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Strident Publishing Ltd v Creative Scotland, 2 March 2020

IN THE COMPETITION APPEAL TRIBUNAL

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

Monday, 2 March 2020

BEFORE:

LORD DOHERTY, Chairman
MR PETER ANDERSON
PROFESSOR ULPH

BETWEEN:

STRIDENT PUBLISHING LIMITED

-and-

CREATIVE SCOTLAND

MS ROSS QC and Julianne Kerr Morrison appeared on behalf of Creative Scotland

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

PROCEEDINGS

Daily Transcript by Larking Hodge Pollock
Suite 3F, 30 Gordon Street, Glasgow, G1 3PU
Tel: 0141 248 6211 / 01730 825 039

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1 Monday, 2 March 2020
 2 (10.27)
 3 LORD DOHERTY: Good morning. Are
 4 there any preliminary matters?
 5 MS ROSS QC: My Lord, so far as I am
 6 concerned, if I may say this morning I appear
 7 with my learned friend Miss Morrison for
 8 Creative Scotland, and of course as before
 9 Mr Charters is representing the Pursuer here,
 10 Strident. From my point of view there are a
 11 number of minor preliminary matters that
 12 arise really dealing with matters that have
 13 arisen since the previous hearing. I propose
 14 to deal with those as part of the introduction
 15 to my submission, and so I am content to
 16 move to those now, unless there are other
 17 preliminary matters that Mr Charters might
 18 wish to raise, or indeed that the Tribunal has
 19 itself.
 20 MR CHARTERS: There is nothing from our
 21 side.
 22 MS ROSS QC: My Lord, the initial matters
 23 before turning to the substance of the
 24 submission in support of the application
 25 which has been made in respect of

1 jurisdiction are these. The first point is that
 2 the Tribunal will recall that at the previous
 3 hearing at the case management conference
 4 on 16 December the Pursuer Mr Charters
 5 indicated that he would lodge an amended
 6 claim form. The indication that was given
 7 then was that that would be a very minor
 8 change. The explanation was that the
 9 essence of the argument had moved from
 10 being a Chapter 1 case to a Chapter 2 case.
 11 Nevertheless Mr Charters said that it would
 12 be simply a matter of, as I recall, replacing
 13 one sentence. In fact the amended claim
 14 form was very substantially rewritten. There
 15 were numerous amendments. The Defender
 16 has provided the Tribunal with a comparison
 17 version showing the marked changes. I
 18 should say that it is not necessary for today's
 19 purposes to examine either the un-amended
 20 claim form or indeed the amended claim
 21 form. Mr Charters was given permission to
 22 amend, but it is appropriate for the Tribunal
 23 to note that the changes were perhaps not as
 24 limited as had been advertised.
 25 The second preliminary matter is that the

1 Pursuer has also within the last week been in
 2 contact in order to try to introduce more
 3 material, and so there is perhaps an
 4 unresolved question as to whether Mr
 5 Charters is entitled to refer to the HIE letter.
 6 My position on behalf of the Defender is that
 7 this should not be admitted. There are three
 8 reasons. First, it is simply too late. The
 9 letter that Mr Charters seeks to rely on is
 10 dated 18 December. There is no reason why
 11 it could not have been dealt with in January,
 12 and it is simply too late to lodge it now.
 13 Secondly, it is incomplete. I am not sure
 14 whether the Tribunal has had the opportunity
 15 to see what it is, but in essence it is a review
 16 letter following a Freedom of Information
 17 request, but it refers to previous
 18 correspondence. Clearly there has been some
 19 correspondence between Mr Charters and
 20 HIE seeking to recover information. That
 21 letter refers to previous correspondence, but
 22 that is not before the Tribunal. So it is
 23 incomplete and it does not make sense to
 24 refer simply to a review letter. I may say in
 25 that regard that the connected point is that

1 not only is it incomplete, but HIE and
 2 Creative Scotland are not one and the same
 3 and Creative Scotland cannot be expected to
 4 intuit what decisions have been taken and
 5 what processes have been applied within
 6 HIE.
 7 That leads to the third reason for objecting to
 8 its receipt, which is that it is also irrelevant in
 9 its entirety to this discussion, which concerns
 10 the jurisdiction of the Tribunal and the status
 11 of Creative Scotland as an undertaking or
 12 not. Even if it is the case that another body
 13 has made grant awards, and even if there is
 14 some dispute about the basis for any such
 15 awards, that has no bearing on the matter
 16 which is before the court.
 17 So for those three reasons my submission is
 18 that the letter ought not to be considered
 19 today.
 20 LORD DOHERTY: Would there be any
 21 prejudice to the Defender if it was admitted?
 22 MS ROSS QC: Potentially, my Lord, yes. It
 23 is still unclear what use Mr Charters wishes
 24 to make of this letter. It is difficult for
 25 Creative Scotland to comment on its contents

1 if Creative Scotland is unable to comment on
2 HIE's decision making, and that is perhaps all
3 that needs to be said. There are references,
4 for example, to application forms and
5 appraisal papers. Creative Scotland has not
6 had sight of those papers. The potential
7 prejudice is simply a lack of ability to
8 respond to any points that might be made if
9 they are advanced in any detail relating to the
10 substance of it.
11 MR ANDERSON: I suppose if it is irrelevant
12 none of that matters.
13 MS ROSS QC: Indeed that may not matter.
14 There is also perhaps a difficulty in taking up
15 time where, if my position is correct that it is
16 irrelevant then it is simply a waste of time.
17 So far as the other preliminary matters are
18 concerned, it is perhaps simply an
19 observation for good order, it might also be
20 recalled at the previous hearing that in
21 discussion about preparation, and in
22 particular in discussion about Mr Charters
23 representing Strident, there was an
24 undertaking, essentially, that Mr Charters
25 would conduct communications with

1 Creative Scotland through Creative
2 Scotland's solicitors. Despite that, there has
3 been some email traffic including recently
4 with members of Creative Scotland's staff
5 seeking information in relation to this case. I
6 do not seek to make anything further of that,
7 but given the discussion that took place
8 before the Tribunal last time on this specific
9 subject it is worth updating the Tribunal to
10 indicate that this has in fact happened despite
11 what was said at the time.
12 The other question concerns the letter which
13 was submitted to the Tribunal on Friday from
14 those instructing me on behalf of Creative
15 Scotland. That had come about because of a
16 question that had arisen from the Tribunal. In
17 particular, there were two issues. One
18 concerned loans, whether loans were part of
19 the business that Creative Scotland had
20 conducted, and the second concerned end of
21 project monitoring. There is a brief letter
22 that was submitted from those instructing me
23 to the Tribunal. It does perhaps need a little
24 further explanation, because since---
25 LORD DOHERTY: We only received this

1 this morning.
2 MS ROSS QC: I see.
3 LORD DOHERTY: So we have not had
4 much time to absorb it.
5 MS ROSS QC: It is a fairly short letter, but I
6 can amplify it and indeed correct something
7 that has been said there in paragraph 1. The
8 first question had been: "Does the Defender
9 ever make loans particularly in relation to its
10 support for publishing?" The answer that
11 was provided is that "Creative Scotland is
12 able to provide loans", and that is clear from
13 the statute, "but currently does not make any
14 loans to any sector including publishing."
15 The explanation further is that Creative
16 Scotland inherited a number of loans from
17 predecessor bodies, none of which were for
18 publishing entities. The further information
19 that I would wish to provide is that in fact
20 that is not a complete picture, because there
21 have been 4 loans which Creative Scotland
22 has provided in the period since. The
23 Tribunal will appreciate that they were
24 predecessor bodies, Scottish Screen and the
25 Scottish Arts Council.

1 LORD DOHERTY: Yes. So since July
2 2010 there have been---
3 MS ROSS QC: Yes. I may say the
4 explanation, and I apologise if this was not
5 identified last week, or earlier this morning,
6 and I apologise if that information was not
7 available when those instructing me wrote
8 the letter, I am advised that there were two
9 loans which were made in 2011 and 2013.
10 As I understand it, neither of those was to a
11 publishing interest. They were both repaid in
12 full and they were zero-interest loans. In
13 addition, there had been in 2017 two
14 occasions on which tax credit loan facilities
15 had been provided. The understanding, and
16 no doubt this can be verified, is that they
17 were also zero-interest loans. That is the
18 understanding of those instructing me at
19 present. But they were both in relation to
20 films, and so they did not affect publishing
21 either. So with these 4 qualifications it
22 remains the position nevertheless that it is not
23 part of Creative Scotland's routine practice to
24 make funding available by way of loans.
25 Certainly in relation to 2011 and 2013 I am

1 advised that those were on the basis of zero
 2 interest, and my understanding is that the
 3 2017 film-related loans were also on that
 4 basis.
 5 The second question that the Tribunal raised
 6 – and this came out of the Defender's
 7 skeleton argument – is: "What sort of ex post
 8 project evaluation does the Defender
 9 Creative Scotland make of its funding
 10 decisions and so far as its support for
 11 publishing is concerned how many of the
 12 projects are published and sold." The
 13 explanation is provided in the letter, that "Ex
 14 post project evaluation consists of a review
 15 of Creative Scotland's End of Project
 16 Monitoring form, the release by Creative
 17 Scotland of the balance of funds for a
 18 publishing project is contingent on titles
 19 being published on the market. Creative
 20 Scotland does require actual sales data to be
 21 provided in the end of project monitoring,
 22 and if this shows there to be any profit
 23 generated from the project this will then be
 24 factored into the calculations for the
 25 reconciliation of the end of project

1 settlement. Awards are conditional also upon
 2 the supply of finished titles to Creative
 3 Scotland, which is generally for review to
 4 ensure compliance with contract conditions,
 5 for example appropriate crediting of Creative
 6 Scotland or National Lottery support."
 7 To amplify that, the Tribunal may want to
 8 consider the item in the volume of
 9 productions. These are the productions which
 10 are appended to Mr Stevenson's witness
 11 statement. The Tribunal will have these and
 12 the one that I have in mind in particular is the
 13 End of Project Monitoring Report, which is
 14 at tab 8 starting at page 149 in the bundle of
 15 documents that was appended to Mr
 16 Stevenson's statement. This is a blank form
 17 and it covers---
 18 LORD DOHERTY: What Tribunal paper
 19 number is this?
 20 MS ROSS QC: Number 28. This is simply a
 21 sample form, as I said, covering the End of
 22 Project Monitoring. It is a form issued by
 23 Creative Scotland to those to whom funds
 24 have been provided. It is not necessary to go
 25 through it in detail. It does ask those who

1 have received funds to explain what the
 2 benefits have been and which groups have
 3 been reached for example and who has been
 4 involved, and towards the end at page 158
 5 (page 10 within the document) financial
 6 management, and it asks there for further
 7 information about project costs forecast and
 8 actual. Also in one of the appendices at page
 9 106 is where the applicant is asked to provide
 10 detailed information. So that is the method
 11 for seeking the provision of information from
 12 those who have received grants.
 13 PROFESSOR ULPH: Can I ask a question
 14 of elaboration to some extent.
 15 MS ROSS QC: Yes, of course.
 16 PROFESSOR ULPH: This is dealing with
 17 the evaluation of the single project.
 18 MS ROSS QC: Yes.
 19 PROFESSOR ULPH: Does there take place
 20 any evaluation across the totality of the
 21 projects? So does Creative Scotland say to
 22 itself "given all the money we can spend and
 23 how, how much has resulted in new titles"?.
 24 Is that how the evaluation took place?
 25 MS ROSS QC: If the Tribunal will bear with

1 me for a moment, my understanding is that
 2 that does, but I would wish to provide a...
 3 (Pause) That takes place, I am advised,
 4 within the context of the preparation of the
 5 annual review, and that would be a matter of
 6 course that would have to come before the
 7 Board, and my understanding is that that
 8 would require the Board to see papers which
 9 allow that analysis to take place, but that is
 10 within the context of the annual review
 11 process.
 12 PROFESSOR ULPH: So that takes place for
 13 the annual review?
 14 MS ROSS QC: Yes, my understanding is that
 15 that would be the standard process that one
 16 would expect to see in a public body
 17 whereby members of staff do prepare
 18 documents based on that overview and
 19 provide that to the Board. The other point to
 20 be aware of in this context of review and
 21 analysis is that there is also a role for Audit
 22 Scotland, the Auditor General for Scotland,
 23 and the explanation that one sees for that is in
 24 the Framework Agreement between the
 25 Scottish Government and Creative Scotland.

1 This is the second item in the bundle which is
 2 appended to Mr Stevenson's statement and it
 3 starts at page 52 in the same bundle we have
 4 just been looking at. Could I direct the
 5 Tribunal's attention in particular to
 6 paragraphs 21 to 24 (page 57 of that
 7 document). This starts at page 52. As an
 8 introduction by way of purpose at paragraph
 9 6 on the first page we see "Creative
 10 Scotland's purpose, strategic aims and
 11 objectives as agreed by the Scottish
 12 Government are those set out in Creative
 13 Scotland's 10-year plan as updated annually
 14 and as approved by Scottish Ministers." So
 15 one sees there the basis for annual reviews to
 16 be compared. There is a strategic plan that is
 17 updated annually. Then so far as the specific
 18 questions about audit are concerned, we see
 19 starting at paragraph 21 on page 57 the first
 20 part there is "Internal audit", and it explains
 21 there in this Framework Agreement
 22 "Creative Scotland shall establish and
 23 maintain arrangements for internal audit in
 24 accordance with public sector internal audit
 25 standards in the internal audit section of the

1 Ministers. And they have to be laid before
 2 the Scottish Parliament, together with the
 3 auditor's report and any report prepared by
 4 her. There are provisions there allowing the
 5 Auditor General to carry out examinations
 6 into the economy, efficiency and
 7 effectiveness with which Creative Scotland
 8 has used its resources in discharging its
 9 functions. So we see there an external check
 10 as well on the performance of functions
 11 specifically with reference to economy,
 12 efficiency and effectiveness. And it is not
 13 surprising to see that there are also rights of
 14 access to documents including those which
 15 are held by contractors, subcontractors and so
 16 forth.
 17 Beyond there we see in the paragraphs that
 18 follow under "Annual Report and Accounts",
 19 jumping to paragraph 26: "The accounts must
 20 be prepared in accordance with relevant
 21 statutes and the specific accounts direction
 22 and other relevant guidance issued by the
 23 Scottish Ministers. Any financial objectives
 24 or targets set by the Ministers should be
 25 reported on in the accounts and will therefore

1 Scottish Public Finance Manual." It is also,
 2 as one would expect, to set up an audit
 3 committee of its board. Again that would be
 4 standard procedure. Reading this short, it
 5 also has to share with the Scottish
 6 Government the papers for the Audit
 7 Committee. It has to forward timeously to
 8 the Scottish Government the Audit Charter,
 9 the strategy, the periodic audit plans and
 10 annual audit assurance report. Those go to
 11 the Scottish Government, and it must keep
 12 records. The Scottish Government's internal
 13 audit division has a right of access to all
 14 documents held by Creative Scotland's
 15 Internal Auditor including where the service
 16 is contracted out. The Scottish Government
 17 has a right of access to all Creative Scotland's
 18 records and personnel for any purpose. So,
 19 so far as internal audit is concerned, there is a
 20 clear role there for Scottish Government.
 21 Then further there is an external audit
 22 function which is performed by the Auditor
 23 General for Scotland who audits or appoints
 24 auditors to audit Creative Scotland's annual
 25 accounts and passes those to the Scottish

1 be in the scope of the audit."
 2 So we see there in some detail there set out
 3 what the whole framework is, the whole
 4 structure which allows there to be checks in
 5 place for verifying not only project by project
 6 in the sense that any individual grant
 7 recipient has to report on what has been
 8 spent, to whom, and when and how, but
 9 further that that will be reviewed and subject
 10 to audit in a way that is consistent with
 11 public sector expenditure across a range of
 12 bodies.
 13 So the answer that came in within the letter
 14 was dealt with fairly briefly, but that is the
 15 expanded version, the explanation on End of
 16 Project Monitoring and overview.
 17 LORD DOHERTY: Yes.
 18 MS ROSS QC: Those then are the
 19 preliminary matters that are required to be
 20 addressed. I would propose then to deal with
 21 the substance of the argument in support of
 22 Creative Scotland's position, which is that it
 23 is not an undertaking and that this Tribunal
 24 does not have jurisdiction. I would in the
 25 first place adopt the note of argument, the

1 skeleton argument which has been provided
 2 for the Defender, and for the reasons set out
 3 there and indeed in the original application
 4 which was submitted to the Tribunal in
 5 respect of jurisdiction move that the Tribunal
 6 find that there is no jurisdiction.
 7 My plan is to deal briefly with an
 8 introduction to the law and the essential legal
 9 issues - to explain by reference to Ian
 10 Stevenson's statement and briefly by
 11 reference to one or two of the further
 12 productions, although we have already dealt
 13 with one or two of those this morning already
 14 - to explain what it is that Creative Scotland
 15 does. And then to deal with the difficulties
 16 that arise in the Pursuer's argument. I
 17 anticipate that that is really where the bulk of
 18 the discussion requires to take place, because
 19 of course the Pursuer has submitted his own
 20 skeleton note of argument, and in my
 21 submission that gives rise to a number of
 22 difficulties, and I propose to address those in
 23 more detail and to deal with the first two
 24 matters, the law and what Creative Scotland
 25 does in relatively short order. I should say

1 that I am working on the assumption that the
 2 Tribunal has of course had the opportunity to
 3 read the skeleton argument and in particular
 4 Ian Stevenson's statement, which explains
 5 how Creative Scotland does what it does, and
 6 I am not proposing to rehearse those in any
 7 detail.
 8 The essential position of course is that the
 9 Defender, Creative Scotland, is not an
 10 undertaking for the purposes of section 18 of
 11 the Competition Act 1988. The relevant
 12 provisions in the Act are before the Tribunal
 13 in the bundle of authorities, but it may be
 14 simplest to take the relevant provisions from
 15 the skeleton argument. Section 18 is set out
 16 in the skeleton at paragraph 38. "Subject to
 17 section 19, any conduct on the part of one or
 18 more undertakings which amounts to the
 19 abuse of a dominant position in a market is
 20 prohibited if it may affect trade within the
 21 United Kingdom." What is regulated is the
 22 conduct of undertakings. It is not conduct
 23 generally. And the extent of the Tribunal's
 24 jurisdiction is determined by reference to the
 25 Act itself, and that is by reference to section

1 47(a) of the 1998 Act. That is what gives the
 2 Tribunal the jurisdiction to hear claims
 3 relating to a breach of section 18.
 4 So the essential position is that if Creative
 5 Scotland is not an undertaking then the
 6 Tribunal does not have jurisdiction, and I do
 7 not understand that to be contested.
 8 The way in which the question about how an
 9 undertaking is understood, how that question
 10 is to be approached, does not arise from any
 11 specific provisions in the Act itself defining
 12 "undertaking", nor in the Treaty, but the
 13 concept derives from the Treaty. I am taking
 14 this structure from Part IV in the Defender's
 15 skeleton, which starts at page 9. I do not
 16 propose to take the court to Hofner in the
 17 bundle, but the excerpt which is provided
 18 there at paragraph 42 in the note of argument
 19 from the decision of the Court of Justice in
 20 Hofner and Elser is that "the concept of an
 21 undertaking encompasses every entity
 22 engaged in an economic activity regardless
 23 of the legal status of the entity and the way in
 24 which it is financed." So the introduction
 25 there is that, broadly, entities which are

1 engaged in economic activities are
 2 undertakings, and as is set out in the
 3 paragraph that follows the Defender's
 4 essential case is that "it is not an undertaking
 5 because in granting funding, in accordance
 6 with its statutory purpose, it is exercising
 7 public powers which are typical of those of a
 8 public authority, which means they are not
 9 economic in nature, and it does not otherwise
 10 engage in an economic activity."
 11 PROFESSOR ULPH: Can I just ask a
 12 question in clarification. Is your position that
 13 to be engaged in economic activity is a
 14 sufficient condition for an entity to be an
 15 undertaking?
 16 MS ROSS QC: No, I am sorry if I gave that
 17 impression. This is the introduction and the
 18 way in. It is not the case that any economic
 19 activity of any kind results in the conclusion
 20 that one is an undertaking. But it is a helpful
 21 way in to try and understand - in assessing -
 22 what is Creative Scotland's activity. The
 23 difficulty is that in the absence of a specific
 24 statutory definition one has to rely on the
 25 evolving reflections of the court, and this is

1 my introduction to that.
2 PROFESSOR ULPH: Could I pose my
3 question in a slightly different way? Would
4 you regard it as a necessary condition for
5 being an undertaking that if you are an
6 undertaking you must be engaged in
7 economic activity?
8 MS ROSS QC: Yes. I will come to that if I
9 may in a moment, and my plan is to explain
10 by reference to a couple of the authorities
11 how economic activity is understood,
12 especially in the context of public authorities,
13 and where I plan to come to at the end is to
14 look at the way in which the Tribunal
15 approached it in the UKRS decision, where
16 one looks at a range of different
17 considerations, and the answers to those will
18 point to the conclusion as to the economic
19 nature of the conduct and therefore to the
20 identity as an undertaking.
21 LORD DOHERTY: Just give me a moment.
22 (Pause) It has just occurred to me that I did
23 not make any ruling in relation to the HIE
24 letter which may have left the parties in some
25 doubt as to where they stand.

1 MS ROSS QC: Yes, I am sorry, my Lord, I
2 did not pause to allow that to happen.
3 LORD DOHERTY: The fault is mine.
4 What I propose to do: I am not going to
5 allow the letter to be admitted at this stage,
6 but I am going to let Mr Charters refer to it
7 and make any argument in relation to it that
8 he wishes, and for you to make any response
9 to it that you wish. And we will decide at the
10 end of the case whether we are going to
11 allow it to be admitted.
12 MR CHARTERS: Permission to speak?
13 LORD DOHERTY: Yes.
14 MR CHARTERS: It may be useful - and
15 reassuring to the Defender - to know that we
16 do not intend to refer to it today in the
17 preliminary issues hearing. We will probably
18 refer to it in the substantive hearing, but we
19 will not refer to it today.
20 LORD DOHERTY: That is of some
21 assistance, but I think we will just leave the
22 ruling as it stands at the moment.
23 MS ROSS QC: I am grateful.
24 LORD DOHERTY: I am sorry, I interrupted
25 you.

1 MS ROSS QC: Not at all, my Lord. Perhaps
2 to indicate at this stage where I intend to end
3 up right at the end of my submission is by
4 drawing together all of the different factors
5 that have to be taken into account before one
6 settles on a conclusion as to whether the
7 nature of the activity, the nature or the status
8 of the organisation which is conducting it.
9 Those are among the factors. There are
10 multiple layers to the assessment.
11 Regrettably is it not as simple as saying
12 "That is economic and therefore...", or "If
13 there is no economic activity, therefore...".
14 It is one of the considerations. Economic
15 activity, taking all of the things together,
16 does come to be the test, but in assessing
17 what that means you have to take into
18 account a number of factors, and I will come
19 to those.
20 LORD DOHERTY: That would be very
21 helpful.
22 MS ROSS QC: So the way in which it is
23 approached, as I say to give structure to this
24 by reference to the skeleton argument, is that
25 there are essentially two propositions which

1 are supported by reference to the authorities
2 taken together, the first being that the
3 Defender is not an undertaking because it
4 exercises public powers which are typical of
5 a public authority. If I can pause there, and I
6 will come to this when I deal with Mr
7 Charters' submission, one of the approaches
8 that the Pursuer has taken is to say "Aha, you
9 cannot just say because you are a public
10 authority - because you are created under
11 statute - that you are exempt." In my
12 submission, it is too simplistic to see it in
13 those terms. Rather, one sees the status, the
14 identity as a public authority, as being one of
15 the factors which must be taken into account.
16 We see that for example from the
17 observations that are taken from the decision
18 in Eurocontrol.
19 LORD DOHERTY: Eurocontrol 1, or 2?
20 MS ROSS QC: I will check. The reference is
21 to case 364/92. It is Fluggesellschaft v
22 Eurocontrol EU. It is No 1. The excerpt that
23 is provided in the skeleton is by reference to
24 Eurocontrol's activities which are to do with
25 flight control. Taken as a whole,

1 Eurocontrol's activities by their nature, their
 2 aim and the rules to which they are subject
 3 are connected with the exercise of powers
 4 relating to the control and supervision of
 5 airspace, which are typically those of a
 6 public authority. They are not of an
 7 economic nature justifying the application of
 8 the Treaty rules of competition.
 9 (10.45)
 10 Obviously the provision of public funding
 11 and to creative industries and the control of
 12 airspace are in very different realms of
 13 activity, but the principle is that if you have
 14 to look at something, you have to look at an
 15 understanding as to whether what is being
 16 carried out is typically that of a public
 17 authority, and the relevant factors to take into
 18 account here are that so far as Creative
 19 Scotland is concerned its aims are
 20 determined by statute. The Scottish ministers
 21 have the power to direct it - we have already
 22 seen the framework agreement which gives a
 23 clear picture of the extent of the involvement
 24 of the Scottish ministers in the activities of
 25 Creative Scotland, and I will return to those

1 when we look at the productions.
 2 LORD DOHERTY: Except in relation to
 3 questions of artistic judgment and so forth.
 4 MS ROSS QC: Of course, yes, and that is
 5 clear and that is clear from the Statute, but
 6 that does not come into - one would not
 7 expect to see ministers determining -
 8 dictating even - what type of art should be
 9 funded, that is clearly devolved to Creative
 10 Scotland to exercise that. But in terms of the
 11 administration of provision of funding, in
 12 particular we have seen the sense in which
 13 there is control of auditing and oversight, but
 14 also the general principle which is enshrined
 15 in legislation, which is that parliament has
 16 determined that there ought to be provision
 17 for the arts which is administered by a public
 18 body. That is where we see the essence of
 19 public powers typical of a public authority.
 20 The second ...
 21 PROFESSOR ULPH: Can I just ask another
 22 question? I am not sure I understand what
 23 you mean by "typically".
 24 MS ROSS QC: Yes.
 25 PROFESSOR ULPH: I can understand

1 perfectly well that governments might
 2 undertake such activity.
 3 MS ROSS QC: Yes.
 4 PROFESSOR ULPH: The question is: is it
 5 typical in the sense that only Governments
 6 would do this, or is it possible that other
 7 types of entities could engage in that activity,
 8 so for example a charity might decide it
 9 wants to support an activity?
 10 MS ROSS QC: Yes.
 11 PROFESSOR ULPH: How does that factor
 12 into your thinking?
 13 MS ROSS QC: In understanding the word
 14 "typical", it is an interesting question.
 15 Typical, when you say typical of a public
 16 authority, the distribution of funding is the
 17 element which would be typical of a public
 18 authority, public authority - and of this kind
 19 in particular, but not exclusively. Creative
 20 Scotland, after all, is not the only public body
 21 which distributes public funds for the public
 22 good. One can think of other examples -
 23 sports funding, for example, might be
 24 another one - that collectively as a whole,
 25 society, expressed through government and

1 where necessary through legislation, has
 2 determined that it is appropriate to support
 3 sports or education or the arts, and it does so
 4 by granting funding. So that aspect is
 5 typical. But I appreciate the question might
 6 be: who else? Philanthropists: you might just
 7 have a wealthy person who decides that - and
 8 that happens, concert halls, theatres, perhaps
 9 even publishing might receive donations,
 10 charitable organisations, philanthropic
 11 organisations. That is true but it does not
 12 make them (it is jumping ahead), but they do
 13 not become undertakings by virtue of
 14 providing funding.
 15 PROFESSOR ULPH: I was just clarifying
 16 the subject whether it is engaging with a
 17 party other than on a profit-making basis that
 18 makes this 'typical'. Because if you allow
 19 the possibility that there are other bodies that
 20 might do the same role...
 21 MS ROSS QC: Yes.
 22 PROFESSOR ULPH: ...then it means you
 23 have to determine the question: what is the
 24 criteria that determines whether a public
 25 body is an undertaking or is not an

1 undertaking. You cannot rely on the
2 argument so much that it is typically
3 something that is done by government.
4 MS ROSS QC: Yes, and I absolutely accept
5 that it is not exclusively, and I think that is a
6 possible danger, is that it cannot be and could
7 not possibly say only government funds
8 public bodies - funds the arts in this way.
9 Clearly philanthropic interests also do. So to
10 that extent if you were taking typical to
11 connote that is generally what the
12 government does or what a public body does
13 and nobody else does, that is not what
14 typically means. Typically in this context
15 means typically done by governments where
16 there is an understanding, expressed in this
17 case through legislation, that it is a good
18 thing for public subsidy to be provided for
19 arts, sports, whatever else. That is the typical
20 function.
21 Now, one could take a further step back and
22 say: is it typical of governments anywhere?
23 Within Western Europe, probably, yes, it is,
24 but that is perhaps taking an unnecessary
25 step.

1 Where the comparison or the contrast with
2 the philanthropic or charitable interest
3 becomes important is in understanding that
4 none of those, like Creative Scotland, are
5 interested in deriving any sort of profit. That
6 is the next critical step, because in order for
7 the pursuer to succeed it is necessary to show
8 that there is a market, that there is economic
9 activity in a market for, and as the pursuer
10 would have it, it is the market of investment
11 finance for the arts. That is where the whole
12 argument in my submission completely
13 breaks down; there is no investment market
14 in which Creative Scotland is participating.
15 It does not have a position because there is
16 not a relevant market for that.
17 Now, that is not to say that it is impossible
18 for private interests who do have an interest
19 in making a profit to invest in publishing.
20 Why not? It could be any other industry.
21 But they would expect to make a return.
22 That is just in the nature of investment. That
23 is what distinguishes the solely privately
24 interested investor from the likes of Creative
25 Scotland or indeed the charity or the

1 philanthropic interest, the benefactor,
2 because they are handing over money for the
3 public benefit, not handing over money in
4 order to derive a return to make a profit on
5 that so-called investment.
6 Perhaps the distinction is best seen in trying
7 to understand investment in its normal, fairly
8 technical sense and in the more metaphorical
9 sense, that an investment, in the normal
10 course, if you make an investment you
11 expect to receive a return. You might be
12 disappointed, the shares might crash, you
13 might lose your money, but you go into
14 making an investment with the expectation
15 that there will be a return.
16 PETER ANDERSON: Does it have to be a
17 financial return?
18 MS ROSS QC: In the normal understanding
19 of the market, yes, it does. Investment in the
20 much looser metaphorical sense in the way
21 governments talk about investing in future
22 generations, investing in education for the
23 benefit of humankind, it is that sort of
24 investment that one is talking about when
25 one is talking about public arts funding, it is

1 investing in the cultural life of the nation.
2 But that is a metaphor because the payback,
3 as it were, comes in, I suppose, ideally the
4 advancement of happiness, education, these
5 sorts of benefits that accrue to the public.
6 But for the purposes that we are talking
7 about, that does not come into it at all, that is
8 just part of the public function; you would
9 not be doing it, the government would not be
10 doing it if there was not supposed to be some
11 overall public good. That is the whole point:
12 it is for the public benefit, not for financial
13 return.
14 So taking these two propositions together, the
15 defender is not an undertaking, as I said, in
16 the first place because the public powers
17 which it exercises are typical of those of a
18 public authority and perhaps typical - I have
19 endeavoured to answer the question, I
20 appreciate at some length, but perhaps the
21 most recent comment in relation to the more
22 metaphorical nature of investment and the
23 returns that one receives through public
24 sector investment in the arts, that is what is
25 typical of a public authority, albeit that it

1 might also be conducted by a philanthropists
 2 or charities who, in common with
 3 government, have no expectation of a
 4 financial return.
 5 Then the defender is not an undertaking
 6 because it does not otherwise engage in
 7 economic activity.
 8 The explanation which underpins the
 9 submission which I have just made is set out
 10 in the skeleton from paragraphs 49 onwards,
 11 and there are a number of cases cited. I
 12 propose, if I may, to take the Tribunal to the
 13 discussion of Advocate General Maduro in
 14 the FENIN case, which there is an excerpt
 15 provided in the skeleton but it is perhaps
 16 instructive to read more widely within that
 17 decision. It is case number 205 of 2003, it is
 18 FENIN v The Commission and that is at ...
 19 LORD DOHERTY: Number 8 in the bundle.
 20 MS ROSS QC: ... tab 8, yes. It starts at
 21 page 393
 22 LORD DOHERTY: You are reading from
 23 the Advocate General's opinion ...
 24 MS ROSS QC: I am reading from the
 25 Advocate General ...

1 LORD DOHERTY: ... but the court took
 2 the same line.
 3 MS ROSS QC: It did, yes. The court's
 4 decision is ...
 5 LORD DOHERTY: 2006.
 6 MS ROSS QC: ... provided there as well.
 7 LORD DOHERTY: Is it?
 8 MS ROSS QC: I believe it is.
 9 LORD DOHERTY: I do not think so. I
 10 certainly could not see it last night.
 11 MS ROSS QC: I apologise, I thought that
 12 they were both there. Nevertheless I do want
 13 to take it from the Advocate General's
 14 discussion there because it quite helpfully
 15 explains. I should say it is consistent also
 16 with the observations of the Advocate
 17 General in Ambulanz Glöckner which is also
 18 provided - it is not necessary to go to both.
 19 But it is really from about page 393 where
 20 the discussion begins at paragraph 11 on the
 21 case law relating to the concept of
 22 undertaking:
 23 "The use of a comparative criterion, which
 24 lies at the root of a functional and wide-
 25 ranging approach to the concept of an

1 undertaking, dates from the judgment in
 2 Höfner and Elser,"
 3 which the relevant excerpt was provided
 4 earlier.
 5 "The court held that the activity concerned
 6 was economic in nature since employment
 7 procurement has not always been and is not
 8 necessarily carried out by public entities."
 9 There is a reference there to Poucet and
 10 Pistre:
 11 "Advocate General Tesauro adopted the
 12 same reasoning and considered that the
 13 activity in question could be carried on only
 14 by a public body and could not be
 15 assimilated with the insurance activities
 16 carried on by private undertakings. He
 17 therefore concluded that the entity in
 18 question was not an undertaking. The
 19 judgment in Ambulanz Glöckner, that offers
 20 a further illustration of use of the
 21 comparative criterion by the court: health
 22 organisations providing services on the
 23 market for emergency and ambulance
 24 services were held to be undertakings,
 25 because such activities have not always been,

1 and are not necessarily, carried out by such
 2 organisations or by public authorities.
 3 "Where there is no competitive market on
 4 which a number of undertakings act in
 5 competition, the question of the economic
 6 nature of an activity and the application of
 7 the comparative criterion become more
 8 difficult. So that the absence of the effective
 9 competition on a market does not lead to its
 10 automatic exclusion from the scope
 11 competition law, the comparative criterion
 12 therefore extends the concept of an economic
 13 activity to include any activity capable of
 14 being carried on by a profit making
 15 organisation. While the court does not
 16 undertake that comparison as a matter of
 17 course, it refers in nearly all its judgments
 18 relating to the concept of an undertaking to
 19 Höfner and Elser, which remains the starting
 20 point for its analysis. However, that
 21 comparative criterion would, literally
 22 applied, enable any activity to be included
 23 within the scope of that competition law."
 24 I will pause there. I will come in looking at
 25 the approach that the pursuer takes to identify

1 precisely that difficulty with the pursuer's
 2 argument, that on his analysis everything
 3 becomes bound up, encompassed within the
 4 scope of competition law.
 5 "Almost all activities are capable of being
 6 carried on by private operators. Thus there is
 7 nothing in theory to prevent the defence of a
 8 State being contracted out, and there have
 9 been examples of this in the past.
 10 Accordingly, in its subsequent judgments, the
 11 court elaborated on that concept by linking it
 12 to participation in a market.
 13 "The second criterion developed by case law
 14 for the purposes of clarifying an activity as
 15 economic in nature is that of participation in
 16 a market or the carrying on of an activity in a
 17 market context. While in Höfner and Elser
 18 the economic nature of the activity stemmed
 19 only implicitly from participation in a market
 20 since the State allowed private undertakings
 21 to participate in the market, in other cases the
 22 court has established a clear link between
 23 participation in a market and the carrying on
 24 of an economic activity. In holding that the
 25 Italian customs agents are undertakings, the

1 motivated by philanthropy or charity, that
 2 does not happen under market conditions.
 3 MR ANDERSON: Is that necessarily the
 4 only way in which you can do that? Would it
 5 not be possible to have somebody who is
 6 prepared to look at, let us say, an individual
 7 author ...
 8 MS ROSS QC: Yes.
 9 MR ANDERSON: ... who currently is
 10 unpublished ...
 11 MS ROSS QC: Yes.
 12 MR ANDERSON: ... because they have not
 13 been recognised, and say: "All right, I am
 14 prepared to support this author, finance this
 15 author. I may lose my introduction of
 16 money," to avoid using a word like
 17 investment.
 18 MS ROSS QC: Yes.
 19 MR ANDERSON: And then link that
 20 perhaps even just to some form of clawback.
 21 Would that not create at least a theoretical
 22 model?
 23 MS ROSS QC: I think the devil there is in
 24 the last qualification, which is perhaps some
 25 kind of clawback, because the important

1 court described their activities as follows:
 2 they offer, for payment, services consisting
 3 in the carrying out of customs formalities,
 4 relating in particular to the importation,
 5 exportation and transit of goods, as well as
 6 other complementary services such as
 7 services in monetary, commercial and fiscal
 8 areas. In subsequent judgments the court
 9 directly assimilated participation in a market
 10 with the economic nature of the activity
 11 carried on. Thus, in Pavlov and others and
 12 Ambulanz Glöckner that 'any activity
 13 consisting in offering goods and services on a
 14 given market is an economic activity'. It is
 15 not the mere fact that the activity may, in
 16 theory, be carried on by private operators
 17 which is decisive, but the fact that the
 18 activity is carried on under market
 19 conditions."
 20 If I can pause there and perhaps deal with
 21 Professor Ulph's question about the other
 22 people who might provide the services, it
 23 may be true that the philanthropist or the
 24 charity provides funding for the arts but it is
 25 not done under market conditions, it is done

1 distinction between the investor, in so far as
 2 there is an investment market, is that that
 3 person would wish to see recovery, would
 4 wish, beyond recovery, would wish to see a
 5 return, normally understood as profit. If it is
 6 simply: "I will support you and I reserve my
 7 right to get my stake back if you make a
 8 success," then there is no benefit to the
 9 investor in the normal sense of profit.
 10 MR ANDERSON: Is there not? Maybe a
 11 benefit simply in terms of reputation, by
 12 being seen to be a supporter of young talent.
 13 MS ROSS QC: That is essentially what a
 14 philanthropist does. A philanthropist, I
 15 suppose --
 16 MR ANDERSON: I get my money back.
 17 MS ROSS QC: Well, yes, it could be
 18 regarded as a seed funding provision by a
 19 philanthropist. There are, yes, charities,
 20 benefactors who might take that position,
 21 who might say: "Seeing as you have done so
 22 well..." and make that a condition: "Seeing
 23 as you have done so well, I would like my
 24 stake back so that I can give it to the next
 25 person that I wish to benefit." But if there is

1 no return, that is what distinguishes it from
 2 the investor. Put it this way, let's say there
 3 were the prospect of investing in the next J K
 4 Rowling, where the financial success is way
 5 out of expectation to anything that might
 6 have happened. Now, the position of the
 7 philanthropist or indeed Creative Scotland is
 8 that they are prepared to support authors,
 9 artists of other kinds. There is a recoupment
 10 provision which allows for the return of the
 11 original stake, as it were - I hesitate to use the
 12 word "stake", it is not really the appropriate
 13 term - but the payment which is made can, in
 14 the event of success, can be recovered, but
 15 there is no further return; that is the critical
 16 point. So for the extremely successful author
 17 of the extremely successful play, the stage
 18 production that nobody ever thought would
 19 take off but it does and it generates millions,
 20 the most that comes back is the original
 21 amount that is put in.
 22 LORD DOHERTY: Can you direct us, just
 23 for the sake of clarity, to the clawback
 24 provisions?
 25 MS ROSS QC: Yes, it is at 3.15 in the terms

1 ought to be allowed to do that to enable it to
 2 continue to use funds to sustain other people.
 3 The reality of course is that on very few
 4 occasions is there any need to invoke that
 5 sort of provision.
 6 MR ANDERSON: I really do not want to
 7 delay you, Miss Ross, but just because the
 8 thought was in my mind, I would be anxious
 9 to know whether that does reflect what is
 10 said in the framework agreement about the
 11 clawback, which for us is at TP22 and
 12 clawback is dealt with at paragraph 59 on
 13 page 63 of the framework agreement. I
 14 appreciate this is nothing more than a
 15 framework agreement so that it does not
 16 necessarily fall to be considered as statutory
 17 and interpreted and weighed, but what it said
 18 in reading the short from line 3, the second
 19 sentence:
 20 "Creative Scotland shall put in place
 21 arrangements sufficient to secure the
 22 repayment of its due share of the proceeds."
 23 That is where - actually I should read the
 24 whole thing.
 25 "Where Creative Scotland has financed

1 and conditions, which is at - these are in the
 2 standard terms and conditions, it starts at
 3 page 65. It is at 66 and over on to 67, it is at
 4 3.15 towards the foot of the page. These are
 5 the standard terms and conditions:
 6 "In the event that you exploit any work,
 7 services, material or intellectual copyrights
 8 from the project in which we are investing
 9 for commercial gain, we reserve the right to
 10 enter into good faith negotiations with you to
 11 discuss appropriate recoupment of funding."
 12 So there is a general provision which can be
 13 invoked. Mr Stevenson in his statement
 14 gives further information about that.
 15 LORD DOHERTY: So it is appropriate
 16 recoupment.
 17 MS ROSS QC: Appropriate recoupment,
 18 yes. Recoupment is not a return --
 19 LORD DOHERTY: It is of the funding.
 20 MS ROSS QC: It is of the funding, yes.
 21 LORD DOHERTY: Yes.
 22 MS ROSS QC: Clearly that is - again taking
 23 a step back from the general principle of
 24 providing public funding for the arts, the
 25 expectation is that a body supporting the arts

1 expenditure or assets by a third party,
 2 Creative Scotland shall make appropriate
 3 arrangements to ensure that any such assets
 4 above an agreed value are not disposed of by
 5 the third party without Creative Scotland's
 6 prior consent. Creative Scotland shall put in
 7 place arrangements sufficient to secure the
 8 repayment of its due share of the proceeds."
 9 MS ROSS QC: Or an appropriate - yes.
 10 MR ANDERSON: "Or an appropriate
 11 proportion of them."
 12 Now if you were to take the J K Rowling
 13 example and suppose that Creative Scotland
 14 had identified J K Rowling as an individual
 15 author who they wanted to support, the first
 16 book is an immediate spectacular success.
 17 The value of the asset is then huge.
 18 MS ROSS QC: Yes.
 19 MR ANDERSON: Would that then have
 20 entitled Creative Scotland to say a due share
 21 of the proceeds is going to represent a
 22 proportion represented by the original
 23 contribution that we made to this?
 24 MS ROSS QC: No. In my submission it
 25 does not. This encompasses what can

1 actually happen in process, which is the
 2 recoupment. I appreciate that within the
 3 framework agreement "due share" without
 4 otherwise being defined could conceivably
 5 stretch to that but that would run contrary to
 6 the statutory position, which is that it is not
 7 there to make a profit. Moreover, the
 8 difficulty there is that you are almost
 9 working backwards; if something is an
 10 unexpected runaway success, you cannot
 11 then say: "Now we want to take a percentage
 12 stake," you have to have identified that in
 13 advance. The terms and conditions make it
 14 clear that what is reserved is the right to
 15 negotiate for recoupment of the original
 16 stake.
 17 LORD DOHERTY: I wonder whether
 18 paragraph 59, in referring to expenditure and
 19 assets, is really envisaging the situation
 20 where there have been grants, because third
 21 party grants are dealt with separately.
 22 MS ROSS QC: Yes. I understand that - if
 23 the Tribunal will bear with me a moment.
 24 (Pause) I do apologise, I would like to make
 25 absolutely sure that I am representing the

1 so it is not investing in any conventional
 2 sense of that term.
 3 (11.15)
 4 Moreover, the second layer of identity as a
 5 non-commercial activity is that the projects
 6 themselves are not supposed to be exploited
 7 for commercial gain. That is one of the
 8 conditions; that is something that is overall
 9 in common to the provision of funding that is
 10 made by Creative Scotland. So in these
 11 multiple ways we see that there is not
 12 intended to be commercial gain. It is that the
 13 priority is on the promotion of the arts.
 14 I paused in dealing with the discussion of
 15 Advocate General Maduro to distinguish the
 16 conventional investor as it were acting in a
 17 market, to distinguish that from the role of
 18 Creative Scotland or the other provider of
 19 funds. The point where I paused there, it is
 20 page 394:
 21 "It is not the mere fact that the activity may
 22 in theory be carried on by private operators
 23 which is decisive, but the fact that the
 24 activity is carried on under market
 25 conditions. Those conditions are

1 position correctly. (Pause) Whilst I see that
 2 this is in the context here of assets and it
 3 follows the references there to the recording
 4 of assets to insurance, procurement and so
 5 forth, it does appear at the end as a general
 6 provision allowing clawback, but the
 7 instructions that I have are that that is not
 8 used, and in any event they apply to third
 9 party grants to which reference is made in
 10 paragraphs 51 and 52.
 11 MR ANDERSON: Yes, I looked at those.
 12 Are we not dealing with third party grant
 13 here?
 14 MS ROSS QC: It is a grant - yes.
 15 Stepping back then to the question of what
 16 the commercial nature of the activity is, what
 17 I have emphasised so far is the distinction
 18 between the investor who invests in the
 19 expectation of a return, which is a profit, and
 20 the person such as Creative Scotland or the
 21 philanthropist or the charity or the person
 22 who puts in money with a condition that it is
 23 to be repaid in the event of success but with
 24 no further additional profit, that that is not
 25 investing for a return

1 distinguished by conduct which is undertaken
 2 with the objective of capitalisation which is
 3 incompatible with the principle of solidarity.
 4 That allows it to be determined whether a
 5 market exists or not even if the legislation in
 6 force prevents genuine competition emerging
 7 on that market. By contrast, where the State
 8 allows partial competition to arise, the
 9 activity in question necessarily implies
 10 participation in a market."
 11 In my submission, the important point there
 12 is that what distinguishes it is the objective of
 13 capitalisation or profit generation, and if that
 14 is not there then these are not market
 15 conditions.
 16 MR ANDERSON: We will try not to
 17 interrupt you again for ages, Ms Ross, but
 18 can you help me with this: where the
 19 objective is capitalisation, does that have to
 20 be the objective only of the person
 21 introducing the money, or could it be a result
 22 for somebody else, notably in this case either
 23 an author or perhaps the publisher who is
 24 receiving the funding?
 25 MS ROSS QC: Well I am not sure I have

1 understood the question. In explaining
 2 before that there are different layers of
 3 assessing what it means to be "not
 4 commercial". In the first place Creative
 5 Scotland is not investing -- it is not investing
 6 at all -- but it is not putting in money with the
 7 objective of capitalisation.
 8 MR ANDERSON: For itself. I see that.
 9 MS ROSS QC: For itself, yes.
 10 MR ANDERSON: But with the objective of
 11 capitalisation for somebody else?
 12 MS ROSS QC: No, because there is a
 13 requirement that that is not the intention that
 14 it be exploited for commercial gain.
 15 MR ANDERSON: I follow that.
 16 MS ROSS QC: Of course, it may be that, if
 17 the assessment is made by looking project by
 18 project, if funding is not provided then this is
 19 not going to be published, this is not going to
 20 happen. It is dependent on funding for the
 21 small run --
 22 LORD DOHERTY: If we look at the OPF
 23 funding it is a condition that during the
 24 project period there will not be a profit.
 25 MS ROSS QC: Yes.

1 LORD DOHERTY: Essentially, if I have
 2 understood it correctly?
 3 MS ROSS QC: That is part of it. That is
 4 correct. So it is intended to fund that which
 5 would not otherwise be capable of being
 6 published. You cannot rule out that the very
 7 small project where a decision has been taken
 8 that, because of artistic merits; and because
 9 of the application that has been made; and
 10 the content of it; but the finance is not there
 11 otherwise, that it is possible that it does
 12 unexpectedly become a success, it wins an
 13 award or a prize and it is on the stands in all
 14 the bookshops and lots of people want to buy
 15 it. It would be ridiculous to suggest that the
 16 book publisher cannot do that. It is in the
 17 nature of things very unlikely, and that
 18 explains why in reality the recoupment has
 19 not been a marked feature of the activities of
 20 Creative Scotland. So those are the two
 21 bases where it is possible to see that this is
 22 not dealing with a commercial activity.
 23 I do not propose to say anything more about
 24 the authorities that are mentioned
 25 specifically. As I said a little while ago, I

1 plan to return at the end to conclude by
 2 looking at the way in which these are all
 3 drawn together in the decision in UKRS, so it
 4 is not the last word on the law, but it is the
 5 introduction to explain why we are in the
 6 position that we are, why this is not a
 7 commercial activity and why, as has been set
 8 out in the written submission that this is not a
 9 body which is exercising public powers
 10 which are typical of a public authority and it
 11 is not otherwise engaging in an economic
 12 activity.
 13 How all of this is done is set out, as I have
 14 explained, in Mr Stevenson's statement. Mr
 15 Stevenson is the Director of Finance within
 16 Creative Scotland. I am conscious of the
 17 time and I do not propose to take the
 18 Tribunal through this statement in any detail;
 19 I appreciate they have already had the
 20 opportunity to read it. Mr Stevenson, it will
 21 be seen, sets out what Creative Scotland do.
 22 He takes the reader through the main
 23 functions: through funding, advocacy,
 24 development and influencing. He explains
 25 the distinction between the different sorts of

1 funding, and here we are dealing with the
 2 Open Project Fund. He explains the market
 3 context for publishing (page 4 paragraph 9)
 4 and explains that the Scottish book market is
 5 not a distinct entity. Really publishing takes
 6 place within the market of the United
 7 Kingdom and Ireland. He explains broadly
 8 how publishing works within the United
 9 Kingdom and the purpose of Creative
 10 Scotland's support for it. He thereafter
 11 explains what the criteria of the Open Project
 12 Fund itself are, and he deals with that in
 13 some detail.
 14 Coming to the point on recoupment, he
 15 explains at paragraph 16 that:
 16 "In practice of approximately 500 awards
 17 made per year through the Open Project Fund
 18 approximately 15 grant recoupments or
 19 reductions take place and these are usually
 20 small amounts of less than £5,000."
 21 There are various appendices which are
 22 included there, which set out some of the
 23 statistics.
 24 I indicated earlier that I would refer to certain
 25 of the productions, but to some extent that

1 ground has already been covered. We have
 2 already considered the framework document
 3 and the standard terms and conditions. The
 4 Scottish Government letter is the fourth item,
 5 it is page 24. I do not propose to go back to
 6 the framework agreement or the terms and
 7 conditions, but dealing with the Scottish
 8 Government letter, I draw the Tribunal's
 9 attention to this letter again just to illustrate
 10 the nature of the public status of Creative
 11 Scotland and, in particular, the Minister's
 12 letter on the second page:
 13 "In accordance with my earlier guidance
 14 letter I expect there to be a strong narrative
 15 from Creative Scotland as to how the totality
 16 of funding for the RF programme supports
 17 common priorities, including developing an
 18 inclusive economy and strengthening
 19 employment opportunities, supporting
 20 geographical reach and diversity, audience
 21 development, educational attainment,
 22 creative learning and youth arts. This will be
 23 in addition to a clear understanding as to how
 24 your decisions will support the arts, including
 25 in particular art form development, screen

1 and creative industries."
 2 So we see there that is perhaps drawing
 3 together the proper way of approaching how
 4 one conceives of "investment". What you
 5 see is the Government-supported purpose of
 6 providing this funding.
 7 I am of course content to deal with further
 8 questions arising from the documents that are
 9 before the Tribunal, but it is not necessary in
 10 my submission to deal with these in any
 11 further detail, and I propose at this point to
 12 turn to deal with the pursuer's argument as
 13 set out in his skeleton. Because I think it is
 14 in looking at this that we see where the
 15 difficulties with the argument arise.
 16 In my submission there are perhaps six
 17 principal difficulties which may not be an
 18 entirely exhaustive list with the way in which
 19 in the --
 20 LORD DOHERTY: This is the Pursuer's
 21 reply, TP19?
 22 MS ROSS QC: The Purser's reply, yes. It is
 23 the Purser's reply to the Defender's skeleton
 24 argument; it is a 12-page document.
 25 In my submission there are six chief

1 difficulties. The first is a discrete point and it
 2 is something which arises both out of this
 3 skeleton argument but also it is a feature of
 4 the pursuer's original claim, and it is this. It's
 5 to do with the lack of substantiation for what
 6 are, in fact, fairly serious allegations made
 7 of, in some cases, quite serious wrongdoing,
 8 but without evidence or even an explanation.
 9 In the claim itself there are allegations made
 10 of people who are not party to these
 11 proceedings acting in conflict of interest
 12 situations, and there are allegations made
 13 about misrepresentations having been made
 14 in the claim form itself. But the examples
 15 that I particularly focus on are in the skeleton
 16 argument for the pursuer, and if I could direct
 17 the tribunal's attention, first of all, to
 18 paragraph 16, where there is reference made
 19 to "The defender claims that grants to
 20 publishers relate to specific titles" and then
 21 the assertion there is: "In practice grants do
 22 not always relate to specific titles.
 23 Sandstone's 2013 application was approved
 24 despite the defender's investment assessment
 25 stating...", and there's an excerpt given there.

1 I pause. In 2013, it was before the open
 2 project fund existed. It's an entirely different
 3 operation. But then the question that we see
 4 there: "Did the list which is now on file
 5 reflect what was actually published or was it
 6 concocted to ensure there was a list, any list?
 7 Given that the defender could not be certain
 8 which title Sandstone had published since it
 9 did not sign them up, how could it judge the
 10 budget on which its overall assessment
 11 relied?" Well, there's a question, a rhetorical
 12 question, there suggesting that something has
 13 taken place, that a list has been concocted.
 14 That is in essence an allegation of – well, of
 15 wrongdoing.
 16 Another example is in paragraph 24 where
 17 again we see a list of what are probably
 18 rhetorical questions. "Do the authors" – this
 19 is to do with advances provided to authors.
 20 Paragraph 24 on page 5: "Do the authors
 21 receive 100 per cent of the advances detailed
 22 in OPF applications? Sandstone has asked
 23 the defender to fund larger advances. What
 24 is stop some or all of an advance being
 25 retained by Sandstone and set against its

1 huge losses? The defender does not seek
 2 copies of signed contracts. A publisher could
 3 say it needs 10K for an advance but have
 4 agreed 2K with the author who has no way of
 5 knowing what the publisher has applied for."
 6 There is no basis for that at all. It comes
 7 very close to an allegation, frankly, of fraud,
 8 because a publisher that tells the author one
 9 thing but seeks funding on the basis of
 10 something else – well, on one view that
 11 would be fraudulent behaviour. It will not
 12 do, in my submission, for these to be phrased
 13 as rhetorical questions or somehow as
 14 insinuations, and I appreciate that certain
 15 allowances do have to be made, of course,
 16 for the fact that Mr Charters is representing
 17 his own company essentially as a party
 18 litigant, but these are the sorts of approaches
 19 to pleadings and to litigation generally that
 20 ought not to be allowed.
 21 So that's the first difficulty, – and these sorts
 22 of insinuations appear in different places in
 23 the argument.
 24 The second difficulty that arises when one
 25 considers Mr Charters' argument is that it

1 relies over and over again on a repeated and
 2 obvious mischaracterisation of the defender's
 3 argument. The defender has endeavoured to
 4 approach these proceedings explaining by
 5 reference to the case law and by reference to
 6 its own activities what its position is. But the
 7 approach taken by the pursuer is to turn that
 8 around and present it as something which it
 9 is not. So, for example, we see at paragraph
 10 6 in the written argument in the reply: "We
 11 acknowledge the defender's statement that it
 12 '...disputes jurisdiction solely on the basis
 13 that it is not an undertaking'. This recognises
 14 that two of the three exemptions it originally
 15 claimed are invalid, namely that it was
 16 exempt by virtue of having been established
 17 by statute (no such exemption is available)
 18 and exempt because the actions complained
 19 of were required by statute (which they were
 20 not)."
 21 Now, it might be a small point but it just
 22 mischaracterises the way in which the
 23 defender has advanced its argument. There
 24 is no claim that being established by virtue of
 25 statute is in itself sufficient. As I explained

1 earlier in discussion, one has to look at a
 2 range of things. There's a multi-layered
 3 approach to assessing whether something is
 4 or is not commercial or an economic activity,
 5 and the fact that a body is established by
 6 statute is one of the factors to take into
 7 account. It may not be decisive,
 8 determinative, but it is something to take into
 9 account, and that has all been explained, and
 10 instead what we see in a reply is that this is
 11 then characterised as somehow an acceptance
 12 of that is invalid.
 13 It's probably an appropriate point, perhaps, to
 14 pause and to make one slight correction to
 15 my own note of argument, the skeleton
 16 statement for the defenders. The pursuer's
 17 reply alleges that the defender makes a false
 18 statement. In fact, it's a typographical error.
 19 The reference in the footnote should have
 20 been to paragraph 6.3.1, not to 6.3.3.
 21 LORD DOHERTY: Where is this in your
 22 note?
 23 MS ROSS QC: It's at footnote 28. It's the
 24 amended claim. That should read 6.3.1. I
 25 understand that perhaps it's a trivial point, but

1 it's just not appropriate to refer to that as a
 2 false statement.
 3 MR CHARTERS: Could I intervene
 4 momentarily just to correct a point of fact?
 5 LORD DOHERTY: You'll have an
 6 opportunity to come back.
 7 MS ROSS QC: Bear with me one moment.
 8 (Pause) I anticipate it may assist to refer to
 9 the... I'm going to deal with the detail
 10 because it may assist Mr Charters in what I
 11 anticipate that he may wish to say, because I
 12 think one of the numbers also requires to be
 13 corrected. The footnote reference requires to
 14 be corrected but there is also a small point in
 15 relation to the number of years. The
 16 reference that is made in the skeleton
 17 argument at – I do apologise for the delay
 18 here. The reference is in paragraph 25 of the
 19 defender's skeleton argument which is where
 20 footnote 28 appears. The sentence is "The
 21 pursuer emphasised in particular the funding
 22 of Sandstone which it claims has received
 23 OPF funding in at least 11 of the past 17
 24 years." It should be to 6.3.1 and I understand
 25 that it should be 13 times in the last 17 years,

1 rather than 11. In my submission that is of
 2 no materiality. It is a small error and it does
 3 not –
 4 LORD DOHERTY: I had better look at it.
 5 It's paragraph 25 and you say it should be –
 6 MS ROSS QC: It should be 13 out of the last
 7 17 years.
 8 MR CHARTERS: It should actually be 13 of
 9 the last 14 years. That's what it actually says.
 10 MS ROSS QC: Yes. The reason why this
 11 error came in is that in the original claim
 12 form which was submitted it was 11 out of
 13 17. That's where that was taken from. In the
 14 amended claim form, which was provided on
 15 30th December, the numbers had changed and
 16 what the pursuer now says is that it's 13 out
 17 of the last 14. That's the source of the
 18 mistake; I'm sorry it's taken me so long to
 19 correct it. But it is not on any view a false
 20 statement. But we see it's an example just of,
 21 frankly, mischaracterisation.
 22 The third difficulty which again runs through
 23 the pursuer's submission, the written
 24 submission, the reply, is that there are some
 25 elementary problems with logic. It is not so

1 thing, we see, arises in subsequent parts of
 2 this argument: that the pursuer either sees
 3 something and concludes that something else
 4 must be the case without understanding that
 5 there might be alternative explanations.
 6 That then connects with the fourth difficulty,
 7 which again is a general theme, and it's again
 8 beset by the same logical difficulty. It seems
 9 to be the pursuer's position that because
 10 money is involved, because the activity is the
 11 provision of funding - that it must therefore
 12 be a commercial activity, and further that
 13 because money is involved, because
 14 payments of money are involved, that must
 15 affect competition. And in some respects it's
 16 quite an easy mistake to make, an easy trap
 17 into which to fall: if it involves money it
 18 must be economic. But it does not follow
 19 from the existence of payments that the party
 20 making those payments or awarding that
 21 money is carrying out economic activity.
 22 The pursuer's logic seems to be that Creative
 23 Scotland is putting money into the arts and
 24 publishing and that looks a bit like investing,
 25 because, after all, investors in the

1 much the legal analysis, although we'll come
 2 to that in a moment, but just with simple
 3 logic, and the first example that I would
 4 direct the tribunal's attention to in relation to
 5 this is paragraph 12 of the pursuers reply
 6 where the observation is made: "The
 7 defender has not set out any advice taken
 8 prior to this case as to whether any of its
 9 actions are
 10 governed by CA98. We conclude that it
 11 assumed, without checking, that it was
 12 exempt from CA98 in every regard.
 13 Ignorance of the law is not a valid defence."
 14 Well, that is the equivalent of saying: I do
 15 not see X, therefore X does not exist, and that
 16 is a very shaky assumption on which to base
 17 any argument at all. It does not allow for the
 18 possibility, indeed the likelihood, that a party
 19 which has received advice is not going to
 20 publish that legal advice, and it's also a
 21 surprising assumption that a public body
 22 does not take any advice at all on the
 23 lawfulness of its activities. But it's this sort of
 24 problem; it's perhaps an easy one because it's
 25 expressed very briefly, but the same sort of

1 conventional sense put money into
 2 something. So because it looks a bit like
 3 investing, because it looks a bit like what an
 4 investor would do, therefore it is investing.
 5 And then his next step is to say: Well,
 6 because it is investing, then that means that
 7 there is therefore an investment market.
 8 Because, after all, the nature of the market –
 9 and in my submission we don't need to get
 10 into this at all because Creative Scotland is
 11 not an undertaking, but if we ever were to be
 12 looking at the concept of the market, it is
 13 wholly unclear whether the pursuer's position
 14 is that we're talking about the publishing
 15 market, in which case it's not just the
 16 publishing, it's not confined to Scotland, it's a
 17 wider market than that, it's a UK and Ireland
 18 market, but that apparently is not what he's
 19 talking about. The pursuer seems separately
 20 to be talking about an investment market in
 21 publishing. But all of this is based on the
 22 same shaky foundation that he's made the
 23 assumption that money, therefore investment;
 24 investment, therefore investment market.
 25 But then he makes the leap beyond that, that

1 Creative Scotland is then in a dominant
2 position in that market, and beyond that he
3 then has to make the further assumption that
4 it's in a dominant position and it's abusing
5 that dominant position.
6 Now, in my submission it falls down at the
7 very first of those shaky assumptions.
8 Putting money into something does not mean
9 that it is investing, which means that Creative
10 Scotland, if it comes unstuck there, and in
11 my submission the argument does come
12 wholly unstuck at that point, then Creative
13 Scotland is not in a position at all in the
14 market, let alone a dominant position, let
15 alone abusing a dominant position.
16 So the whole flaw here is in mis-describing
17 Creative Scotland as an investor. That's a
18 wrong description and it's misleading, and
19 that seems to arise as a result of seeing
20 everything through the lens of the provision
21 of money, but there are no returns and there
22 are not expected to be returns, for the reasons
23 that I've set out earlier. There is no objective
24 of capitalisation which comes from the
25 observations of the Advocate General in

1 FENIN. There's no objective of
2 capitalisation. Then there are the two layers
3 of non-commercial behaviour. There's no
4 investment for a return and the projects
5 themselves, it's part of the condition that they
6 are not done with the intention of commercial
7 gain. As I said earlier, in some cases, in
8 those unusual cases, there may be
9 commercial success and recoupment but that
10 is just recovering the original money and it is
11 not a profit.
12 On one view I suppose it is possible that in
13 those rare examples where something does
14 become a success, if one sees the original
15 payment as something that is recouped as
16 even being close to investment, then on that
17 analysis Creative Scotland would only
18 become an investor in the event of success,
19 and that can't be right. It can't be that you
20 have a position in the market only in the
21 successful cases or only in the handful of
22 cases where there is commercial success
23 generated. It doesn't –
24 PETER ANDERSON: Could you not carry
25 two statuses for one project - and so it could

1 be a "supporter", if I can use that expression,
2 for one- but then if another one takes off and
3 it become an "investor"? Or not?
4 MS ROSS QC: No, not after the event. You
5 can't change your status and there can't be an
6 investment market that only exists for those
7 projects which turn out to be successful.
8 That would be a –
9 LORD DOHERTY: What it really comes
10 down to is you're saying all that Creative
11 Scotland could get at best would be
12 recoupment.
13 MS ROSS QC: Yes.
14 LORD DOHERTY: And you say that's not
15 an investment.
16 (11.45)
17 MS ROSS QC: That is not an investment at
18 all. Once one leaves behind the metaphorical
19 sense of public good, but it is best, in my
20 submission, for these purposes to set that
21 entirely to one side. Recoupment in those
22 very unusual circumstances is not
23 investment, in any realistic sense that is
24 relevant for the purposes of competition law
25 and an understanding of what the market is.

1 PROFESSOR ULPH: The investor you are
2 talking about is an example of one that was
3 making an investment for the purposes of
4 getting financial returns.
5 MS ROSS QC: Yes.
6 PROFESSOR ULPH: And they might make
7 a range of investments, some of which are
8 good, some of which are bad.
9 MS ROSS QC: Yes.
10 PROFESSOR ULPH: So it makes some
11 losses and it makes some gains. On average
12 it nets out. So if it nets out to zero ...
13 MS ROSS QC: Yes.
14 PROFESSOR ULPH: ... it can still exist in
15 the market.
16 MS ROSS QC: Yes.
17 PROFESSOR ULPH: And fund more
18 projects.
19 MS ROSS QC: Yes.
20 PROFESSOR ULPH: So are you saying it is
21 not investment? Does it have to have
22 positive return?
23 MS ROSS QC: One can - there is plenty of
24 investors who have had their fingers --
25 LORD DOHERTY: It has to be an objective

1 ...
 2 MS ROSS QC: Yes.
 3 LORD DOHERTY: ... where at the
 4 beginning it is possible one can make a
 5 profit.
 6 MS ROSS QC: Yes, exactly so. Stock
 7 market crashes show that there are investors
 8 who lose everything, and they do not become
 9 non-investors by virtue of failure, they are
 10 just bad investors or unlucky investors. Even
 11 if they come out at zero they might actually
 12 be doing quite well in those circumstances
 13 but it is the basis on which they went into
 14 that which is determinative, it is the objective
 15 of capitalisation. In my submission standing
 16 the conditions within which Creative
 17 Scotland operates, its statutory basis, its
 18 public status, its relationship to the
 19 government, its own terms and conditions
 20 which say maximum is recoupment and also
 21 its condition that we are funding that which
 22 is not intended to make a profit, all of that
 23 points to there being no objective of
 24 capitalisation, no objective of profit. It is in
 25 those circumstances that they cannot then

1 usually that would be that sort of setup. For
 2 the sort of individual - and a charity comes to
 3 mind because it is almost, if the objective is
 4 to provide good quality bread and make
 5 enough to sustain the business and no more,
 6 that it could even be of the social enterprise
 7 type bakery, which do exist, in my
 8 submission again that would not be - it
 9 certainly would not be a conventional
 10 investment with the aim of making a profit,
 11 and it is the intention that one goes into.
 12 For private individuals, of course it is very
 13 difficult to tell. The bakery might be selling
 14 hot cakes and do terrifically well and you
 15 cannot help yourself but you are generating
 16 the money, and you might change your mind
 17 and say: "Well, actually this is all rather nice
 18 and I will just put it in the bank," or if you
 19 are sticking to your original principles of
 20 providing nice bread for everybody you
 21 might just open up and make more bread.
 22 One can think further as to how the
 23 individual investor is categorised.
 24 None of that though in my submission would
 25 play back into saying: therefore you have to

1 after the event be labelled as an investor
 2 because something happens to have been
 3 successful, especially when even then they
 4 are not in a position to derive a profit from
 5 that.
 6 PROFESSOR ULPH: So if I was, say, a
 7 successful person in business who decided I
 8 wanted to give all this up ...
 9 MS ROSS QC: Yes.
 10 PROFESSOR ULPH: ... For example, if I
 11 was to open an artisan bakery and produce
 12 high quality bread for the benefit of other
 13 people, not aiming to make an overall
 14 financial return just enough to keep me
 15 solvent and pay my bills, how would you
 16 classify that? They are competing other
 17 bakers, for the sake of argument. They are
 18 not for philanthropy, they are doing it
 19 because they believe in producing nice bread.
 20 MS ROSS QC: That takes one into quite a
 21 range of questions. I will answer the
 22 question but it puts in mind, for example, a
 23 charity which conducts a trading enterprise,
 24 but there, for that to happen, the returns then
 25 have to be fed back into the charity, and

1 look at Creative Scotland in a different way.
 2 It is in a different category to the charity or
 3 the individual person or the ...
 4 LORD DOHERTY: There would still be the
 5 differences. The artisan baker would not be a
 6 public body doing it for public purposes,
 7 exercising public powers ...
 8 MS ROSS QC: Yes.
 9 LORD DOHERTY: ... doing something
 10 typical of the exercise of such powers. So
 11 there would be those distinctions certainly.
 12 MS ROSS QC: Yes. I suppose one could
 13 take this analogy and go a little bit further.
 14 Let's say the very wealthy person who really
 15 likes baking decides to open up the wonder
 16 bakery and likes bread so much and likes
 17 people to have bread so much that that then
 18 results in disruption of competition with
 19 other bakers. There might be a whole set of
 20 different questions about whether that baker
 21 started out life as an undertaking, whether
 22 because of profit it somehow changed its
 23 status. But you would be looking at the
 24 bread market. None of that - it is not the
 25 investor status of it which is important, it is

1 the activity which is carried on, the basis on
 2 which it is carried on, and if it is just a
 3 private individual none of that is in any way
 4 comparable to, respectfully, your Lordship in
 5 the Chair, the market in which, or the area of
 6 activity in which Creative Scotland operates.
 7 The fifth difficulty is possibly the most
 8 serious one, and that is that the whole
 9 premise of the pursuer's argument is flawed
 10 for this reason, because the pursuer is
 11 working backwards from effect. The logical
 12 difficulties which I have already alluded to
 13 infect the quality of the reasoning but this is
 14 the really fundamental problem. The pursuer
 15 says that there is a distinction between
 16 intention and effect, and that is obviously
 17 acknowledged. You may not intend to abuse
 18 your dominant position but if the effect is an
 19 impact on competition, then there will be a
 20 breach. That is a banal statement. That is
 21 true if you are an undertaking. None of that
 22 helps to determine whether or not you are an
 23 undertaking.
 24 The pursuer's approach is to see bad effects,
 25 he says - that is not accepted but that is what

1 effect on competition and therefore there is a
 2 breach of competition law. To which the
 3 answer is: no, it is only if undertakings
 4 behave in a way which affects competition
 5 law that any question of breach arises. None
 6 of the allegations which are made goes to the
 7 question of whether or not Creative Scotland
 8 is an undertaking, and everything that the
 9 pursuer says assumes that it already is.
 10 I mentioned earlier that the second difficulty
 11 is the faulty assumption problem. I
 12 mentioned earlier the reference to the
 13 existence of legal advice. In that instance the
 14 pursuer did not see X, legal advice, and
 15 therefore concluded that it did not exist.
 16 Conversely, here the pursuer sees an effect
 17 and concludes that it must have a cause,
 18 which is a breach of competition law. Now,
 19 as a matter of logic, effects do have causes,
 20 but what the pursuer is doing is running the
 21 identification of the cause into a breach of
 22 competition law, and there is no basis for
 23 doing that. The pursuer in my submission is
 24 approaching the question in entirely the
 25 wrong way by attempting to work backwards

1 he says - and to work back from that and say:
 2 therefore it is Creative Scotland's fault and
 3 Creative Scotland is an undertaking. That is
 4 a very basic flaw.
 5 The pursuer's approach is to make lots of
 6 allegations; his whole claim and his whole
 7 reply are full of all sorts of allegations, very
 8 few of which are substantiated in any way
 9 and some, as I have already said go rather too
 10 far. But in making lots of allegations there is
 11 a result in obscuring what Creative Scotland's
 12 functions actually are. Most of the
 13 allegations are based on assumption and
 14 speculation. Most, if not all, are wrong.
 15 Even if they are right - this is the critical
 16 point - even if Mr Charters, even if the
 17 pursuer is right (and they are not) then they
 18 all go to how Creative Scotland is fulfilling
 19 its function, not what its function is.
 20 In essence, what the pursuer says is that
 21 Creative Scotland are doing the wrong thing,
 22 and that is either fraudulently or carelessly or
 23 incompetently or in some other way he says
 24 that Creative Scotland are doing the wrong
 25 thing, that doing the wrong thing is having an

1 from effect and coming to the conclusion of
 2 breach.
 3 Instead, in my submission the proper
 4 approach is this: to ask to whom does the law
 5 apply, what does the law require, what is the
 6 activity and does that activity contravene the
 7 law? At that stage you would then begin to
 8 look at the effect. Of course it is right to say
 9 it is not the intention, it is the effect, but you
 10 only start looking at effect once you have
 11 traced it through and understood the answers
 12 to the questions which I have just set out.
 13 So the pursuer here sees an effect, he sees
 14 other publishers have received funding
 15 whereas his own applications have been
 16 turned down, although the pursuer has
 17 received funding in the past but the pursuer's
 18 funding applications have been turned down,
 19 others have received funding. The pursuer
 20 also sees a long list of things to complain
 21 about. He has identified broadly an alleged
 22 failure to follow proper procedures, an
 23 alleged misapplication of criteria, he claims
 24 that there has been insufficient rigour,
 25 unequal treatment. He concludes from all of

1 that that there must be a breach of
 2 competition law, and that is the error.
 3 The basic fallacy in the pursuer's reasoning
 4 can maybe be illustrated in this way, that
 5 what he says is that there is an effect on
 6 competition, therefore there is a breach. To
 7 take two possible analogies, and these are
 8 maybe out there with the bakeries, an
 9 analogy is that: say there are several
 10 companies which operate in a market, let's
 11 call them bakeries, and two bakeries are
 12 given a Royal warrant because the quality of
 13 the bread is good. They benefit as a result of
 14 getting the Royal warrant, and their
 15 competitors lose out and they think that that
 16 is unfair. Now, that may be an effect on
 17 competition but it does not make the Queen
 18 an undertaking. You can identify what has
 19 happened but you cannot reverse it back and
 20 say the cause of that, the Queen, is an
 21 undertaking.
 22 Let's say there are two bakeries, each one has
 23 built up a good factory and one bakery burns
 24 down, it is arson. So that company, that
 25 bakery cannot compete any more, and the

1 other bakery benefits. The actions of the
 2 arsonist have had an effect on competition,
 3 but the arsonist is not an undertaking.
 4 It is the same - these might seem trivial, but
 5 the logical flaw is the same in the pursuer's
 6 case. He is making a similar error. The
 7 pursuer sees a bad thing and believes that it is
 8 having an effect. Now, perhaps it is, perhaps
 9 he is right, he has alleged bad things are
 10 taking place, but it does not follow that it is a
 11 breach of competition law.
 12 Even if the pursuer is right that Creative
 13 Scotland is not following its own procedures,
 14 it is not applying the right criteria, it is
 15 paying too much, it is favouring some people
 16 rather than others, there are perfectly proper
 17 mechanisms for regulating that, either
 18 through State aid or through judicial review.
 19 That is perhaps an answer to the pursuer's
 20 final complaint about the risk of tyranny, that
 21 there are procedures which are available.
 22 When one understands the pursuer's whole
 23 approach in that way one sees the basic error.
 24 To take an example of how this faulty logic
 25 can be seen in the skeleton, at page 9 at

1 paragraph 53:
 2 "The defender's actions have had a
 3 significant capitalisation effect in the market.
 4 Although the defender does not take
 5 shareholdings in publishing companies, it
 6 directly affects their capitalisations by
 7 supplying cash."
 8 He goes on in some detail to explain what he
 9 sees as the effect. He goes on down the
 10 page:
 11 "We have noted capitalisation effects, there
 12 is cash flow effects."
 13 But all of this is intended to answer the point
 14 that this is not a market, this is not an
 15 investment, this is not commercial activity.
 16 The only explanation that we come to is at
 17 paragraph 59:
 18 "In contesting jurisdiction the defender is
 19 asking the tribunal to find that evidenced
 20 non-regulatory economic impact does not
 21 amount to economic activity. That would be
 22 perverse."
 23 In my submission there is no perversity at all
 24 in the defender's position. It is not to say that
 25 the actions of a public body are unregulated.

1 Far from it. Public bodies, especially those
 2 that spend money, are heavily regulated, and
 3 ultimately in the courts, whether through
 4 State aid or through conventional judicial
 5 review.
 6 Taken to its extreme, the logic of the
 7 pursuer's position would be that everything
 8 that a public body that is making grants does
 9 is within the realms of competition law. If
 10 that were right, there would be no need at all
 11 for any provision for State aid regulation.
 12 And there is. That is exactly the point of
 13 State aid regulation, in the treaty and as
 14 enforced, including in the domestic courts.
 15 The sixth and final difficulty, and this is
 16 really my conclusion, deals with the pursuer's
 17 treatment of the law. I indicated at the outset
 18 that I proposed to draw everything together
 19 by reference to the decision of the tribunal in
 20 the UKRS Training decision, which is the
 21 second authority in the bundle, it starts at
 22 page 32. If I could invite the Tribunal to
 23 have a number of documents in front of them
 24 as I endeavour to draw these points together.
 25 In the first place there is the decision itself.

1 The highlighted paragraphs deal with a very
 2 helpful summary which I do not propose to
 3 read but which that summary covers all of
 4 the authorities which have been cited by the
 5 defenders, and these are drawn together then
 6 in the guidance and considerations which
 7 start at paragraph 67, and there are six points
 8 there.
 9 Perhaps the most helpful way into the
 10 defender's position is by considering the
 11 defender's application in relation to the
 12 jurisdiction argument. This is not repeated in
 13 the skeleton argument but if I could refer the
 14 Tribunal to paragraph 2.10 of the application
 15 itself, where the defenders have taken these
 16 points of guidance and have responded to
 17 each of them.
 18 LORD DOHERTY: Sorry, paragraph 2.10
 19 of ...?
 20 MS ROSS QC: Paragraph 2.10 of the
 21 defender's, of Creative Scotland's application.
 22 This was the application ...
 23 LORD DOHERTY: Yes.
 24 MS ROSS QC: At that paragraph we have
 25 taken the guidance from the tribunal, which

1 Creative Scotland is for: it is for dispersing
 2 public funds to support the arts. There is no
 3 separate discreet function.
 4 The second part of the guidance from the
 5 tribunal: "Where the activity is of a nature, a
 6 core function of the State, the body will not be
 7 an undertaking." Now, the Creative Scotland
 8 position is that providing grant funding for
 9 cultural purposes is a function of the State. As
 10 is acknowledged, there might be some room
 11 for discussion about whether funding the arts
 12 is core in the sense that air traffic control or
 13 other public functions might be core functions,
 14 but it is something for which provision is made
 15 in statute. It is acknowledged, Parliament has
 16 decided through legislation that that is an
 17 appropriate use of public resource, it is a core
 18 function. Instead, the pursuer's approach is
 19 that the defender does not carry out its
 20 functions on behalf of the ...
 21 MR ANDERSON: Do you say that the
 22 activity in this case is a core function of the
 23 State, or do you simply leave that as
 24 unsure/uncertain?
 25 MS ROSS QC: Parliament has passed

1 starts with a functional approach being
 2 appropriate, and deals with discrete
 3 functions. Then the other document is the
 4 pursuer's own skeleton and at paragraph 60
 5 to 66 of that. The pursuer deals with the tests
 6 or the guidance in this way. The first one:
 7 "Where the tribunal has explained that a
 8 functional approach is appropriate where a
 9 body carries out several activities, it is
 10 necessary to consider whether the activity in
 11 question can properly be regarded as a
 12 discrete function."
 13 (12.15)
 14 The pursuer's position is that it has engaged
 15 in a discrete function. This is the endeavour
 16 to somehow carve out investment finance
 17 from providing project funding.
 18 It is said that these are different in nature and
 19 effect." In my submission, for all of the
 20 reasons already set out, the notion of an
 21 investment function is illusory. There is no
 22 investment function that is separate from the
 23 provision of project funding. Grant funding,
 24 project funding is integral to the purpose, the
 25 very essence of the defender; that is what

1 legislation which says that Creative Scotland
 2 exists in order to - I am paraphrasing, of
 3 course - there is primary legislation which says
 4 that Creative Scotland exists in order to
 5 disperse public funds, and it is not a new thing.
 6 MR ANDERSON: And must do so?
 7 MS ROSS QC: Yes, and that ...
 8 MR ANDERSON: Does that then make it a
 9 core function of the State in order to do so?
 10 MS ROSS QC: I acknowledge that there is,
 11 there might be, room for discussion as to
 12 whether, as to what "core" means. It is, in my
 13 submission, of significance that that is
 14 something that Parliament has recognised
 15 should take place and, moreover, it is not a
 16 new thing; this did not start in 2010. There are
 17 predecessor organisations and, indeed, public
 18 patronage of the arts has a long pedigree. To
 19 that extent, it can be seen as something which
 20 is integral to a healthy society.
 21 LORD DOHERTY: Is it an autonomous EU
 22 notion, or is it something which varies from
 23 State to State where there is a margin of
 24 appreciation?
 25 MS ROSS QC: Well, it cannot be, it is not

1 mandated that every Member State must
 2 provide a minimum level. It is not of that
 3 order. But perhaps an example where one can
 4 see that there is recognised ...
 5 LORD DOHERTY: What I am talking about
 6 is, when - I mean, the word "core" is used by
 7 the Advocate Generals in some of the opinions
 8 ...
 9 MS ROSS QC: Yes.
 10 LORD DOHERTY: ... and the other
 11 expression that is used is "essential" ...
 12 MS ROSS QC: Yes.
 13 LORD DOHERTY: ... and what I am asking
 14 is: are those expressions autonomous EU
 15 expressions, or is it something which will vary
 16 from State to State?
 17 MS ROSS QC: It may vary from State to
 18 State. But what I would say, in addition, is
 19 that, when one looks at the parallel regulation
 20 of State aid, that within the exemption
 21 regulation, within the General Block
 22 Exemption Regulation, there is an
 23 acknowledgement of the roll of cultural
 24 activity there. So, there is, at an EU level,
 25 there is a recognition that States will provide

1 resource, essentially State funding, for cultural
 2 activity. That has been acknowledged within
 3 the General Block Exemption Regulation
 4 made under the Treaty.
 5 LORD DOHERTY: And we have that in the
 6 authorities, do we?
 7 MS ROSS QC: I do not understand that that is
 8 in the authorities. I can provide a reference if
 9 you ...
 10 LORD DOHERTY: Perhaps you can provide
 11 a reference over the lunch break?
 12 MS ROSS QC: I will do that, my Lord. Yes, I
 13 will not say any more about that at the
 14 moment, I will provide the excerpt from the
 15 regulation which supports that. So, there is an
 16 acknowledgement that, at an EU level, that
 17 State provision for cultural purposes is
 18 something which is respected in that
 19 legislative context.
 20 The third part of the guidance: "The fact that
 21 the body ..." - I am taking this from the tribunal
 22 decision - " ... does not operate for a profit is
 23 relevant but by no means decisive." And the
 24 sole point that is made by the pursuer here is
 25 that the defender does not operate for profit

1 does not mean that it is not an economic
 2 undertaking - which is simply to acknowledge
 3 that it is by no means decisive. The
 4 multiplication of negatives there just gets one
 5 to a restatement of what is in the guidance, it
 6 does not - from the tribunal - it does not add
 7 anything at all.
 8 MR ANDERSON: It is just another factor?
 9 MS ROSS QC: It is another factor. But it is a
 10 relevant factor. The defender here, Creative
 11 Scotland, does not operate for profit, it does
 12 not operate as an investor at all. That is a
 13 relevant factor, and that is - not only is it, it is
 14 not just one of those extra little bits and pieces,
 15 it is relevant.
 16 The fourth part of the summary: "Where the
 17 activity in question has been or is also carried
 18 out by a private body on a commercial basis,
 19 that indicates that it is to be regarded as an
 20 economic activity, such that the body carrying
 21 it out is an undertaking." And here - and I do
 22 not propose to repeat all of this: we have dealt
 23 already with the comparison with the
 24 philanthropist or the charity or whatever. And
 25 the critical thing is that it is not the objective: it

1 is the absence of the profit objective there
 2 which is important. And that, again,
 3 distinguishes the arguments that have been
 4 made on behalf of the pursuer here: "Where
 5 investment finance is provided in return for
 6 equity, it is prima facie on a commercial basis.
 7 The question is not whether the defender seeks
 8 returns, it is whether others do. Self-evidently,
 9 shareholders who provide investment capital
 10 to companies do seek a return." But that,
 11 again, is a faulty comparison because we are
 12 not here comparing and contrasting with
 13 investors who invest for profit.
 14 The fifth part: "Where the charges levied by
 15 the body are determined not by it but by a
 16 public authority, that indicates that it is not an
 17 undertaking." There are no charges levied by
 18 Creative Scotland here.
 19 And then, sixthly, the sixth part of the test, or
 20 the guidance: "Where the power exercised by
 21 the body derives directly from legislation or is
 22 exercised on behalf of the State or a public
 23 authority, that indicates that it is not an
 24 undertaking." And, again, this is really
 25 important for the reasons that have been

1 provided by the defender in the application
 2 itself. The power exercised by the defender
 3 derives directly from the 2010 Act and the
 4 defender exercises those powers on behalf of
 5 the State. And we have already seen the letter
 6 from the Minister, we have seen the
 7 framework agreement between the Scottish
 8 Government and Creative Scotland. All of
 9 those flow with the direction here that it is an
 10 indication that it is not an undertaking. And
 11 all that the pursuer comes to with this is that,
 12 "That test considers whether the power
 13 exercised derives directly from legislation or is
 14 exercised on behalf of the State or a public
 15 authority." And he cites there the Competition
 16 and Market Authority guidance, which is
 17 provided, but the excerpt is given there: "The
 18 legislation or other legal instrument must
 19 require undertakings to engage in the
 20 agreement or conduct in question." Now, the
 21 problem here, by relying on that CMA
 22 guidance, is that that is guidance for
 23 undertakings. It is only once you are in ...
 24 LORD DOHERTY: It is the next stage.
 25 MS ROSS QC: Yes, that you look at - and it

1 LORD DOHERTY: Now, do you want a
 2 short break before you start, to think about
 3 what has been said, or would you prefer to
 4 start right-away? Normally, I would have
 5 broken for 15 minutes at about half past 11,
 6 but I did not.
 7 MR CHARTERS: I am more conscious of
 8 everybody else's comfort and convenience,
 9 shall we say.
 10 LORD DOHERTY: I am also thinking a little
 11 bit of the live note people, who do appreciate a
 12 short break.
 13 MR CHARTERS: Yes, my Lord.
 14 LORD DOHERTY: You would. I think we
 15 will take 15 minutes and we will try - let's
 16 make it promptly, 15 minutes.
 17 (Short break)
 18 LORD DOHERTY: Yes, Mr Charters.
 19 MR CHARTERS: Thank you. I will deal
 20 with a number of preliminary points,
 21 responding to points that Ms Ross made earlier
 22 on, and then I will come on to the main section
 23 of our remarks, addressing the issue of
 24 whether Creative Scotland is an undertaking.
 25 Can I first thank Harper Macleod for their

1 is entirely proper that, if you are an
 2 undertaking that is a public body, that you
 3 should be following very strict rules. But it
 4 does not tell you anything at all about whether
 5 or not you are actually an undertaking.
 6 So, when all of these are drawn together by
 7 reference to this list of criteria which derive
 8 from the case law, in my submission, one can
 9 clearly see that they all are consistent with
 10 each other, that they all point in the same
 11 direction and they all show that Creative
 12 Scotland is not an undertaking and that, for
 13 those reasons, this tribunal does not have
 14 jurisdiction. And the endeavour made on the
 15 part of the pursuer to argue otherwise is based
 16 on fundamentally faulty logic which starts at
 17 the end and arrives at a conclusion which is
 18 wholly unfounded. I appreciate I have gone a
 19 little over the estimate provided and I
 20 apologise for that, but those are my
 21 submissions.
 22 LORD DOHERTY: Well, we were 10
 23 minutes later starting, and we have only
 24 overrun by 10 minutes.
 25 MS ROSS QC: I am obliged.

1 assistance in putting together the joint list of
 2 authorities, which is very much appreciated
 3 from our side, as novices in this area. On the
 4 amended claim form, to that point, our feeling
 5 was that, as we also have a business to run for
 6 the rest of the year, over Christmas, we felt it
 7 was better to do as much work as we could
 8 and provide as accurate a claim as possible, to
 9 put that before the tribunal, rather than to
 10 slightly amend what we already had, which
 11 would have given a false impression of the
 12 claim going forward. The HIE letter, we have
 13 dealt with. And on the correspondence issue,
 14 we have deliberately limited our
 15 correspondence directly with Creative
 16 Scotland to matters that require a Creative
 17 Scotland response. So, for example, where we
 18 have made a formal complaint about
 19 something, we could not make that formal
 20 complaint in terms of process through their
 21 lawyers, in our view, and therefore we have
 22 made it directly to Creative Scotland. On the
 23 question of the letter which the tribunal sent to
 24 the defender which asked about the question of
 25 loans and the question of valuation, just a

1 couple of very brief comments on that. Loans
2 are questions that have been - or the provision
3 of loans is a question that has been - raised
4 before, when discussing Creative Scotland's
5 funding, and other than the particular instances
6 that Ms Ross has referred to, the loans have
7 not been generally provided, but there is an
8 ability to provide loans, although I think from
9 memory it may require a particular
10 authorisation to do so. On the question of
11 evaluation, projects are evaluated, but the
12 totality of projects to any given organisation,
13 particularly to any given company, that is not
14 evaluated. So, our understanding is that
15 Creative Scotland does not look at all the
16 instances of provision to any one body and
17 assess what the totality of that provision has
18 given that company and, equally, has given
19 Creative Scotland and, therefore, the public in
20 general in return. On the audit side, we have
21 had some communication with Audit Scotland.
22 Our understanding is that they can only audit
23 the processes that Creative Scotland have put
24 in place. It is not their job primarily to
25 determine whether those are the appropriate

1 processes that have been put in place, but as to
2 whether those processes have been followed
3 by being put in place by the Board. And one
4 particular point: when it evaluates the
5 responses to the project, primarily through the
6 project monitoring form which they refer to,
7 sales are asked for but there is no way of
8 verifying those sales. If a company has made
9 sales directly to the public and has chosen not
10 to put those on there, those are not on there.
11 As far as Creative Scotland is concerned, they
12 simply do not exist. And there is no
13 independent way of verifying those sales in
14 any case; there is no general register of who
15 has sold what in the market. There are some
16 means of assessing that, but they are not
17 specific and they exclude direct sales. I think
18 that will do in terms of the preliminary issues
19 and I will move on to our opening remarks.
20 So, this case is about maintaining the
21 competitive structure of the market and
22 preventing competition being distorted. We
23 contend that the defender has infringed the
24 prohibition on the use of a dominant position
25 contained in Part 1, Chapter 2, s.18 of the

1 Competition Act 1998. And at the substantive
2 hearing, we will show that there is a relevant
3 market on which the defender is dominant and
4 that it has abused its dominance. So, the
5 question of whether we are challenging State
6 funding: the defender claims at 3.2 in its
7 application - that is the rule 34 application -
8 that we, "Seek to challenge the provision of
9 State funding by the defendant to a private
10 entity." First, this is categorically not State
11 funding. It is Creative Scotland funding.
12 Paragraph 8 of the framework document
13 between the Scottish Government and Creative
14 Scotland states, "Creative Scotland does not
15 carry out its functions on behalf of the
16 Crown." Second, we are challenging the
17 manner of the defender's provision of
18 investment finance, not its provision per se.
19 We seek to ensure that this provision in a
20 commercial market is made in accordance
21 with the Competition Act 1998, not contrary to
22 it. The question for this preliminary hearing is
23 whether the defender is an undertaking for the
24 purposes of our claim. We will show that it is
25 by, first, briefly setting out the context of our

1 claim, then examining how the law interprets
2 "undertaking" and then considering what the
3 effect would be if the tribunal found that the
4 defender is not an undertaking. The
5 Competition and Market Authority guidance
6 aims to prevent breaches of prohibition by
7 public bodies. Where prevention fails, the
8 Competition Act provides for remedy, which
9 is what we are seeking in the wider case. We
10 therefore invite the tribunal to accept
11 jurisdiction over our claim and reject the
12 defender's application to have it struck out.
13 So, if I can first turn to context, and the context
14 is important, and we would say that it is the
15 defender's failure to consider context that has
16 in fact led to our claim. In this section we will
17 look at the Open Project Fund itself, at how
18 the Competition and Markets Authority
19 defines "undertaking" and how it expects
20 public bodies to determine if they are acting as
21 one, then briefly at the exemptions that the
22 defender has claimed, which Ms Ross has to
23 some extent covered, and also at intent versus
24 effect.
25 So, the Open Project Fund, first of all.

1 Creative Scotland, the defender, subsidizes
 2 creative output through various programmes,
 3 and the one relevant to our claim is its Open
 4 Project Fund. The Open Project Fund is not a
 5 statutory requirement. Creative Scotland
 6 chose to set it up. It operates it under its rules,
 7 not the rules imposed in any way upon it. The
 8 defender acknowledges at paragraph 66 in its
 9 skeleton argument that, "Competition law is
 10 concerned with the effect of conduct and not
 11 just the intention behind that conduct."
 12 However, it then sets out only the intentions
 13 behind its OPF and ignores the effect of the
 14 way in which it has actually been operated.
 15 The effect of the defender's operation of OPF
 16 has been to materially distort, we say,
 17 competition in Scotland's commercial book
 18 publishing market. Certain companies have
 19 received OPF investment finance annually.
 20 Two, Birlinn and Floris, have net assets of
 21 almost £2 million and dominate segments of
 22 the Scottish market. Both have made large
 23 profits, resulting in substantial distributions.
 24 The third, Sandstone Press, is the defender's
 25 most funded publisher. It has received £0.41

1 million of investment finance and has had that
 2 added to its balance sheet by the defender and
 3 its predecessors, and it has been financed for
 4 14 consecutive years - and I will repeat that:
 5 14 consecutive years. It has ...
 6 LORD DOHERTY: I mean, Creative
 7 Scotland has only been in existence for less
 8 than 10, so ...
 9 MR CHARTERS: That is why I referred to
 10 the point about its predecessors as well. So,
 11 between its predecessors and Creative
 12 Scotland, it has been funded for 14
 13 consecutive years.
 14 MR ANDERSON: Forgive me if I am wrong,
 15 but the OPF has only existed from about 2014,
 16 is that not right?
 17 MR CHARTERS: That is correct.
 18 MR ANDERSON: So, really, you cannot
 19 compare prior arrangements on any logical
 20 basis because we do not know the basis of
 21 those, and it is the OPF that you are protesting
 22 about ...
 23 MR CHARTERS: It is particularly the
 24 application of OPF.
 25 MR ANDERSON: So, anything prior to 2014

1 is not of real relevance?
 2 MR CHARTERS: We would say that the
 3 context is relevant because we would argue
 4 that Creative Scotland should look at the
 5 totality of its funding. So, if it has funded for,
 6 and its predecessors have funded over a
 7 number of years, then that has a cumulative
 8 effect, which is something which we will talk
 9 about later in our submission. Sandstone has
 10 continued to be funded annually, despite losses
 11 totalling £0.328 million, compared with just
 12 £7,000 of profit, and that is across, for the
 13 avoidance of doubt, 14 years. So, the defender
 14 has had a strategy of underwriting Sandstone's
 15 huge losses, and that means it has had a
 16 strategy of financing an inefficient business to
 17 keep it in the market at the expense of its
 18 viable competitors. Having implemented that
 19 strategy indicates that the defender is an
 20 undertaking. Having added £0.41 million to
 21 its balance sheet, the defender considers
 22 Sandstone too important to fail.
 23 Recommending a fourteenth annual subsidy,
 24 which was approved in April 2019, the
 25 defender's portfolio manager's summary,

1 which is on page 172 of the appendix to Ian
 2 Stevenson's witness statement, should you
 3 wish to refer to that, and I will quote from it
 4 very briefly - the line says, "In this context,
 5 Sandstone Press is viewed by many in the
 6 sector as, 'a vital fixture.'" It does not say or
 7 explain who the "many" are, and that
 8 assessment includes no recognition that the
 9 defender engineered Sandstone's position by
 10 underwriting 100% of its enormous losses.
 11 We ask the tribunal to consider two particular
 12 aspects of the defender's approval of that
 13 application that are indicative of the manner in
 14 which the defender operates its OPF as an
 15 undertaking. First, the assessment offered up
 16 the company's non-executive directors, and
 17 soon to be appointed replacement finance
 18 director (the incumbent finance director at that
 19 time, a chartered accountant, having resigned),
 20 as mitigation for concerns about Sandstone's
 21 lack of profitability. At page 166 of the
 22 appendix to Ian Stevenson's witness statement
 23 the application assessment states, "There are
 24 two executive directors who are also
 25 employees of the company, Robert Davidson

1 and Moira Forysthe [sic], and one non-
 2 executive director. They have recently added
 3 Jenny Todd to their board." And at page 169 it
 4 states, "A new FD will be appointed in the
 5 spring of 2019." Jenny Todd was formally
 6 publishing director at Canongate, a large,
 7 profitable publisher. The Team page of
 8 Sandstone's website presents her - and this is
 9 correct as of Friday - as, "A non-executive
 10 director", which is the term that is used, from
 11 which it might be inferred that her recent
 12 appointment to the board was additional, with
 13 the result that Sandstone has two non-
 14 executive directors. When the defender
 15 approved the application, Sandstone did not
 16 have two non-executive directors, Sandstone
 17 did not have one non-executive director; it had
 18 precisely none. It has had none since Jenny
 19 Todd resigned her directorship on 31st of
 20 January 2019. Jenny Todd is not and was not
 21 at the time of the approval a Sandstone non-
 22 executive director. A new finance director has
 23 not been appointed a director. Sandstone's
 24 only directors were, at the time of the
 25 approval, and still are, its two shareholder

1 directors, who have presided over 13 years of
 2 losses, after 14 years of funding - a fact that
 3 the defender could have ascertained in 30
 4 seconds online at Companies House, and we
 5 would say should have. It is for the defender
 6 to explain why its funding panel was misled in
 7 this way and why it did not check the
 8 information presented to it.
 9 LORD DOHERTY: Mr Charters, this is really
 10 looking very much at the merits of the
 11 individual applications, which is not really
 12 something we have jurisdiction to deal with.
 13 MR CHARTERS: I accept that and the reason
 14 that I am giving this context is that it will show
 15 and feed into our argument about why we
 16 believe and can show that Creative Scotland is
 17 an undertaking, and this is instructive in terms
 18 of the way in which it applies the OPF, with
 19 regard to the effect that it has in the
 20 marketplace. I will shorten this section
 21 considerably if that would help and we will
 22 then very quickly move on to looking at the
 23 law itself, if that would be acceptable?
 24 LORD DOHERTY: Yes.
 25 MR CHARTERS: Presumably, the defender

1 knew who owned Sandstone when it approved
 2 the application - except that it did not. I will
 3 shorten this section considerably, but suffice it
 4 to say that what is contained in the
 5 confirmation statement filed at Companies
 6 House does not appear to in fact be the actual
 7 position; it is contradicted by the notification
 8 of a person of significant control. So that, we
 9 believe that one of the shareholders who is
 10 registered does not in fact exist, and that
 11 shareholder is the former finance director, a
 12 chartered accountant with a reputation to
 13 protect - a not insignificant point. So, the
 14 company that the defender terms, "a vital
 15 fixture", and that it has funded it for 14 years,
 16 is neither owned nor managed as the defender
 17 imagines. How is this relevant to the question
 18 of undertakings? Well, it shows that the
 19 defender makes judgments independent of
 20 government, uses OPF as a tool to manipulate
 21 competition in commercial markets, prioritises
 22 the success of certain companies over others in
 23 a commercial market, does not process
 24 applications as a neutral body interested only
 25 in artistic quality, but rather on a partisan

1 basis, in a commercial market, pursuing a
 2 market strategy, and even presents to its
 3 funding panel false information that is used to
 4 justify financing decisions.
 5 How have we tried to avoid the need to pursue
 6 a legal remedy in this case? Since 2017 we
 7 have invested considerable effort, raising with
 8 the defender the effect on the market of its
 9 OPF interventions. That has included
 10 preparing and submitting detailed proposals
 11 direct to the Arts Funding of the Scottish
 12 Parliament's Cultural, Tourism, Europe and
 13 External Affairs Committee. The defender has
 14 paid no heed and has continued funding on
 15 exactly the same basis, with the same anti-
 16 competitive effect. Shutting stable doors after
 17 horses have bolted is a well-known
 18 phenomenon. In respect of our claim, the
 19 defender deliberately left the stable door open,
 20 having failed to check that the stable contained
 21 a horse, despite hearing neighing. Having
 22 bolted, its horse charged through the market
 23 and was filmed causing serious damage.
 24 Instead of attempting to repair the damage, the
 25 defender is doubling down. In lodging its rule

1 34 application, it is claiming that it is entitled
 2 to allow horses to bolt whenever it wants and
 3 that injury caused is not its responsibility.
 4 So, what does the Competition and Markets
 5 Authority expect of public bodies regarding
 6 the Competition Act 1998 and particularly as
 7 regards "undertaking"? The CMA states, at
 8 1.4 in its publication reference OFT/1389,
 9 "Public Bodies and Competition Law,
 10 application of the Competition Act 1998":
 11 "Public bodies will fall within the definition of
 12 an 'undertaking' when they carry out economic
 13 activity. It is for the public bodies themselves
 14 to assess on a case by case basis whether in
 15 carrying out any of their functions they are
 16 acting as undertakings." And at 4.1, the same
 17 document says, "Public bodies need to self-
 18 assess whether their conduct is compliant with
 19 competition law to determine whether any
 20 amendments are required." The defender has
 21 presented no evidence that prior to us bringing
 22 our case that it ever considers whether any of
 23 its activities might make it an undertaking for
 24 CA '98, let alone whether providing
 25 investment finance to a publisher in the

1 statute. They are not required by statute. They
 2 stem entirely from Creative Scotland's policy
 3 and strategy choices; choices it makes
 4 independently of the State. So, Creative
 5 Scotland is not entitled to an exemption on that
 6 basis either.
 7 The defender states at paragraph 67 of its
 8 skeleton argument that it "disputes jurisdiction
 9 solely on the basis that it is not an
 10 undertaking." And we are saying that that
 11 suggests that it recognises that the first two
 12 exemptions are invalid. Despite this, it is now
 13 arguing that, having been established by
 14 statute, it means it is a public body and that
 15 somehow, for reasons it does not seem to
 16 explain, that gives rise to an automatic
 17 exemption. Again, it does not. A public body
 18 ...
 19 MR ANDERSON: I do not think that was
 20 what Ms Ross was saying. She was not saying
 21 that it gave an automatic exemption, Mr
 22 Charters. All she was saying is that that is a
 23 factor.
 24 MR CHARTERS: It is a factor.
 25 MR ANDERSON: No more than that. It is a

1 commercial market, in competition with
 2 private bodies, might do so. It has assumed,
 3 apparently without checking, that everything it
 4 does is somehow exempt by virtue of it being
 5 a public body. And we do say that ignorance
 6 of the law is not a valid defence, and wilful
 7 ignorance even less so. That is why at the
 8 substantive hearing we will seek the award of
 9 exemplary damages. The defender is a £92
 10 million turnover body, yet it has failed to put
 11 in place any process to identify the potential
 12 Competition Act infringements, and it has
 13 failed to address them even when made aware
 14 of them.
 15 We will very briefly look at the exemptions, as
 16 Ms Ross has covered this, before moving on to
 17 an examination of the law. It is worth noting
 18 that the defender has previously claimed to be
 19 exempt from the Competition Act on two
 20 bases: first, because it was established by
 21 statute. We do not contest that it was
 22 established by statute. But being established
 23 by statute does not create an exemption. Only
 24 certain actions can be exempt, not bodies.
 25 And, second, that its actions are required by

1 factor.
 2 MR CHARTERS: Our interpretation ...
 3 MR ANDERSON: Your interpretation, I
 4 think, is not what Ms Ross was saying. I
 5 appreciate that you will have prepared this in
 6 advance of hearing her, but her position was
 7 made pretty clear in her submissions, and it is
 8 those submissions that you need to address,
 9 and it is not necessary to repeat things you
 10 have said before in your written document,
 11 other than perhaps to withdraw them where
 12 they are no longer relevant to us.
 13 MR CHARTERS: Point taken.
 14 LORD DOHERTY: That is 1 o'clock. Should
 15 we adjourn there and resume at 10 to 2?
 16 (13.00)
 17 (The short adjournment)
 18 (13.52)
 19 MS ROSS QC: My Lord, sirs, this is a very
 20 brief intervention.
 21 LORD DOHERTY: Yes.
 22 MS ROSS QC: Your Lordship Lord Doherty
 23 asked for a direction towards the General
 24 Block Exemption Regulation. What I have
 25 done - Mr Charters has reminded me that at

1 tab 13 in the authorities there is a reference to
 2 the regulation but that appears perhaps to be
 3 a preamble. What I have printed out is the
 4 first page, Article 1 and Article 53, and I
 5 have provided copies of those for the
 6 Tribunal and for Mr Charters. Article 1
 7 makes it plain at J that aid for culture and
 8 heritage conservation is within the scope of
 9 the Regulation and then Article 53 sets out
 10 the provisions relating to aid for culture and
 11 heritage conservation, and it will be seen
 12 within the purposes and activities under 2 at
 13 2F there is a reference to writing, editing,
 14 production, distribution, digitisation and
 15 publishing of music and literature, including
 16 translations. So that would encompass the
 17 sorts of activities with which this case is
 18 concerned. But it was simply to make the
 19 point in response to the question that there is
 20 recognition within that regime of the
 21 significance of culture and heritage.
 22 LORD DOHERTY: Yes, thank you. Yes,
 23 Mr Charters.
 24 MR CHARTERS: Thank you, sirs. You
 25 caught us at an opportune moment, almost as

1 considerations for assessing if an entity
 2 should be considered an economic
 3 undertaking per the Act were derived in the
 4 preliminary issue judgment of UKRS
 5 Training v NSAR, which at paragraph 67 in
 6 clauses 1 to 6 sets out in effect six tests.
 7 Those tests consider whether the activity
 8 under consideration constitutes a discrete
 9 function; secondly, is a core function of the
 10 State; thirdly, is undertaken for profit;
 11 fourthly, is also carried out by private bodies
 12 on a commercial basis; fifthly, the
 13 consideration is who determines charges, and
 14 I think is probably accepted, certainly by us,
 15 that it is not relevant to this case; and the
 16 sixth test considers whether the power
 17 exercised derives directly from legislation or
 18 is exercised on behalf of the State or a public
 19 authority.
 20 In our reply to the defender's application at
 21 paragraph 60 to 65 we set out and applied the
 22 six tests and showed why the defender's
 23 conclusions were in our view flawed in
 24 relation to our claim. We will deal with each
 25 test in turn, and I should perhaps ask you to

1 if you were reading our notes, because we
 2 were one line away from moving on to the
 3 question of how the law addresses
 4 undertaking. We finished at the point where
 5 we were saying that a public body is subject
 6 to the Competition Act, as is any other body.
 7 So we will now turn to the specific question
 8 of undertaking. The defender has exerted
 9 considerable economic influence in a
 10 commercial market by providing funding -
 11 that is, investment finance - to Sandstone
 12 with the effect of enabling it to remain in the
 13 market at the expense of its viable
 14 competitors, and likewise providing funding
 15 to the largest and most profitable businesses
 16 in the market, with the effect of maintaining
 17 their dominance.
 18 We would say that an entity that has such
 19 economic impact on a market through direct
 20 non-regulatory intervention is ipso facto an
 21 economic undertaking. Whether it is an
 22 undertaking for the purposes of the
 23 Competition Act is a separate question that
 24 we will now consider by examining the law.
 25 As has been noted by Ms Ross, guidance and

1 note that the first one is longest and they get
 2 progressively shorter, in terms of how we
 3 deal with them.
 4 So the first test is: does the activity in
 5 question constitute a discrete function? What
 6 the UKRS judgment sets out is the test as
 7 such:
 8 "A functional approach is appropriate.
 9 Where a body carries out several activities it
 10 is necessary to consider whether the activity
 11 in question can properly be regarded as a
 12 discrete function."
 13 The defender does carry out several
 14 activities. Of relevance to this case is the
 15 discrete function of providing investment
 16 finance, which is fundamentally different in
 17 nature and effect from providing project
 18 funding. In the skeleton argument and today
 19 indeed as well, the defender has denied our
 20 contention that the provision of investment
 21 finance and the provision of project funding
 22 are discrete functions. So, we must consider
 23 the clear distinction between them.
 24 Investment finance is provided in
 25 commercial markets. It is invested in

1 income-generating assets that give recipients
 2 the potential to become self-sustaining. By
 3 contrast, project funding is provided in non-
 4 commercial markets and creates little or no
 5 ability to self-fund future projects. It funds
 6 projects that could not go ahead otherwise
 7 and would not attract commercial financing.
 8 If we contrast two scenarios, in the first
 9 Creative Scotland provides project funding to
 10 a theatre project, enabling a show to be put
 11 on that could not go ahead otherwise, the
 12 budget showing in advance that a loss was
 13 inevitable. Creative Scotland funds the gap
 14 between the box office income and the
 15 show's costs. There is no ongoing financial
 16 benefit when the show's run ends, and it can
 17 only be repeated if the project funding is
 18 repeated. In the second example, Creative
 19 Scotland provides investment finance to a
 20 company to publish books, perhaps a
 21 company like ourselves, books which are
 22 income-generating assets. Sales and rights
 23 income continue for many years, or may
 24 continue for many years after, and are
 25 reinvested to fuel further growth. Creative

1 Scotland provides further investment finance.
 2 At some point the publisher becomes capable
 3 of self-financing his publications, having
 4 generated and reinvested sufficient retained
 5 profits. It can also borrow against the assets
 6 that have been created to further accelerate
 7 growth. Further investment finance is not
 8 required so any that is provided beyond that
 9 point is additional profit, and that has a
 10 significant impact on the market, in that it
 11 allows that company potentially - or that
 12 organisation potentially - to operate outside
 13 of commercial norms.
 14 We say that providing project funding is
 15 materially different and discrete from
 16 providing investment finance. Placing the
 17 two together under one Open Project Fund
 18 label does not make the functions themselves
 19 any less discrete. They are still two discrete
 20 functions. The functions are not defined by
 21 the umbrella label under which they are
 22 placed.
 23 So the question of whether the defender is
 24 undertaking in respect of all its activities (and
 25 Miss Ross has made the point that that is

1 what we are trying to characterise it as, and
 2 that is not what we are trying to characterise
 3 this as) is not relevant to our claim. What is
 4 relevant to our claim is that the defender is an
 5 undertaking in respect of the discrete
 6 function of providing investment finance. In
 7 a report commissioned by the defender, an
 8 organisation called Culture Radar - and the
 9 report is available on the Creative Scotland
 10 website - pointed out that the defender's
 11 funding model assumes it to be dealing with
 12 market failure. It is true that most of the
 13 defender's interventions are not in
 14 commercial markets. In respect of those
 15 interventions, we accept that the defender is
 16 not an undertaking for the purposes of the
 17 Competition Act.
 18 However, most is not all. Sometimes -
 19 though admittedly fairly rarely in the scope
 20 of its overall activities - sometimes the
 21 defender is dealing with market success, as in
 22 book publishing. Its rejection of the
 23 distinction between providing investment
 24 finance and providing project funding
 25 reflects its erroneous assumption that its

1 interventions never impact commercial
 2 markets. Of course, they do. It is why we
 3 are standing here, a commercial business
 4 operating in a commercial market, bringing
 5 our claim.
 6 So where does responsibility for
 7 distinguishing between the provision of
 8 investment finance and project finance lie?
 9 We say it is for the defender to distinguish
 10 between those of its activities - and this is a
 11 reference back to the Competition and
 12 Markets Authority guidance that says it has
 13 to have in place a process for looking at its
 14 activities and deciding which of those might
 15 breach, potentially, competition law - so it is
 16 for the defender to distinguish between those
 17 activities that provide investment finance and
 18 those that provide project funding.
 19 Prioritising the imposition of a one-size-fits-
 20 all OPF rule or set of rules over consideration
 21 of the effect of its actions on competition in a
 22 commercial market, may well explain the
 23 defender's anticompetitive actions, as we
 24 would have them, but it does not excuse
 25 them. The defender is required to implement

1 a policy that complies with the Competition
 2 Act. It cannot disregard statute as
 3 incompatible with its policy. Statute takes
 4 precedence over policy and not vice versa.
 5 One of the markets in which the defender
 6 intervenes is commercial book publishing in
 7 Scotland, comprising businesses operating on
 8 commercial terms and attempting to generate
 9 profit. Not always succeeding and not
 10 always succeeding in every book, but overall
 11 attempting to generate profits. That some
 12 businesses generate profits but others make
 13 losses is evidence of the commercial nature
 14 of that market. Those who make ongoing
 15 losses - with the notable exception of
 16 Sandstone, which the defender has kept in
 17 the market by underwriting its £0.31 million
 18 losses - businesses that make losses and
 19 continue to make losses ultimately cease to
 20 be businesses, which is to say that they fail.
 21 The main reason the defender does not
 22 distinguish between providing investment
 23 finance and providing project funding is that
 24 it has concluded or decided that it does not
 25 need to, a decision that we would say is

1 without justification. However, several
 2 policy choices have exacerbated its inability
 3 to distinguish between the two.
 4 It has chosen not to differentiate between
 5 those who need funding and those who want
 6 funding they do not need. In a commercial
 7 market that creates the entirely foreseeable
 8 risk that competition will be distorted. By
 9 funding on a continuous basis a company that
 10 does not need funding, what you are doing in
 11 effect is building up a war chest and/or
 12 allowing it to operate outside of normal
 13 commercial terms.
 14 It also applies arbitrary time limits – and, this
 15 is important, these are for its administrative
 16 convenience - to what constitutes income
 17 resulting from its provision of investment
 18 finance. Anything beyond one or two years
 19 is ignored. Of course, such pretence does not
 20 prevent income flowing to the profit and loss
 21 accounts, and thus the balance sheets, of the
 22 funded businesses. Rights deals and
 23 payments relating to overseas sales in the
 24 publishing market are notorious for the
 25 length of time which they take to trickle

1 down. So, if that money has not been
 2 received at the point at which the end of
 3 project monitoring form goes in, then as far
 4 as Creative Scotland is concerned it simply
 5 does not exist. So, the organisation may well
 6 have made a profit - it could have, perhaps,
 7 published the next J K Rowling, to use the
 8 earlier example - but the income that would
 9 flow from that, if it was coming from
 10 overseas or a whole series of territory deals,
 11 it would not appear on the end of project
 12 monitoring form unless it happened to arrive
 13 by the end of the first or second year, or
 14 whatever the arbitrary period was that was
 15 applied.
 16 LORD DOHERTY: You say arbitrary. Is it
 17 arbitrary to pick some sort of period in which
 18 to assess whether profit has been made or
 19 not?
 20 MR CHARTERS: I would say almost by
 21 definition it is arbitrary if you pick a period.
 22 LORD DOHERTY: Is it arbitrary or is it
 23 pragmatic?
 24 MR CHARTERS: One might argue there is
 25 a degree of pragmatism in it but it does not

1 reflect the reality, and we would say that to
 2 have such a short window - two years is not a
 3 long period of time if you look at trading
 4 terms on which publishers operate; it can
 5 take up to six months for even domestic sales
 6 income to flow. So if you have a one-year
 7 arbitrary period, effectively you will be
 8 counting perhaps six months of income. If
 9 you look at the timing of certain festivals -
 10 Edinburgh obviously has a very large and
 11 successful one - substantial amounts of
 12 income can be generated by certain
 13 companies through sales at a festival like
 14 that. If it happens to fall one month after, or
 15 if the payment is received from that festival -
 16 Edinburgh order in, from memory, May, and
 17 then pay in November for the receipts from
 18 that - then that can take a huge chunk of
 19 income into a following year. So I think we
 20 would say we would accept that there is a
 21 need to put some sort of time limit on it, but
 22 we would say that two years is way too short
 23 and does not reflect the reality.
 24 I think there is a wider point, which is to say
 25 that that only becomes particularly relevant if

1 you are ignoring the financial position of the
 2 entity that is receiving the income in the first
 3 place. If it does not need the income, then
 4 the fact that you are putting a two year, three
 5 year, five year, whatever period on it is
 6 irrelevant, you are still giving it income that
 7 it does not actually require. So I think that
 8 would be the wider point that we would
 9 make in that regard.
 10 The defender highlights its low recoupment
 11 rate, roughly 15 in every 500 awards, or out
 12 of 500 awards, in respect of OPF as an
 13 indication that OPF does not result in profit.
 14 In fact - and I addressed this in my
 15 preliminary remarks earlier on - the low
 16 recoupment rate is partly the result of relying
 17 on unverifiable self-reporting and applying
 18 those time limits. The defender's skeleton
 19 argument cites at paragraph 21 the terms and
 20 conditions of OPF, and this was the 3.15
 21 term that was mentioned earlier on, that there
 22 is potential for Creative Scotland to enter into
 23 negotiations regarding an appropriate
 24 recoupment, is the phrase that is used, of
 25 funding. To the best of our knowledge, and

1 we stand to be corrected on this, but to the
 2 best of our knowledge the defender has not
 3 applied that term to any funded publisher. I
 4 note also the phrase in those terms and
 5 conditions which says "in which we are
 6 investing". We will return to the notion of
 7 investment in just a moment.
 8 Perversely, choosing to ignore context and
 9 need actually makes it impossible for the
 10 defender to comply with the National Lottery
 11 Distribution Fund's requirements that finance
 12 should not be provided primarily for private
 13 gain, and all - I think I am correct in saying
 14 all - the Open Project Funding is derived
 15 from the distribution made by the National
 16 Lottery Distribution Fund, which has a
 17 statutory basis. If the applicant can afford to
 18 carry out the project, the presumption must
 19 be that private gain will result from
 20 approving the application. Indeed, if they
 21 can afford to carry out the project themselves
 22 then clearly private gain will result by giving
 23 them money that they did not require.
 24 LORD DOHERTY: I am not quite sure that
 25 that follows. If a publication of a particular

1 book, let's say for example, would not be
 2 carried out because it was seen to be loss-
 3 leading, but the person who applies for
 4 funding is a person who has lots of funds,
 5 could dedicate its own funds to make a loss
 6 but would not, as a commercial decision, but
 7 says: "We will publish it if you give us the
 8 money to do it." I am just not - it does not
 9 seem to me to tally to say that it all depends
 10 on the means of the publisher. It depends
 11 surely upon whether the project is one which
 12 is going to be profitable or not and is seen to
 13 be profitable, and if it is one which is seen to
 14 be likely to be loss-making, it does not really
 15 matter what the resources of the publisher
 16 who is proposing to do it are.
 17 MR CHARTERS: So, I take your point and
 18 it feeds in a little bit to a comment or a
 19 question that you asked earlier on. What I
 20 would say is that in my experience, and I
 21 speak as a publisher here, very rarely do
 22 publishers go into a venture knowing that
 23 they are going to make a loss. We are in
 24 business to make a profit, and over the
 25 totality of our list we need to make a profit.

1 So if we were making a conscious decision
 2 that we might invest - I will use that word -
 3 invest in one particular book, so for example
 4 it could be the second book in a series, or
 5 third book that an author has produced, in
 6 order to retain the rights to the first book
 7 which we know is profit-making, we might
 8 make a conscious decision to make a loss in
 9 one area but overall what we are trying to do
 10 is make a profit. So there is sometimes that
 11 degree of trade off.
 12 The point that you [Mr Anderson] made
 13 earlier on was about reputation, so might we
 14 invest intending to bring benefit in terms of
 15 reputation. I think that is a very valid point
 16 and I think there might be an instance - so, I
 17 could conceive of an instance - where we
 18 might undertake a project to, to coin a
 19 phrase, curry favour with a funder who
 20 thought that that was something they wanted
 21 to see happen and perhaps we were in a good
 22 position to be able to make it happen for
 23 them, because we would hope that that might
 24 be looked upon kindly in some way when we
 25 came to make other applications that were for

1 a different matter. So reputation is
 2 something which we would invest in and we
 3 might countenance making some degree of
 4 loss in a specific project if we felt it would
 5 have a positive influence on our business
 6 overall.
 7 So if we can turn to the capitalisation effect,
 8 and this was something which Miss Ross
 9 touched upon. So the defender highlights in
 10 their skeleton argument that AG Maduro in
 11 the FENIN case noted that activity is
 12 economic if:
 13 "Carried on under market conditions
 14 (distinguished by conduct which is
 15 undertaken with the objective of
 16 capitalisation)."
 17 Scotland's commercial book publishing
 18 market achieves the object of capitalisation.
 19 As noted earlier, some businesses make
 20 profits, others make losses. Actually one
 21 thought I had over lunch regarding this was
 22 that capitalisation can mean either creating
 23 positive net assets through an act but it can
 24 also be capitalising so that you have
 25 effectively zero net assets, so where there are

1 negative net assets, if you pump money in
 2 and you create a situation where the business
 3 is still solvent, that is capitalisation, perhaps
 4 not positive capitalisation but it is
 5 capitalisation of a sort, it is pumping money
 6 into the business.
 7 The defender's interventions have added
 8 £1.15 million to the capitalisations, taken
 9 collectively, of Sandstone, Birlinn and Floris.
 10 As we show at table 1 of our reply to the
 11 defender's skeleton, the defender has
 12 provided 19 per cent of Floris' net assets and
 13 26 per cent of Birlinn's. The point we would
 14 make is that these are not percentages of tiny
 15 start-ups where you might put in a little, and
 16 because there are not many assets to start
 17 with you end up with a significant
 18 percentage. These are percentages of two of
 19 the three largest companies in the
 20 marketplace, with net assets approaching £2
 21 million each. Staggeringly, the defender is
 22 responsible for 575 per cent of Sandstone's
 23 net assets as a result of having injected £0.41
 24 million via 14 consecutive years of
 25 investment finance provision. So absolute is

1 Sandstone's reliance on the defender that we
 2 would say you could almost consider that it
 3 effectively trades in the market through
 4 Sandstone, even though it is fully accepted
 5 that it does not make any form of editorial
 6 decision and is prevented from doing so.
 7 In capitalising businesses through the
 8 discrete function of providing investment
 9 finance, the defender is, we say, clearly
 10 acting as an economic undertaking for the
 11 purposes of the Act in respect of test 1.
 12 Test 2 is whether the activity is a core
 13 function of the State, and the effective test
 14 reads:
 15 "Where the activity is of its nature a core
 16 function of the State, the body will not be an
 17 undertaking."
 18 Providing grant funding is not of its nature a
 19 core function of the State, nor is the discrete
 20 function of providing investment finance. As
 21 already noted - and this was a reference back
 22 to the framework document between the
 23 Scottish government and Creative Scotland -
 24 the defender explicitly does not carry out its
 25 functions on behalf of the Crown.

1 Second, shareholders carry out the same
 2 function, either by injecting investment
 3 finance into a business or allowing created
 4 capital to be reinvested. On the discrete
 5 project funding side, trusts, charities and
 6 local authorities, as was mentioned in the
 7 question earlier on, carry out the same
 8 function as the defender. So again, in
 9 applying test 2, we say the defender is an
 10 undertaking. The activity is not of its nature
 11 a core function of the State.
 12 So, is the action undertaken for profit, which
 13 is test 3? We fully recognise that the
 14 defender does not operate for financial profit.
 15 The question of what is profit is a separate
 16 one. But in terms of financial profit, we
 17 accept that they do not operate for financial
 18 profit, but importantly the guidance makes
 19 clear that this does not stop it being
 20 considered an economic undertaking if all the
 21 other facts suggest that it is, and we say that
 22 they do.
 23 Test 4: is the activity also carried out by
 24 private bodies on a commercial basis? The
 25 test here is:

1 "Where the activity in question has been or is
 2 also carried out by a private body on a
 3 commercial basis, that indicates that it is to
 4 be regarded as an economic activity such that
 5 the body carrying it out is an undertaking."
 6 We would ask a very simple question: who
 7 provides investment finance for a publisher
 8 of new books when the defender does not?
 9 The provision of investment finance is
 10 carried out by private bodies and private
 11 individuals on a commercial basis. Those
 12 bodies include business owners like me, or
 13 they are companies and private equity
 14 investors. I have provided investment
 15 finance to Strident, just as the founders of
 16 other publishing companies have provided it
 17 to their businesses. We are not all totally
 18 reliant on Creative Scotland. Birlinn has
 19 provided investment capital to Nicolson
 20 Digital Ltd. The defender's statement that
 21 the activities carried out by the defenders are
 22 not carried out by private bodies is, we say,
 23 self-evidently untrue. It is carried out by
 24 other bodies.
 25 Where such investment finance is provided

1 in return for equity, it is prima facie on a
 2 commercial basis. The question is not
 3 whether the defender seeks a return but
 4 whether others do. Self-evidently,
 5 shareholders who provide investment capital
 6 to companies do seek a return. There is a
 7 possibility - even if not always in reality -
 8 there is a possibility of profit. This is not an
 9 activity that is exclusively social in nature.
 10 LORD DOHERTY: Sorry, there is a
 11 possibility for profit for who?
 12 MR CHARTERS: For the shareholders. As
 13 I say, it does not always materialise that way,
 14 but one hopes that it does, and one aims to
 15 make sure that it does. So this is not an
 16 activity that is exclusively social in nature; it
 17 may have social benefits and it is accepted
 18 that it does have some social benefits, but it
 19 is primarily commercial in nature. I would
 20 contrast that with --
 21 LORD DOHERTY: Why is it primarily
 22 commercial rather than social?
 23 MR CHARTERS: Because if I invest in my
 24 company and any other individual
 25 shareholders, assuming they have the same

1 motivation to get a return, if they are seeking
 2 a return by investing in their company which
 3 then produces --
 4 LORD DOHERTY: No, I follow what you
 5 say in relation to the comparator private body
 6 investments, but why in relation to the grants
 7 provision by the defender is it primarily
 8 commercial rather than social?
 9 MR CHARTERS: So this is where we go
 10 back to the distinction between project
 11 funding, which is primarily social, and
 12 investment finance which is primarily
 13 commercial, because the objective in the
 14 marketplace of all those participating in the
 15 marketplace - in the commercial marketplace
 16 - is to gain a return. So, in book publishing
 17 there is the possibility of a profit, and most
 18 companies do make a profit, over time they
 19 will make a profit. Creative Scotland may
 20 choose not to participate in the market on
 21 that basis, but the whole point of the previous
 22 test, test 3 - is the action undertaken for
 23 profit? - is to say that that might be relevant,
 24 but the fact that it is not undertaken for profit
 25 does not exclude that organisation from

1 being an undertaking. In other words, it may
 2 still be an undertaking despite the fact that it
 3 is not participating in that market for profit.
 4 PROFESSOR ULPH: The whole thrust of
 5 your argument is about funding bodies rather
 6 than funding projects, so you have a
 7 company which is a profit seeking private
 8 company, it may sometimes, if it gets outside
 9 funding, choose to publish a book it would
 10 not otherwise have chosen to publish because
 11 it would not generate enough of a return to
 12 do it. So that could still be undertaken by a
 13 profit-seeking company in a non-profit-
 14 seeking area. The whole thrust of your
 15 submission seems to be around funding for
 16 companies or funding for entities rather than
 17 funding for individual projects.
 18 MR CHARTERS: So I take your point and I
 19 would say that that is important to us, so we
 20 would say that when the defender is
 21 providing investment finance to a company,
 22 if it knows that that company is capable of
 23 self-funding the project - so if I take, for
 24 example, Floris, which made half a million
 25 pounds over a three-year period, half a

1 million pounds of profit over a three year
 2 period - it could self-fund its project. So,
 3 providing them with funding did not make
 4 the project happen, it actually just simply
 5 added money to their balance sheet.
 6 PROFESSOR ULPH: Part of the point my
 7 colleague made a while ago, that yes, it could
 8 potentially self-fund that, but if you were
 9 seeking maximum profits you may choose
 10 not to do that, because you will only keep on
 11 producing things which increase your profits.
 12 So the fact that you could have chosen to
 13 divert some of your profits from elsewhere to
 14 that, does not mean that this now becomes a
 15 profitable project. It just means it is
 16 something you are choosing to do or you
 17 might want to do it.
 18 LORD DOHERTY: The difficulty I am
 19 having at the moment with is: your reasoning
 20 is it would have happened anyway. At the
 21 moment I am having difficulty in accepting
 22 that, because if the project was something
 23 which the company assessed as being not a
 24 runner without funding, then it would not
 25 happen anyway.

1 MR CHARTERS: If it assessed that. The
 2 point that we would make would be that if
 3 they are applying for funding, how do we
 4 know that they have assessed it in that way?
 5 How do we know they have assessed it as
 6 making a loss? It may, but it may not. They
 7 might simply put numbers in that show that it
 8 makes a loss that gains the funding. I think it
 9 is entirely conceivable that something like
 10 that could happen. So if you want to get the
 11 funding and you know the funding is not
 12 going to be recouped, which the numbers
 13 suggest that it is not, and if we know that
 14 terms and conditions 3.15 are not going to be
 15 applied, then there is no disincentive to put in
 16 numbers that make it certain that your project
 17 will be funded.
 18 PROFESSOR ULPH: I am not sure that is
 19 entirely true because you have to pass certain
 20 tests in order to get the funding, you have to
 21 be assessed as being some kind of cultural
 22 merit. You have to spend time and effort
 23 filling in the application form. I speak as an
 24 academic, I spend a lot of time filling out
 25 project grants and I think very carefully

1 about something that I want to do before I
 2 fill that out. So you would have to think
 3 quite carefully about it. If there is somebody
 4 there handing you money free and it costs
 5 you almost nothing to apply, of course you
 6 would go for it. But that is not what you are
 7 dealing with, you actually have to make an
 8 application. That would be assessed and
 9 possibly rejected; if it has not got any
 10 cultural merit it will be rejected, and you
 11 have to weigh up whether you want to go
 12 ahead and make that investment of time.
 13 MR CHARTERS: Yes. It is accepted that
 14 that is a process that one goes through and
 15 the forms - I sometimes describe them as
 16 hurdles that are put in your place that you
 17 have to jump over, so that you have to want it
 18 enough to actually go through the process of
 19 filling out the not insubstantial form in order
 20 to get that funding. So that is accepted.
 21 I think I would go back to a couple of points.
 22 One is that there is sometimes a good reason
 23 for producing something, even if it is break-
 24 even, so there might well be a good reason
 25 reputationally for that. Also, that in funding

1 the project you are in part covering a little bit
 2 of your overhead, so although the project is
 3 not aimed nominally at covering overhead,
 4 sometimes it does. So, if you increase the
 5 volume of titles that you produce, then your
 6 salesperson, it does not cost you any more for
 7 them to carry one extra or ten extra titles into
 8 somewhere. So there are hidden financial
 9 benefits, you might say, from simply doing it
 10 that way.
 11 PROFESSOR ULPH: There are economies
 12 of scale.
 13 MR CHARTERS: There are economies of
 14 scale. There definitely are, and it is
 15 something that we have always said that we
 16 have strived for, which is typically what we
 17 call critical mass: there is a point that you
 18 have to reach for the business to really be
 19 viable, and we have said previously in
 20 various of our documents that we totally
 21 accept that it is legitimate for an organisation
 22 such as the defender to kickstart
 23 organisations, to help them get to that point
 24 where they have sufficient economies of
 25 scale that they have reached critical mass. It

1 is the funding beyond that point that we take
 2 issue with if it is meant to be funding that
 3 produces good things rather than simply
 4 profit. And we would point to the fact that
 5 profit is effectively prohibited - or
 6 discouraged is perhaps a better term for it -
 7 through the National Lottery funding
 8 mechanism and it is explicit in that
 9 legislation. In that circumstance I think it
 10 makes sense for them to consider very
 11 carefully any funding they give beyond that
 12 point where a business has reached its critical
 13 mass, if that makes sense.
 14 So, providers of investment finance would
 15 not provide project funding on a commercial
 16 basis to, for example, a dance company
 17 providing opportunities to the elderly free of
 18 charge. The possibility of profit is an
 19 important part of the differentiation between
 20 the provision of investment finance as
 21 discrete from the provision project funding.
 22 Providers of investment finance are not
 23 philanthropists. (I would love to be a
 24 philanthropist, but I am not a philanthropist,
 25 corporate or otherwise.) They may seek

1 returns in different forms and over different
 2 periods, but they do all seek returns. They
 3 compete on a commercial basis to invest in
 4 the best assets, which is to say the assets
 5 most likely to generate the returns they seek,
 6 for the business as a whole. Perhaps not on
 7 individual project bases, but for the business
 8 as a whole.
 9 Since the activity of providing investment
 10 finance is also carried out by private bodies
 11 on a commercial basis, that indicates that it is
 12 to be regarded as an economic activity such
 13 that the body carrying it out is an
 14 undertaking. The conclusion that we draw
 15 from test 4 must be that the defender is to be
 16 regarded as an undertaking for the purposes
 17 of the Competition Act.
 18 Test 5, as I mentioned, is about charges and
 19 we are not proposing to spend any time upon
 20 that as it is not really relevant to this case.
 21 The final test then is test 6: is the power
 22 exercised derived directly from legislation or
 23 exercised on behalf of the State or a public
 24 authority? The test reads thus:
 25 "Where the power exercised by the body is

1 derived directly from legislation or is
 2 exercised on behalf of the State or a public
 3 authority, that indicates that it is not an
 4 undertaking."
 5 As we have already made clear, the
 6 framework document between the Scottish
 7 government and Creative Scotland states at
 8 clause 8 that Creative Scotland does not carry
 9 out its functions on behalf of the Crown. So
 10 the defender's power is not exercised on
 11 behalf of the State or a public authority, but
 12 independent of it. We ask the Tribunal to
 13 note that the Competition and Markets
 14 Authority applies an unequivocally narrow
 15 interpretation of "derives directly from",
 16 stating at page 20 of its Public Bodies and
 17 Competition Law: a guide to the application
 18 of the Competition Act 1998:
 19 "The legislation or other legal instrument
 20 must require,"
 21 and it puts that word "require" in bold,
 22 "(explicitly or in practice) undertakings to
 23 engage in the agreement or conduct in
 24 question."
 25 LORD DOHERTY: That is dealing with the

1 general exemption of the application of the
 2 Act, once you have established that you are
 3 dealing with an undertaking.
 4 MR CHARTERS: Yes, yes, so we would
 5 say that --
 6 LORD DOHERTY: So it is not the test that
 7 is applied in deciding whether something is
 8 an undertaking.
 9 MR CHARTERS: It is not, but it is relevant
 10 because it is considering whether the public
 11 body in that instance is going to be an
 12 undertaking because -- or whether it might
 13 not be an undertaking.
 14 (14.32)
 15 LORD DOHERTY: No, not at all. It
 16 assumes that the Schedule 3 exemption
 17 which refers to something being imposed as a
 18 statutory requirement is dealing with a
 19 situation where one is dealing with an
 20 undertaking and one is deciding is this an
 21 undertaking which is exempted from the
 22 requirements of the Act.
 23 MR CHARTERS: Okay.
 24 LORD DOHERTY: And it is exempted from
 25 the requirements of the Competition Act if all

1 it is doing is something which it is required
 2 to do by statute. So it is a completely
 3 different question from the one that we are
 4 considering.
 5 MR CHARTERS: I think that we would
 6 look at it in reverse and say that if it was to
 7 be exempt from the Act then it is because on
 8 that basis it has derived its power from
 9 statute. So we would say that that is a
 10 genuine public body that is exercising the
 11 power of the state or the power of statutes.
 12 The defendant is not required to provide
 13 investment finance, nor to operate the Open
 14 Project Fund. Its ability to do so does not
 15 equate to a requirement for it to do so. So,
 16 the power exercised in respect of our claim
 17 does not derive directly from legislation;
 18 rather than from---
 19 LORD DOHERTY: The power is
 20 specifically provided for in legislation. If
 21 you turn to the statutory provisions it
 22 empowers the making of grants. How much
 23 clearer a statutory conferment of the power
 24 can one have?
 25 MR CHARTERS: I accept that the power is

1 there, the ability---
 2 LORD DOHERTY: It is a statutory power.
 3 MR CHARTERS: And the ability to---
 4 LORD DOHERTY: Conferred on a public
 5 body.
 6 MR CHARTERS: The ability to exercise it
 7 is not contested, but the requirement to
 8 exercise it. It chooses to exercise it in the---
 9 LORD DOHERTY: Of course any power
 10 involves a decision as to whether the power
 11 is exercised.
 12 MR CHARTERS: We would draw the
 13 distinction for example in the Eurocontrol
 14 case involving air traffic control, so there is a
 15 requirement on the UK National Air Traffic
 16 Control organisation (the name of which I
 17 cannot immediately recall) to provide that
 18 service. There is not a requirement on
 19 Creative Scotland to do the things that it
 20 does. There might be an expectation---
 21 LORD DOHERTY: But it does not need to
 22 be a requirement in order to be a power or in
 23 order to be a power that is typical of the
 24 powers exercised by the State. There does
 25 not need to be a statutory requirement to

1 something.
 2 MR CHARTERS: We would suggest that
 3 that is the inference that should be drawn
 4 from that statement that the Competition
 5 Markets Authority has set out. Regarding the
 6 context in which it was said, it seems to us
 7 that that is what they are trying to say. In
 8 deciding whether or not the Act is going to
 9 apply to you, then you need to determine
 10 whether or not you fall within the Act. You
 11 may not fall within the Act if you are
 12 required to do something. I appreciate that
 13 this is a question which we are going slightly
 14 round in circles on.
 15 LORD DOHERTY: It is a question of law of
 16 statutory construction. I think I have your
 17 submission on it, Mr Charters.
 18 MR CHARTERS: So we would say that
 19 applying test 6 it is also indicated that the
 20 Defender is to be regarded as an undertaking,
 21 albeit taking your point on board.
 22 Therefore, applying all the tests together, the
 23 activity of providing investment finance, we
 24 say, does constitute a discrete function and is
 25 not a core function of the State, is undertaken

1 for profit by some in the market, is also
 2 carried out by private bodies on a
 3 commercial basis. Test 5 is not relevant to
 4 this case. So finally, 6, we say the power
 5 exercised is not derived directly from
 6 legislation or exercised on behalf of the State
 7 – certainly not exercised on behalf of the
 8 State on that last point.
 9 That being the case, on the basis of the
 10 guidance and considerations in UKRS
 11 Training v NSAR we say that the Defender is
 12 without a shadow of a doubt an undertaking
 13 under the Competition Act for the specific
 14 purposes of our claim.
 15 Finally just before moving on to conclusions,
 16 let us look at the position if the Tribunal
 17 rejects jurisdiction. If it was to reject
 18 jurisdiction and determine that Creative
 19 Scotland is not an undertaking in respect of
 20 the specific activity of the provision of
 21 investment finance in a commercial market -
 22 about which we are complaining - the effect
 23 would be that any commercial business that
 24 Creative Scotland - the Defender - could
 25 finance and capitalise any commercial

1 business for any reason and to any extent
 2 without any regard for the distorting effect on
 3 competition, and we say that that is
 4 something which it has to take account of.
 5 And then no publishing business could seek
 6 any form of remedy against the Defender
 7 under the Competition Act in any
 8 circumstances, because the Tribunal would
 9 have found that it was not an undertaking. It
 10 would be to say that a body that exercises
 11 profound economic power such that it
 12 manipulates markets and competition,
 13 deciding who can and cannot succeed in - or
 14 perhaps even be in - a market was not an
 15 undertaking. We say that such a finding
 16 would be at odds with the intended functions
 17 of the Competition Act and with the
 18 published guidance to public bodies from the
 19 CMA and its predecessors.
 20 Finally if I may conclude, Lord Sumption
 21 opined on the decision in the second Miller
 22 case - albeit on BBC's Newsnight and
 23 outwith the court - that had the Supreme
 24 Court not found against the UK Government
 25 it would have had the effect of allowing any

1 UK government to prorogue parliament on a
 2 whim to avoid accountability. Such an
 3 outcome would have been, in his view, a
 4 recipe for tyranny. Whilst ours is not a
 5 constitutional case, it is about ensuring
 6 accountability. In contesting jurisdiction, the
 7 Defender is asking the Tribunal to find that
 8 the non-regulatory economic influence it
 9 yields in a commercial market with economic
 10 effect does not amount to economic activity.
 11 In our view, that would be perverse and
 12 illogical. Competition law's function is to
 13 protect the integrity of markets, and the
 14 Tribunal's stated role is to decide cases
 15 involving competition or economic
 16 regulatory issues. We say this is a
 17 competition issue and so belongs in this
 18 forum, in the Tribunal. The Defender is not
 19 entitled to rely on one of the narrow
 20 exemptions in respect of its actions, and
 21 applying the sixth test we have shown that in
 22 respect of activity that is the subject of our
 23 claim - the provision of investment finance in
 24 a commercial market - the Defender is an
 25 undertaking under the Competition Act.

1 Therefore, since our claim falls within the
 2 jurisdiction of the Tribunal, we invite the
 3 Tribunal to accept jurisdiction and reject the
 4 Defender's application to have our claim
 5 struck out.
 6 LORD DOHERTY: Thank you, Mr
 7 Charters. Yes, Ms Ross.
 8 MS ROSS QC: Very briefly there are a
 9 couple of small points perhaps just for
 10 tidiness. The first point deals with the
 11 submission that has been made a number of
 12 times both in writing and orally which is to
 13 the effect that Creative Scotland within the
 14 terms of the Framework Agreement does not
 15 carry out its functions on behalf of the
 16 Crown. Mr Charters has placed great store
 17 by that single sentence, which does appear in
 18 the Framework document. It perhaps ought
 19 to be understood that that is in the context of
 20 the paragraph headed "Legal origins of
 21 powers and duties". It sets out that Creative
 22 Scotland is established under the Public
 23 Services Reform (Scotland) Act 2010. The
 24 constitution of Creative Scotland is set out in
 25 Schedule 9 of the Act. Creative Scotland

1 does not carry out its functions on behalf of
 2 the Crown. And the paragraph immediately
 3 following that starts: "The Scottish Ministers
 4 are ultimately accountable to the Scottish
 5 Parliament for the activities of Creative
 6 Scotland and its use of resources". In my
 7 submission, the sentence "Creative Scotland
 8 does not carry out its functions on behalf of
 9 the Crown" is simply a description of the
 10 status of Creative Scotland as a public body
 11 which operates at arm's length from the
 12 government. Essentially it comes to an
 13 explanation that if you are going to sue
 14 Creative Scotland you do not sue the Crown.
 15 It is of that order of describing its status.
 16 Nothing follows from it in the way that Mr
 17 Charters has suggested, and if there were any
 18 doubt about it, as I say, the following
 19 paragraph makes it absolutely plain that the
 20 Ministers are accountable to the Parliament
 21 for the activities of Creative Scotland. How
 22 much more public a body can there be?
 23 There is one general point and one separate
 24 specific point that I wish to make. The
 25 difficulty with the entirety of the submissions

1 that have been advanced for the Pursuer
2 today is that they are based on two kinds of
3 blurring. The first blurring is between the so-
4 called investment market and the publishing
5 market. The second sort of blurring is
6 between funding a project and funding a
7 company. When these are all conflated, not
8 distinguished; read one way and then read
9 another way, then possibly one comes out
10 with an understanding as to where Mr
11 Charters reaches the conclusions that he
12 does. But it is important, in my submission,
13 not to allow that blurring and that moving
14 from one side to the other to take place.
15 The final point, and it is a separate point and
16 picks up a point I made right at the beginning
17 in describing some of the concerns that the
18 Defenders have about the representations that
19 have been made about the conduct of
20 individuals – and this is a point that I would
21 wish to repeat. The reason that I wish to
22 repeat it is this that, of course, unlike normal
23 court proceedings these proceedings are
24 recorded and a transcript will be publicly
25 available. In the course of his submissions

1 today, as he has already in writing, Mr
2 Charters on behalf of the Pursuer has made a
3 number of allegations about the conduct of
4 individuals. They have been referred to both
5 generally and in a few cases specifically by
6 name – employees of a company or directors
7 of a company. Their behaviour, their
8 motivations, and indeed the behaviour and
9 decision making and motivations of people
10 within Creative Scotland have been called
11 into question in a way which ought not to be
12 permitted. Seeing as all of this is recorded it
13 would be most unfortunate if people
14 searching for information about this were to
15 read those allegations and understand them to
16 be in some way founded in fact, or not to be
17 disputed, and I would wish to make it
18 absolutely clear that these allegations are in
19 no way accepted and have been put before
20 this Tribunal without a proper basis for doing
21 so, and it is important that that is also
22 recorded.
23 Unless I can assist the Members of the
24 Tribunal further, those are the submissions I
25 would wish to make on behalf of the

1 Defender.
2 LORD DOHERTY: Very well. I am
3 grateful to both parties for their submissions
4 and for adhering to the timetable. We will
5 obviously have to take time to consider this,
6 and we will issue our decision in writing in
7 due course.
8 (14.43)