from those sources, or indeed their
7 equivalents in Scotland. The Guide does
8 indicate that the Tribunal is sympathetic to
9 small businesses that wish to pursue a case
10 before the Tribunal but lack the means to
11 obtain legal representation. In his claim form
12 Mr Charters does refer to the company being a
13 small business of relative means, and I
14 appreciate that, but it is not entirely clear to me
15 or to the defendant whether the company just
16 does not have the means, or whether it is Mr
17 Charters' preference that he represent the
18 company. I may say also that I do not know,
19 and it is a matter for Mr Charters as to whether
20 he wishes to disclose, whether he has
21 previously obtained legal advice.
22 I may say that my researches have not been
23 extensive, but it does appear to be relatively
24 infrequent for companies who are parties to
25 this sort of litigation not to be represented by

1 someone legally qualified. I have been able to
2 identify a couple of cases where there has been
3 a company director. I can provide the court
4 with a little more information, but probably
5 each case must turn on its own facts. But there
6 is at least one observation by a Tribunal Chair
7 suggesting that a company director ought to
8 consider obtaining legal advice.

9 On the specific issues that arise in this case I
10 would make these observations. First of all,
11 these are undoubtedly deep legal waters upon
12 which Mr Charters is setting sail. In my
13 submission, careful analysis is required and
14 with the greatest respect, and I do mean that
15 sincerely, to Mr Charters, the written
16 representations which have been lodged thus
17 far do not indicate that, perhaps, analysis of
18 the necessary forensic level has been done to
19 date.

20 The second point is related to that. The
21 written material, the application form which
22 has been lodged and is now supplemented by a
23 reply – again I do not wish to be overly
24 critical, and I appreciate Mr Charters is not
25 legally qualified – but those written

1 though. The response to the application which
2 was received on Thursday if anything makes
3 things more confusing. The claimant's
4 application was articulated as being based on
5 the existence of an anticompetitive agreement,
6 a Chapter 1 difficulty. Now we see in the
7 Reply that it has shifted to an abuse of
8 dominant position, i.e. a Chapter 2 problem.
9 Mr Charters' Reply document at paragraph 4.1
10 explains: "In our claim form we articulated
11 this case in terms of anticompetitive
12 agreements. Upon reflection we now consider
13 it as an abuse of a dominant market position.
14 Anticompetitive agreements are one of the
15 means by which the abuse has been
16 perpetrated, but they are not the only means.
17 4.2: We will seek the Tribunal's permission to
18 amend our claim form to reflect this improved
19 understanding. Such an amendment would not
20 affect the substance of the claim. Only the
21 wording in the first paragraph of the summary
22 claim would change." Again, with great
23 respect, that is not right. Changing the basis of
24 your claim is a very significant matter. It is
25 quite a substantive matter.

1 submissions are, in my submission, diffuse,
2 lengthy and rather unfocused. The defendant
3 of course considers there to be a fundamental
4 difficulty with jurisdiction, and for immediate
5 purposes that is the sole point, but looking
6 beyond the jurisdiction point into the
7 substance, as it were, of the claim there are
8 real problems. If I could highlight three
9 particular difficulties:

10 The first one is that the claimant purports to be
11 claiming on behalf of authors as well as itself.
12 It is wholly unclear which authors, on what
13 basis, what the value of their claim might be
14 and what the contractual relationship between
15 the authors and the company might be. So that
16 is one area of real uncertainty.

17 The second point is that the claimant appears
18 to rely on payments made to Sandstone as
19 being the main problem, but also refers to
20 Birlinn and Floris, and it would appear that
21 payments made to those parties are also an
22 issue, but again it is really rather unclear
23 whether and to what extent those payments are
24 in issue.

25 The third point is probably the most important

1 MR ANDERSON: Can you help me with
2 that, Miss Ross. I had read that, possibly
3 wrongly, as an attempt to add a new case
4 rather than to replace the existing case with a
5 new case so that we were going to have, if you
6 will, two alleged breaches rather than the
7 original alone. But are you treating it as a
8 substitution, one for the other?
9 MS ROSS QC: I think my first answer, sir, is
10 that I do not know. It is not clear. It may very
11 well be that that interpretation is right, and no
12 doubt Mr Charters can clarify this. On one
13 view it does look as if it is simply an
14 additional point, but I had wondered whether
15 "upon reflection we now consider it as an
16 abuse of a dominant market position" meant a
17 change of position.
18 The point - and I appreciate that this is really
19 getting into the detail and that may be a matter
20 for later on in the agenda - that I am seeking to
21 make by referring to these is to illustrate the
22 difficulties that there are for an unrepresented
23 litigant without professional support in
24 analysing and presenting to the Tribunal a
25 clear and focused case. And it is not clear that

1 the Tribunal can really have the confidence
 2 that under the current arrangements with Mr
 3 Charters and the company unrepresented that
 4 this case will be presented with clarity and
 5 efficiency. Legal representation would enable
 6 the company, of course, to take advice and
 7 present its position in a more focused way.
 8 My final point (and this is in a different
 9 chapter and it may be possible to deal with this
 10 in another way, but it is something that I
 11 would wish to draw the attention of the
 12 Tribunal to) - in his conduct of the litigation
 13 thus far, although at a very early stage, Mr
 14 Charters has not engaged with the defendant in
 15 the way that a solicitor would, and in doing so
 16 there is the risk of giving rise to some
 17 confusion and at least inconvenience. To
 18 explain that, in parallel with these proceedings,
 19 the company/Mr Charters, is also currently
 20 taking matters up with the Scottish
 21 Government and with the Department of
 22 Culture, Media and Sport, who have
 23 responsibility for oversight of the spending of
 24 Lottery money. There has been
 25 correspondence from those bodies to the

1 defendant to explain this. Separately there
 2 have been press releases about these
 3 proceedings, and I am not suggesting that that
 4 is improper, but also Mr Charters has very
 5 recently within the last week or so written
 6 directly to a member of staff within the
 7 defendant's organisation asking for
 8 information and making representations to that
 9 member of staff about its funding approach. It
 10 may be that, if the Tribunal is otherwise
 11 satisfied that it is appropriate for matters to
 12 proceed as they currently do, that then it might
 13 be a suitable approach that an undertaking
 14 might be given that the communications
 15 should be restricted to the solicitors, those who
 16 are instructing me on behalf of the defendant.
 17 Clearly the approach of writing to a lot of
 18 people at the same time is something that is
 19 not going to work and is going to make the
 20 conduct of the litigation much more difficult
 21 and cumbersome than it needs to be.
 22 So my position comes to be that there are real
 23 concerns from the defendant's perspective
 24 about proceeding in this way with an
 25 unrepresented litigant. I say that, of course,

1 against the background that the Tribunal
 2 should be open, recognising that there is a
 3 starting point of sympathy, especially bearing
 4 in mind the means that companies may or may
 5 not have to obtain what may be expensive
 6 legal advice, and I recognise that these are
 7 properly issues that are before the Tribunal,
 8 but it is important nevertheless that I do raise
 9 these really quite significant concerns that the
 10 defendant has about the future progress of this,
 11 not least because inevitably when one is
 12 having to deal with matters conducted in this
 13 way that that itself is likely to generate
 14 spending more time and more expense for the
 15 other party.
 16 So these are the issues that I would wish to
 17 draw to the Tribunal's attention.
 18 LORD DOHERTY: Thank you. Mr Charters.
 19 MR CHARTERS: If I may address some of
 20 those issues, as many as I possibly can along
 21 the way and make the more general point.
 22 Although it is infrequent for people like
 23 myself to represent a company there is
 24 certainly no prohibition on it, and there is
 25 scope for that within the Rules. I think that

1 given the circumstances we are in, and by that
 2 I mean two things, both that we have a
 3 reasonable legal understanding of the position
 4 – and we have tried to articulate that, and I will
 5 come on to that in a moment – and secondly
 6 that in essence we have no other option - we
 7 do not have a £92 million income stream such
 8 as the defendant does that we can rely on - so
 9 there is simply no other option for us but to
 10 represent ourselves. If we do not represent
 11 ourselves there will be no case. And our view
 12 is that this is a case that is of significance not
 13 just to us but more widely, and therefore
 14 deserves to be heard.
 15 I think we have an ability to articulate the case.
 16 What I would say, and I come to Miss Ross's
 17 point, is that we started looking at this from
 18 the perspective of understanding what the
 19 problem is and now need to reverse back into
 20 how does the law articulate that in terms of
 21 statute and so on. So our understanding -
 22 which is the point that was made in our Reply
 23 – is that we have perhaps altered our view of
 24 how the law sees this matter, developed it. We
 25 initially saw it as a Chapter 1, in other words

1 as an anticompetitive agreement. We now see
2 it as an abuse of market position - market
3 dominance - in which anticompetitive
4 agreements are part of the means by which that
5 has become manifested. So we have changed
6 how we see it, but we have not changed the
7 substance of what we are alleging. It is
8 essentially anticompetitive agreements which
9 form part of a wider abuse of dominant market
10 position.

11 MR ANDERSON: Mr Charters, could I just
12 ask you the same question I put to Miss Ross.
13 It is far better to ask you. Is it the case that
14 you are replacing your original reliance on a
15 breach of Chapter 1 and you are now relying
16 on a breach of Chapter 2? My understanding
17 was wrong. You are replacing one with
18 another.

19 MR CHARTERS: We are replacing one with
20 another and we are seeking permission---

21 MR ANDERSON: Thank you. Subject to
22 permission of course, obviously, but yes, I
23 follow that. Thank you.

24 MR CHARTERS: In terms of the authors, I
25 think it is quite clear that all of our authors are

1 something which we like to spend our time
2 doing, but it is something that we have had to
3 do to get the information that feeds into the
4 case.

5 Going back to the point Miss Ross made about
6 the detail of the case and how we will present
7 that, we have read up quite considerably on
8 this and we have a pretty good understanding
9 of what we need to show in terms of abuse of
10 dominant market position, namely that there is
11 an undertaking, that it has a dominant position
12 that it has abused, and so I think our case -
13 accepting that we are not competition lawyers
14 and therefore it will not be perfect I am sure - I
15 think it will be reasonably articulated and I
16 think it will be reasonably structured. I think I
17 would draw your attention to the claim form
18 where we set down some of the key issues
19 which are largely to do with jurisdiction. I
20 think it is shown in our approach that we can
21 convince the tribunal that we can articulate
22 what needs to be articulated and with the
23 understanding of the law that is required.
24 LORD DOHERTY: Yes, I think it is
25 probably more logical to move on to

1 contracted, and so that matter we think is clear.
2 The Birlinn and Floris issue which was raised
3 is indicative of some of the ways in which the
4 abuse of dominant market position has
5 manifested itself. We can go into the detail of
6 that if required.

7 In terms of engagement, I think what you have
8 seen from us is what you would expect. We
9 do not want to bring a matter like this to court.
10 That is our starting point, and we have
11 repeatedly tried to engage with the defendant
12 to resolve this matter outwith this building and
13 these proceedings. There has been no
14 engagement and no willingness to take that on
15 board, and that is why we are at this point. We
16 have corresponded with the Competition and
17 Markets Authority, again as you might expect
18 us to do. The fact that we are also
19 corresponding with the National Lottery
20 Distribution Fund and others to whom this is a
21 pertinent matter should come as no surprise to
22 the defendants. In fact, we are surprised that
23 they are surprised, if I may put it that way.
24 We have submitted Freedom of Information
25 requests that are relevant to the case. It is not

1 paragraph 4; and we need to address the
2 question of whether jurisdiction ought to be
3 treated as a preliminary issue first before we
4 consider any of the other merits.

5 MS ROSS QC: Yes, my Lord, in my
6 submission it should. The reasons for that
7 are set out in the application for the order in
8 terms of Rule 34 and there are probably two
9 reasons; one is, in principle, that jurisdiction
10 is a prior matter and is capable of being dealt
11 with discretely; and the second reason is
12 pragmatic, which is that the time and expense
13 involved in preparing a full-scale response to
14 all of the arguments which are articulated,
15 regardless of under which chapter they are
16 now presented, would be disproportionate
17 when it may be possible to dispose of this
18 matter on a preliminary basis. So for those
19 combined reasons, in my submission, that
20 would be the appropriate course.
21 I say that with perhaps one slight caveat,
22 which is that the defendant will clearly need
23 to take time to consider what effect, if any,
24 the change of position - the switch to a
25 Chapter 2 argument - might make to that

1 question. My immediate reaction then, as I
 2 understand that that is the way in which it is
 3 advanced, is that that ought not to make a
 4 difference to the ability of the Tribunal and
 5 the parties to address this as a preliminary
 6 matter, but clearly that is something which
 7 will need to be focused in any written
 8 submissions and any submissions before the
 9 Tribunal in due course.
 10 I am also conscious that it is possible that an
 11 analysis, depending on the depth to which the
 12 tribunal wishes to go in understanding what
 13 the practical workings of Creative Scotland
 14 are for the purposes of coming to a view as to
 15 whether or not it is an undertaking or
 16 undertaking economic activity, might depend
 17 on some factual analysis, but I would not
 18 have thought it would be difficult for that to
 19 be sufficiently covered in documentary
 20 evidence and in affidavits.
 21 The defendants have already lodged an
 22 affidavit from Mr Ian Stevenson which is an
 23 introduction, as it were, to the role and
 24 function of Creative Scotland and that is a
 25 matter which would be expanded in due

1 course. So with the benefit of that material,
 2 in my submission, it ought to be possible to
 3 deal with this as a discrete matter in one
 4 hearing and which I would envisage would
 5 take no more than one day.
 6 I may say, perhaps just for completeness,
 7 because the question may come up, the
 8 defendant, in its application, also drew
 9 attention to the possibility that, for other
 10 reasons, even if the tribunal are satisfied as to
 11 the jurisdiction arguments advanced by the
 12 claimant, that for other reasons it may be - it
 13 will be the defendant's position that a strike
 14 out would be the appropriate disposal., But I
 15 think probably the best approach for present
 16 purposes is to say that the jurisdiction
 17 question is the primary one, but the
 18 defendant should not be taken to waive its
 19 position in relation to strike out for other
 20 reasons and again that can be articulated
 21 further in written submissions, allowing us to
 22 reserve our position in relation to that.
 23 LORD DOHERTY: Yes, Mr Charters?
 24 MR CHARTERS: Your Lordships, our
 25 position is that looking into the issue of

1 jurisdiction first is actually quite useful in
 2 this particular instance. It goes to the heart
 3 of many of the matters of the case. We think
 4 it is logical to look at jurisdiction before
 5 looking at the detail of abuse of dominant
 6 market position in considerable detail. At the
 7 heart of it is looking at whether or not this is
 8 an economic undertaking. And if it is an
 9 economic undertaking in the matters of this
 10 claim, then that has a bearing on the
 11 defendant's general activities and so, both for
 12 this particular case, which we are primarily
 13 interested in, but also I would imagine for the
 14 defendant more generally, it is something
 15 that they need to know because otherwise if
 16 it is found that they are an economic
 17 undertaking and they are at times acting in a
 18 commercial sphere such as this, they could
 19 be stoking up future claims. So we think it is
 20 something that is useful to look at first and
 21 we would submit that it can be done on the
 22 basis of written evidence, much of which is
 23 already before the tribunal, but which can be
 24 expanded on if required.
 25 LORD DOHERTY: Do you think, from

1 your point of view, it could be done on the
 2 basis of documents and perhaps an affidavit
 3 or more --
 4 MR CHARTERS: Yes, and we would
 5 submit that the affidavit ... the statement
 6 from Ian Stevenson for the defendants
 7 actually, to a large extent, in the wording,
 8 seems to anticipate this issue of abuse of
 9 dominant market position in any case. We
 10 can certainly provide our perspective on the
 11 market as defined here, through written
 12 evidence, and similarly that is perhaps the
 13 best way to do so. So we have no objection
 14 to dealing with the matter of jurisdiction as a
 15 preliminary matter and think that actually we
 16 seek to do that.
 17 (The tribunal conferred)
 18 MR ANDERSON: Mr Charters, could I just
 19 ask you one thing arising out of what you
 20 said? Is it your expectation or your primary
 21 position that the tribunal would deal with this
 22 first issue of jurisdiction without having any
 23 further oral hearing and oral argument, or are
 24 you content to engage in oral argument on
 25 this as well?

1 MR CHARTERS: If - I will re-phrase that.
2 If it is a question essentially "Are we happy
3 to deal with that issue today?" then we could,
4 but --
5 MR ANDERSON: No, it is not. I mean --
6 MR CHARTERS: We could deal with it as
7 oral and I think it is perhaps because from
8 our side there is a need to look back at the
9 law, which we do not carry in our heads in
10 perhaps quite the same sort of way as the
11 defendant's representatives may do, I think
12 we would prefer to be able to analyse it and
13 then present it back as written submissions, if
14 that answers your question.
15 LORD DOHERTY: Miss Ross, do you have
16 a view as to whether or not it should just be
17 done on the basis of written submissions?
18 MS ROSS QC: It could be done on the basis
19 of written submissions, but I think perhaps
20 this does come back to the first question
21 which is to do with representation and
22 especially bearing in mind what Mr Charters
23 has just said about the right analysis. I think
24 my hesitation would be that having in mind
25 the way in which the application is structured

1 and the reply is structured the risk might be
2 that the tribunal finds itself with - I am not
3 sure, I do not want to be impolite - but
4 perhaps mismatching documents. I would
5 anticipate preparing fairly detailed written
6 submissions in any event, regardless of
7 whether there was a hearing or it was just to
8 be decided on paper and there are two
9 arguments essentially with authorities
10 referring to documentary evidence in the
11 normal way. If I were confident that that
12 would be met in the same terms, then it
13 might be an appropriate way to proceed. The
14 tribunal will appreciate that I am a little
15 cautious about simply signing up to that as a
16 way forward given that I do not quite know
17 what it is that the defendant will be faced
18 with in terms of structure, analysis and so
19 forth and in those circumstances it would
20 probably be better to take the opportunity to
21 ventilate the issues in the course of a hearing.
22 MR CHARTERS: Could we respond to that?
23 LORD DOHERTY: Of course, Mr Charters,
24 yes.
25 MR CHARTERS: Our position on that is

1 that most of the arguments are already laid
2 out in both the application to the tribunal to
3 deal with the matter of jurisdiction and our
4 reply to that application and that seeking to
5 have it heard orally simply adds to the cost
6 and, without being disrespectful to the
7 defendant, we would question why they
8 would wish to add to that cost and there may
9 be a good reason why they would wish to add
10 to that cost on our side. So we feel it can be
11 and should be dealt with in writing and that
12 most of the arguments are already laid out -
13 certainly the core of the arguments -
14 including all references to previous cases,
15 which we have set out in our reply.
16 MS ROSS QC: My Lord, if I may respond to
17 one point, which was suggested by Mr
18 Charters which was, as I heard it, it was to
19 suggest that the defendants might be seeking
20 an oral hearing in order to increase the cost
21 and I wish to say very clearly on behalf of
22 the defendant that that is absolutely no part
23 of the motivation or incentive for suggesting
24 an oral hearing.
25 LORD DOHERTY: If the tribunal were to

1 go down the road of determining this matter
2 as a preliminary issue and requiring further
3 documents, affidavits, written arguments and
4 then perhaps a one-day hearing, what sort of
5 timescale would you think would be required
6 before such hearing?
7 MS ROSS QC: Mr Charters has already
8 drawn attention to the work that has been
9 carried out in preparing the application itself,
10 so clearly some of that work has already been
11 done and I would anticipate though that
12 further work will undoubtedly be required. I
13 have in mind both the competing interests of
14 this being done quickly and also the existing
15 commitments both on - I would say on my
16 part that January is already very heavily
17 committed and I would be looking, with the
18 indulgence of the tribunal, for a date not in
19 January, but if it were until February, the
20 later part of February then it could be
21 anticipated that written submissions and a
22 note of argument or a skeleton, I believe a
23 term used elsewhere, could be prepared by
24 late January, early February, perhaps even to
25 March if that were of course also in the

1 interests of the claimant to take into account
 2 as well.
 3 LORD DOHERTY: Yes, Mr Charters?
 4 MR CHARTERS: From our side we would
 5 like to resolve the matter as quickly as
 6 possible. We would be able to come and
 7 respond in January to all those matters, or the
 8 second - latter - part of January. There is, I
 9 am sure you appreciate, work to be done in
 10 the early part to respond, but most of that
 11 work and most of that thinking has been
 12 done, so most of it is about articulating that
 13 work.
 14 LORD DOHERTY: Right. What do the
 15 parties have to say about fast track?
 16 MS ROSS QC: To an extent this question
 17 had been overtaken ---
 18 LORD DOHERTY: Yes.
 19 MS ROSS QC: --- by the discussion about
 20 the timetable. Were the tribunal minded to
 21 fix either a hearing, or to decide to resolve
 22 this on the papers on the question of
 23 jurisdiction, it is probably premature to
 24 decide this question today. It is also very far
 25 from clear that, as presently articulated, this

1 case is suitable for a fast track procedure. I
 2 have in mind the tribunal's own guide at
 3 5.146 which indicates that it is suitable - that
 4 a fast track procedure is suitable - where
 5 parties are clearly committed to a tight,
 6 constrained and exceptionally focused
 7 approach to the litigation. As matters stand, I
 8 think exceptional focus has yet to be found.
 9 Clearly matters can be focused on
 10 jurisdiction, but probably a better course is to
 11 hold over the question of fast track procedure
 12 until after the preliminary matter has been
 13 resolved.
 14 LORD DOHERTY: Yes, Mr Charters?
 15 MR CHARTERS: We broadly agree with
 16 that approach. What we would say is that
 17 once the matter of jurisdiction is resolved
 18 that allows a great deal of clarity in the case.
 19 A lot of this case is to do with the matter of
 20 jurisdiction and whether this falls within the
 21 law. If it is found that it is within the law,
 22 then the question becomes, to some extent,
 23 how much - how we quantify the behaviour
 24 and the effect of that behaviour. So we
 25 would not object to carrying over the matter,

1 if that would seem to be the most effective
 2 way of dealing with the case.
 3 (The tribunal conferred)
 4 LORD DOHERTY: One aspect which is
 5 compulsory in the fast track, which is
 6 optional elsewhere, is a cost cap for parties
 7 entering. If we were approaching matters on
 8 the basis of determining the preliminary
 9 issue, is there any advantage in fixing a cost
 10 cap in relation to that part of the
 11 proceedings?
 12 MS ROSS QC: It may well again be too
 13 early to say. As things stand currently, of
 14 course, Mr Charters is unrepresented and it is
 15 difficult to anticipate, were he to either be
 16 required to or choose to seek, in time, legal
 17 advice, then that may put a different
 18 complexion on the question of costs of both
 19 parties. My submission, though, would be
 20 that it would probably be a mistake to allow
 21 the question of cost capping to determine
 22 whether or not this is suitable for a fast track
 23 approach. The prior question is whether it is
 24 suitable or not and, in my submission, it is
 25 not at this stage because of the ---

1 LORD DOHERTY: No, the question was
 2 asked on the assumption that we postpone the
 3 fast track decision ---
 4 MS ROSS QC: Yes, I see.
 5 LORD DOHERTY: --- until after the
 6 preliminary issue is determined and I was
 7 asking in those circumstances whether the
 8 parties have anything to say about whether
 9 we should impose cost capping in relation to
 10 that part of the proceedings.
 11 MS ROSS QC: I see. If you would just...
 12 (After a pause) In addition to the question of
 13 cost capping, there is also a concern on the
 14 part of the defenders about security for costs.
 15 Those are matters which probably have to be
 16 considered at the same time. I am not in a
 17 position today to
 18 seek --
 19 LORD DOHERTY: Yes.
 20 MS ROSS QC: -- an order in relation to
 21 security for costs, but it would appear, at
 22 least on the preliminary view, that standing
 23 the status of - indeed the assets of - the
 24 claimant company, that there would be
 25 reason for the defenders to have concerns

1 about that. As I say, I am simply putting that
 2 information before the Tribunal; I am not
 3 seeking an order today.
 4 LORD DOHERTY: Yes.
 5 MS ROSS QC: So, again it would appear to
 6 me to be premature to attempt to resolve
 7 costs-related questions today. I appreciate of
 8 course that if parties are sent away to embark
 9 on a significant quantity of work in advance
 10 of a forthcoming hearing, that it may be
 11 unsatisfactory to leave this without any
 12 resolution but, in my submission, standing
 13 where we are, it is not possible today to
 14 resolve that. So, both the question of cost-
 15 capping and security should probably be
 16 addressed together, but at a later point.
 17 LORD DOHERTY: Mr Charters?
 18 MR CHARTERS: Our position in that
 19 regard is that cost capping will become
 20 relevant. The matter of jurisdiction is a fairly
 21 detailed one, we would submit, and if that is
 22 resolved, then I think that would be the better
 23 time to then put a cost-cap into place. As to
 24 the matter of security, which is something
 25 which we anticipated that the defenders

1 would bring up, we are conscious that within
 2 the rules there is no requirement to put a
 3 costs cap in place, but sometimes it can be to
 4 the claimant's advantage, or both parties'
 5 advantage, to have that in place. Our view
 6 would be that this is a matter of significance;
 7 that regardless of our assets, the Tribunal
 8 should hear it, we would submit, because it
 9 goes to the heart of a very important issue
 10 that has, to the best of our knowledge, as yet
 11 not yet been tested by the court, and that is
 12 the intersection between public and private -
 13 where a publicly-funded body engages in a
 14 commercial market place, which is what we
 15 say has happened on this occasion - and
 16 whether it has to have due regard to
 17 competition law. In our reply to the
 18 application regarding jurisdiction. we have
 19 set out some of the thinking - the serious
 20 thinking by tribunal chairpeople - as regards
 21 this, that the issue is protecting the
 22 marketplace rather than dealing with the
 23 issue of costs. Some things are bigger than
 24 purely the issue of costs; which is not to say
 25 that costs are not an issue, but the issue itself

1 is something which we feel is of significance.
 2 LORD DOHERTY: If we were going down
 3 the road of determining the preliminary issue
 4 first and that involves the production of
 5 relevant documents, affidavits and possibly a
 6 Tribunal hearing, is there anything under
 7 head three "Confidentiality" which we
 8 would require to address at this stage?
 9 MS ROSS QC: Yes, my Lord. Again given
 10 the slightly unusual circumstances here with
 11 an unrepresented party, and it comes back to
 12 the comments that I made in relation to that
 13 at the start of this hearing. This comes out
 14 of, again, a slight concern on the part of the
 15 defenders that whilst, of course, Mr Charters
 16 is at liberty to communicate widely, that the
 17 normal understanding of the treatment of
 18 documents lodged for the purpose of the
 19 litigation ought to be adhered to. Again, if
 20 there were an understanding with a solicitor,
 21 with legal representation on the other side, it
 22 may not be - the need for an express
 23 provision in relation to the confidentiality
 24 may not be quite as marked. I think probably
 25 the better course is to say at this stage that

1 documents which are lodged for the purpose
 2 of these proceedings, of this litigation before
 3 the Tribunal, ought to be treated as
 4 confidential. Of course, respecting the fact
 5 that the Tribunal itself, acting transparently,
 6 makes available on its own website various
 7 parts of relevant material. So, that ought to
 8 deal with the transparency - the need for
 9 transparency. And also another relevant part
 10 of the background is that of course a number
 11 of the documents, including those which
 12 have already been lodged by the defender,
 13 are already in the public domain and clearly
 14 it would be silly to suggest that those
 15 suddenly become subject to confidentiality.
 16 Probably the clearest, simplest, easiest way
 17 to proceed is to make it clear that, whether
 18 formally by the creation of a confidentiality
 19 ring or otherwise, that documents not in the
 20 public domain, where there is no obligation
 21 in terms of the Tribunal's own proceedings in
 22 so far as dissemination of information is
 23 concerned, that documents which are lodged
 24 for the purposes of the litigation should be
 25 held confidentially. I appreciate that that is a

1 very broad description, but it may be the
 2 simplest way to proceed.
 3 LORD DOHERTY: Yes. Mr Charters?
 4 MR CHARTERS: Can I say that broadly
 5 speaking that outlines how we would propose
 6 to come at this. As has been noted, much of
 7 the information is in the public domain. The
 8 Creative Scotland website provides much of
 9 that information. A lot of information is
 10 either obtainable via freedom of information
 11 requests or we have already obtained it by
 12 freedom of information requests. We could
 13 continue down that route where it is
 14 necessary to do so. What we have
 15 deliberately not done, and we would have no
 16 intention of doing, is we are not seeking to
 17 expose the commercial elements of
 18 applications that have been made by those
 19 who have been in receipt of funding from
 20 Creative Scotland. That is not our intention
 21 in this matter. So, we would certainly
 22 undertake to continue down that route of not
 23 disclosing that element - which in any case in
 24 freedom of information responses is
 25 redacted, so we are not able to see it in order

1 to expose it, even if we wished to do so.
 2 Things such as the statement that Mr
 3 Stevenson has made that the defender has
 4 lodged: we would not anticipate and certainly
 5 we have no intention of disclosing something
 6 like that. So our view is there is no need for
 7 a confidentiality ring.
 8 LORD DOHERTY: (After a pause) Now,
 9 are there any other matters which the parties
 10 wish to raise.
 11 MS ROSS QC: No, thank you, my Lord.
 12 LORD DOHERTY: Mr Charters?
 13 MR CHARTERS: From our side the only
 14 matter we would wish to raise is the one we
 15 have noted already which is the permission
 16 that we would seek to amend our claim form
 17 to reflect our better understanding of how the
 18 law articulates dealing with this particular
 19 issue.
 20 LORD DOHERTY: That amendment won't
 21 really affect the question of whether the
 22 respondent is an undertaking or not, will it?
 23 MR CHARTERS: No.
 24 LORD DOHERTY: So, that could be a
 25 matter that is held over, I suppose.

1 MR CHARTERS: We would accept that.
 2 LORD DOHERTY: Yes. Have you
 3 anything to add?
 4 MS ROSS QC: Not really, my Lord. Clearly
 5 I think for the sake of completeness in the
 6 defenders' preparations I would want to
 7 consider, as I indicated earlier, whether or
 8 not it does make any difference to the
 9 jurisdiction question. As I indicated earlier,
 10 my immediate reaction is: no it doesn't, but
 11 given what I now understand to be the case,
 12 which is an intention to shift from Chapter 1
 13 to Chapter 2, I would probably have to
 14 reserve my position on that and the impact, if
 15 any, that will have on the structure of the
 16 argument. If it assists, I am not objecting at
 17 the moment to what is proposed. It has been
 18 suggested that that is now the basis for the
 19 proceedings. I am conscious that Mr
 20 Charters has approached it on the basis it
 21 doesn't make much difference. I say it might
 22 well make a big difference, but it probably
 23 doesn't make a sufficiently big difference to
 24 jurisdiction that it has to be dealt with today.
 25 LORD DOHERTY: (After a pause) We will

1 adjourn now for a short time to consider our
 2 decision.
 3 (11.53)
 4 (Adjourned for a short time)
 5 (12.27)
 6 LORD DOHERTY: Yes. Mr Charters, we
 7 are going to allow you leave to amend your
 8 claim. How long do you think you need to
 9 do that?
 10 MR CHARTERS: I would imagine we could
 11 have that done by certainly this week.
 12 LORD DOHERTY: I will give you 14 days.
 13 MR CHARTERS: Thank you.
 14 LORD DOHERTY: Now, we have come to
 15 the fairly clear view that it makes sense for
 16 the preliminary issue to be dealt with first, so
 17 everything that follows really dovetails with
 18 that. In relation to forum, it is
 19 uncontentious. We shall pronounce an order
 20 making Scotland the forum for all purposes.
 21 In relation to representation, we hear what
 22 you say Mr Charters in relation to not being
 23 in a position to instruct legal assistance. On
 24 that basis we are not going to leave you
 25 without a remedy, and we are going to grant

1 permission for you to represent the company
 2 at least until the conclusion of the
 3 preliminary issue stage. I think matters can
 4 obviously be revisited at that stage if we
 5 require to. However, I think we are all of the
 6 view that this is a case where some difficult
 7 legal issues do arise. It is quite a "legal-
 8 heavy" dispute., We have not inquired into
 9 the company's resources in any detail, or
 10 indeed into the steps you have taken to
 11 explore the possibility of conditional fee
 12 arrangements and the like. These are
 13 matters which if you have not done you
 14 might like to think about because legal
 15 assistance would definitely be an advantage
 16 in a case of this sort, which I do know well.
 17 Whatever the position is, of course there will
 18 be responsibility on us and on counsel for the
 19 defender to make sure that both sides of the
 20 argument are put before the court, but I
 21 simply flag up that these are not
 22 straightforward issues. The benefit of legal
 23 advice should not be understated. As I said,
 24 we are going to deal with the preliminary
 25 issue first and the timetable which we are

1 proposing is that in the first instance within a
 2 period of five weeks from today - I think that
 3 takes us to 20 January - we are going to order
 4 the defender to lodge a statement of facts and
 5 a skeleton argument. And also to produce
 6 documents upon which the defender relies.
 7 We are not going to specify, as the defender
 8 knows them better than us, but obviously
 9 your OPF grant - provisions dealing with that
 10 - and a specimen agreement might be
 11 obvious documents, but there may be many
 12 others. We were not sure how much time to
 13 allow you, Mr Charters. Our initial view was
 14 to allow you two weeks to respond by
 15 indicating agreement or disagreement with
 16 the statement of facts, or one or more or
 17 other of them. And if you proposed any
 18 alternative facts - to put forward an
 19 alternative - to put those alternative facts
 20 forward in a statement, and also to produce
 21 any further documents which the defender
 22 had not produced upon issue. Now, if 14
 23 days is too short, say so now and we can---
 24 MR CHARTERS: I would say that 14 days
 25 is sufficient for us to file anything further

1 required of that nature.
 2 LORD DOHERTY: Very well. We do
 3 envisage it is likely that we will require an
 4 oral hearing here because we think the issues
 5 are not straightforward. So, we are going to -
 6 the date we have alighted on is Monday 2
 7 March 2019(sic). We pick a Monday on the
 8 view that it is likely to be more convenient to
 9 counsel, even if they have other
 10 commitments. It is also more convenient for
 11 the court in terms of provision of a court
 12 here. So, there are advantages in it. Based
 13 on the material which has been produced in
 14 advance by the parties, it may be that the
 15 Tribunal will pose questions for the parties
 16 for that hearing which it would like to be
 17 addressed or like to obtain assistance on. So,
 18 that is something which you are likely to hear
 19 from the tribunal on in advance of the
 20 hearing. The other matters which were
 21 discussed: confidentiality. All that we
 22 would propose to do at this stage would be to
 23 note that both parties appear to understand,
 24 as expressed at the Bar, how documents
 25 produced for the appeal ought to be used.

1 Further to that, I would simply remind both
 2 parties of the obligations imposed by Rule
 3 102. Returning to the question of
 4 representation, Miss Ross did raise the issue
 5 of the channel of communication with the
 6 solicitor. The Tribunal found that that is a
 7 valid point and that it does become difficult
 8 if there is not one point of contact. So, it
 9 would be desirable if everything really was
 10 channelled through the defender's solicitors,
 11 and the other way round via you to the
 12 company. There are obvious exceptions, like
 13 without prejudice settlement discussions or
 14 things of that nature, obviously the Tribunal
 15 is not supposed to see. But things should be
 16 copied to the Tribunal as well. The Tribunal
 17 simply reserves questions of fast tracking and
 18 cost capping until after the preliminary issues
 19 have been dealt with. Is there anything else
 20 from the parties?
 21 MS ROSS QC: Not on our part. I am
 22 obliged.
 23 MR CHARTERS: My Lord, nor on ours.
 24 LORD DOHERTY: Yes. Very well. These
 25 directions will be drawn up in the form of an

- 1 order by the Tribunal and circulated in the
- 2 next day or two. Thank you.
- 3 (12.37)
- 4 (Hearing concluded)