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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1418/5/7/21

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10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

Wednesday 23 March 2022

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15 Before:
16 The Honourable Lord Ericht
17 Peter Anderson
18 Andrew Young QC
19 (Sitting as a Tribunal in Scotland)
20

21
22 **BETWEEN:**

23
24 Blue Planet Holdings Ltd
25 **Pursuer**

26
27 v

28
29 Orkney Islands Council
30 Orkney Ferries Limited
31 Sinclair Haulages Limited
32 **Defenders**
33
34

35 **A P P E A R A N C E S**

36
37 Kenneth Murray (On behalf of Blue Planet Holdings Ltd)
38 Daniel Byrne (On behalf of Orkney Islands Council and Orkney Ferries Limited)
39 Dave Neil (on behalf of Sinclair Haulage Limited)
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(3.00 pm)

THE CHAIRMAN: Well, good afternoon everyone. Welcome to this hearing.

There are a number of matters which we will be dealing with in this hearing, so I thought I would start by indicating what we would deal with and what order we would deal with them in.

The first is the pursuer has amended his claim form, so we'll deal with that. The second matter is that the pursuer has sent a letter dated 16 March withdrawing his application of 14 February, so that's the second item on the agenda. The third item on the agenda is the pursuer's request for the production of documents by letter of 23 February. The fourth item on the agenda is the pursuer's request for information -- and it's information rather than documents -- in his letter of 22 March. And the final matter relates to matters relating to witnesses.

So if we start in that order, the first item being the amended claim form. Mr Murray has produced an amended claim form where he has deleted some matters, so as a formal matter we should allow him to amend the claim form in the way that has been indicated in the form which he submitted.

Mr Murray, would that be acceptable to you?

MR MURRAY: Yes, that is agreeable to me.

THE CHAIRMAN: Thank you.

Mr Byrne, do you have any objection to that?

MR BYRNE: I have no objection.

THE CHAIRMAN: And Mr Neil, do you have any objection to that?

MR NEIL: I have no objection to that, my Lord.

1 THE CHAIRMAN: Thank you. That's what we'll do in relation to that.

2 The second item, Mr Murray, your letter of 16 March: you've withdrawn your
3 application of 14 February. Now, your application of 14 February covered
4 various matters, including an application for summary judgment. So I just
5 wanted to confirm with you that we've understood your position correctly.

6 If the application of 14 February is withdrawn, the consequences are that at the
7 hearing in May, your application for summary judgment will not be before the
8 Tribunal; and there is a timetabling order for you to lodge submissions and
9 that wouldn't apply either, that would be deleted at that stage; and the hearing
10 would go ahead on the other matters.

11 Can I just get your confirmation that I've understood that position?

12 MR MURRAY: Yes, that is my position.

13 THE CHAIRMAN: Thank you.

14 So in that case we will allow Mr Murray to withdraw his application of 14 February,
15 including his application for summary judgment. We'll amend the timetable
16 set out in the order of 21 February by the deletion of paragraph 5(a), and
17 that's the paragraph which sets out the timetable for submissions in support of
18 the application, which has now gone. And the hearing in May will now go
19 ahead on the other matters referred to in the order of 21 February.

20 This then brings us on to the third matter, which is Mr Murray's request for the
21 production of documents by the letter of 23 February 2022. Under this
22 heading we're looking at the production of documents.

23 Just to let you know what I propose to do in relation to this, I propose to take each
24 paragraph in turn and then in relation to each paragraph I'll ask Mr Murray to
25 make his submissions and the defenders to make their submissions, and
26 there will be an opportunity for myself or the other members of the panel to

1 ask any questions. Then we'll go on after that to look at the letter of
2 22 March. And at the end of that, the panel proposes to retire and consider
3 everything that's been said on these two matters and come to its decision,
4 and then we'll come back and advise you of that.

5 So --

6 MR BYRNE: My Lord, before my Lord proceeds in that exercise, I wonder if I could
7 help. In respect of the request of 23 February 2022, there's two limbs, limb A
8 and limb B, to the pursuer's application. We have already indicated to the
9 pursuer that we are --

10 THE CHAIRMAN: Mr Byrne, I think I can anticipate what you're going to say, and
11 I've seen a letter which has been submitted; we've seen that this afternoon.
12 Can I ask you just to hold back on that just now because that is actually the
13 third paragraph of the letter of 23 February. So I would like to deal with the
14 other paragraphs first, unless you particularly think we need to deal with that
15 now. No, thank you.

16 So the letter of 23 February, we'll deal with it in this order: we'll deal with
17 paragraph 1, which is Weil Holdings pursuing the purchase and sale
18 agreement; then we'll deal with paragraph 3, which is the first and second
19 defenders to provide information; and then we'll deal with paragraph 2, which
20 is a request for Menzies Distribution. And if you're wondering why I'm taking
21 them out of your order, Mr Murray, it's just logical to look, first of all, at what
22 the first and second defenders might be able to provide, before we then look
23 at what third parties might be able to provide.

24 So in relation to the first paragraph, which is the request for Weil Holdings to provide
25 the share purchase agreement, explanation of funding and copies of bank
26 statements, can I ask you to address us on that, Mr Murray.

1 MR MURRAY: My Lord, I set out my position on this in my submission of
2 20 March --

3 THE CHAIRMAN: Yes.

4 MR MURRAY: -- that I hope everybody received.

5 THE CHAIRMAN: Yes, I can certainly say that the members of the panel have that
6 and we have read that; there's no need to repeat it.

7 MR MURRAY: I don't think I have anything more to add to it other than what's set
8 out there.

9 THE CHAIRMAN: Thank you very much.

10 Mr Neil?

11 MR NEIL: My Lord, I set out a response to the Tribunal as well, my reasons for not
12 divulging the share purchase agreement. There are three issues. The first is
13 that we have a non-disclosure agreement between the sellers of Sinclair
14 Haulage, Mr and Mrs Sinclair, and myself and Mark Wallace of
15 Ross Investments, who have provided the funding. The document is
16 commercially sensitive in that by releasing it in the public domain, it would
17 then put Sinclair Haulage and Weil Holdings in a potentially difficult position
18 should we wish to acquire other businesses or expand or negotiate business
19 deals. And the third issue is that there are members of staff named in the
20 share purchase agreement, which we run the risk of breaching GDPR rules,
21 although Mr Murray has indicated that that may not be an issue in front of the
22 Tribunal.

23 I propose a compromise. Myself and the other parties involved with the share
24 purchase agreement do not have any issue with submitting the share
25 purchase agreement to the Tribunal to consider in private, and to take a test
26 or to examine that and assess whether that meets the criteria that are set out

1 by Mr Murray. I don't want to obstruct the proceedings but I feel that on
2 points 1 and 2, ie the non-disclosure agreement and the fact that it contains
3 commercially sensitive information, I would rather that the document was not
4 released into the public domain.

5 THE CHAIRMAN: Thank you, Mr Neil.

6 Mr Murray, do you have anything you want to say in response before we move on to
7 the next topic?

8 MR MURRAY: I think, my Lord, I've made all the points that there is in my written
9 response and I haven't heard anything that differs from that, or would make
10 me alter that position, put it that way.

11 THE CHAIRMAN: Thank you very much.

12 So we'll now move on to paragraph 3 and if we take these one by one:
13 paragraph 3(a), which is copies of all agreements, documents and
14 correspondence between the Council and JBT Distribution.

15 Perhaps at this stage, Mr Byrne, perhaps you could address us on what I think I
16 interrupted you from saying at an earlier stage.

17 MR BYRNE: Simply, my Lord, that we're in the process of gathering these
18 documents with a view to voluntarily complying with that request. So it's
19 unnecessary for the court to make any order in that respect.

20 THE CHAIRMAN: You're in the process of that. Do you have a timescale for that?

21 MR BYRNE: Yes, my Lord: we hope to be in a position to deal with that by the
22 middle of next week. So it may be that if, by the middle of next week, the
23 matters haven't been disclosed to the pursuer's satisfaction, he may feel it
24 necessary to seek some form of coercive order against the first and second
25 defenders. But as matters stand, we're in the process of complying with that
26 voluntarily.

1 THE CHAIRMAN: Thank you.

2 Do you have any response to that, Mr Murray?

3 MR MURRAY: Yes. I'm afraid I wouldn't be happy with that position. I mean, I have
4 requested this information in the past on a voluntary basis, they were obliged
5 to provide it under law and they never did so. So I would feel a lot more
6 comfortable if there was a court order ordering them to provide the documents
7 that I have requested.

8 THE CHAIRMAN: Yes.

9 MR MURRAY: I think it would have a lot more gravitas and I could feel a lot more
10 comfortable that I would be provided with the correct evidence, as opposed to
11 what's happened in the past.

12 THE CHAIRMAN: Yes. Thank you.

13 So if I were to go down that line and the panel agreed to make a court order -- and
14 we're only talking about 3(a) at the moment, just for clarity -- Mr Byrne, you
15 say you're expecting to have them by the middle of next week. So if we were
16 to make a court order, would, say, the end of next week be a suitable date for
17 that, if we were to go down that line?

18 MR BYRNE: If the court were to make the order, we would invite the court to require
19 these documents to be produced insofar as they're held by the first and
20 second defenders, because obviously we're in the process of looking and
21 gathering these materials. So if the court were to do that, then we would
22 continue to seek to comply with the order.

23 THE CHAIRMAN: I don't quite follow that, because the qualification "insofar as they
24 are held" --

25 MR BYRNE: Yes, is my Lord envisaging making the order 3(a)?

26 THE CHAIRMAN: Well, we're just exploring it at the moment. But as I've

1 understood it, your position was that you were going to comply with this
2 voluntarily by the middle of next week, but now you're saying you're not;
3 you're only going to give us what you have.

4 MR BYRNE: No, apologies, my Lord. We're in the process of gathering this
5 material. That process hasn't completed, so we don't have all that material to
6 hand. It's being looked out, as I understand it. And we would hope to have
7 looked it out and recovered it by the end of next week.

8 THE CHAIRMAN: Right.

9 MR BYRNE: So that's where we are.

10 THE CHAIRMAN: So going back -- and it's probably my fault entirely if I've
11 misunderstood it -- if you say you hope to have this exercise completed by the
12 middle of next week. If the court were to give you a deadline of the end of
13 next week, would you be able to comply with that?

14 MR BYRNE: I'll just wait and see if I can get some instructions from those instructing
15 me whether that's achievable, my Lord.

16 THE CHAIRMAN: While that's coming in, can I just invite the other members of the
17 panel if they have any other questions they wish to raise on 3(a).

18 MR YOUNG: Yes, there's one point I'd like to ask Mr Byrne about.

19 In terms of the wording there, it's quite a broad wording. Are you confident you know
20 exactly what you're being asked to identify and produce? Because on the
21 face of it, there's no time limit or there's nothing time -- what the
22 correspondence relates to. So I'm just wondering whether you need further
23 guidance as what you've to look out.

24 MR BYRNE: Well, I'm obliged, my Lord. If the court were to turn that into an order,
25 I think it would need to be tightened up, and it would be need to be tightened
26 up in the form of, at the very least, to be expressed that these are items that

1 we actually hold. And in terms of what we hold, we're in the process of trying
2 to recover these materials. It may be by the time we get to the end of that
3 process, we do need further specification. But as the court will appreciate,
4 whilst we're metaphorically looking through the drawers, we don't know what
5 it's going to look like at the end of that process.

6 So it would be more desirable, in my submission, to let that process run its course to
7 the middle of next week, produce what we have recovered; and if that's not to
8 Mr Murray's satisfaction, then he can be more specific as to when precisely it
9 is he thinks is missing.

10 But of course, one concern we would have -- and it would be implied in the order in
11 any event -- one concern we would is that we were held to an order which we
12 couldn't possibly comply with and were held to be in breach of that order in
13 respect of producing something that we simply don't hold or couldn't obtain.

14 My Lord, if you just bear with me, I've just had an email through. I'm being told that
15 the only delay is the potential archive documents and emails, which we don't
16 have a timescale for as yet. And we're going to press the clients on this
17 matter, but it may take a week or so beyond the proposed deadline.

18 THE CHAIRMAN: Mr Anderson, did you have any questions you wish to raise about
19 3(a)?

20 MR ANDERSON: I'm much obliged to the Chair. No, there's nothing more that
21 I need to raise. I'm a little puzzled by the answer Mr Byrne has given, on the
22 view that some searching is being done to find material: why is more
23 specification needed if they're already looking for it? However, I have no
24 other questions.

25 THE CHAIRMAN: Yes.

26 Just on the timing, Mr Byrne, you'll appreciate that this case has been in the offing

1 for quite a while now and it has actually been before the Tribunal for quite
2 a while and we have set a very detailed timetable, which is including
3 production of witness statements. So it's rather surprising to hear now that
4 you don't have all these documents already and you're having to look in
5 drawers for them.

6 MR BYRNE: Well, my Lord, the request came in on 23 February and the process of
7 going back to the clients and looking for these materials started then.

8 THE CHAIRMAN: One would have thought you might have needed them for the
9 production of your witness statements and you might have had them all
10 looked at well in advance of doing that work, but ... I'm just checking when
11 your witness statements are due in. Summaries of witness statements by
12 4 April and bundles on 12 May. It does seem rather late in the day to be
13 trying to find documents in drawers.

14 MR BYRNE: Well, these are the documents that were requested on 23 February.
15 So that's where we are. But we obviously take those comments on board and
16 we'll be complying with the proposed deadlines in the timetable.

17 THE CHAIRMAN: Yes, thank you.

18 Well, I think we'll leave that now and go on to the next issue, which is
19 paragraph 3(b), which is asking for a sworn statement listing hauliers and
20 details about subsidiaries, et cetera. I'm going to ask Mr Byrne to address us
21 on this one first.

22 MR BYRNE: I'm obliged, my Lord.

23 We put in, just before the hearing, the proposed form of words which we have
24 proposed with the pursuer. In substance, it would give him, in my submission,
25 everything that he wants from 3(b) but just ensures that we are not subject to
26 an order to obtain material that we don't have or couldn't reasonably obtain.

1 THE CHAIRMAN: Yes.

2 Mr Murray, have you had a chance to look at what is now being proposed and
3 consider it?

4 MR MURRAY: I have, my Lord. To me, the position is quite simple: we're entitled to
5 this information in law and it really ought to be provided to us in compliance
6 with that law.

7 The reason I --

8 THE CHAIRMAN: Sorry, can I just ask you: what law are you entitled to it under?

9 MR MURRAY: The Freedom of Information Act. Now, you may say that's irrelevant
10 in this case, I'm not sure. But we had requested this in the past using that
11 legislation, but, my Lord, it hasn't been provided.

12 THE CHAIRMAN: I'm looking at 3(b), because this is what we're looking at at the
13 moment.

14 MR MURRAY: Yes.

15 THE CHAIRMAN: And the first thing that is being asked for is it is to be in the form
16 of a sworn statement.

17 MR MURRAY: I'm relaxed -- the reason I put that in, my Lord, was because in the
18 past, when I put questions to the first defender, I did not get straight answers:
19 I received answers to questions that were never put or I received no answers
20 at all. I felt that by requesting a sworn statement, it would put more pressure
21 on people to be simply straightforward and honest.

22 THE CHAIRMAN: Yes. Another point that's being taken in relation to the wording of
23 3(b) is that you talk about "subsidised/discounted fares", and if I've
24 understood the latest letter on behalf of Mr Byrne's agents, they seem to be
25 happy to provide information about the discounted fares, but "subsidised" is a
26 bit of value judgment as to what the court is deciding. Do you insist on the

1 word "subsidised"?

2 MR MURRAY: I don't. I would just say, using the Government's definition, they are
3 subsidised, they are subsidies.

4 THE CHAIRMAN: Right.

5 MR MURRAY: But I would not insist on it.

6 THE CHAIRMAN: What would be the timescale, Mr Byrne, for providing the
7 information which you are now offering to provide?

8 MR BYRNE: We were proposing by 11 April. Because we should also note that --
9 and apologies for jumping out of my Lord's order further -- a further query
10 came in -- and no doubt my Lord will come to this -- on the 22nd, which is
11 looking for what my Lord has, I think, quite correctly called "information" --

12 THE CHAIRMAN: Yes.

13 MR BYRNE: -- and we were proposing that we would try and put that into the
14 witness statement.

15 THE CHAIRMAN: Yes.

16 Well, I'll ask again my colleagues on the panel if they have any questions to raise at
17 this stage. Mr --

18 MR ANDERSON: I don't.

19 MR YOUNG: I have nothing, my Lord.

20 THE CHAIRMAN: Nothing to add at this stage. Thank you.

21 Now, moving on to the second paragraph, which is the Menzies Distribution
22 paragraph. As I understand your request, Mr Murray, you're asking for
23 Menzies Distribution, who is not a party to these hearings, to provide these
24 agreements, et cetera, broadly similar to what you've asked for in
25 paragraph 3. There seems to be a difference in your asking about the second
26 defenders, Orkney Ferries, in paragraph 2 but not in paragraph 3.

1 MR MURRAY: In paragraph 3 -- let me read it again -- I was only asking for the
2 actual contract that exists between JBT Distribution and the first defender or
3 the second defender, as the case may be. Although I see the agreement,
4 I don't know who the contract's with, but I believe it's with the first defender.

5 THE CHAIRMAN: Right. So would I be right in thinking that if the first and second
6 defenders provided that contract to you under paragraph 3, you wouldn't need
7 to go to Menzies under paragraph 2?

8 MR MURRAY: Yes. But what I'd like to say, my Lord: I've already requested this
9 contract under the Freedom of Information Act and I was told that one didn't
10 exist. So I felt that by going to, as it were, an independent company, the other
11 party to the contract, that I had the better prospect of getting it and be
12 confident that what I've received is what I want.

13 THE CHAIRMAN: Yes. Thank you.

14 Again, I'll ask my fellow members of the panel if they have any questions about
15 paragraph 2.

16 MR YOUNG: I don't, my Lord.

17 MR ANDERSON: Nothing either. Thank you.

18 THE CHAIRMAN: Thank you.

19 We'll now go on to the next item on my agenda, which was the request for
20 information in the letter of 22 March 2022. As we've already mentioned, that's
21 a request for information rather than documents.

22 So I really have, at the outset, two questions for you, Mr Murray. The first is: what is
23 the legal basis for making a request to this Tribunal for information under the
24 Freedom of Information Act?

25 MR MURRAY: I'm afraid I can't answer that. I just assume that if the Freedom of
26 Information Act applied, then it applied irrespective of where the request came

1 from.

2 THE CHAIRMAN: Thank you.

3 Mr Byrne, do you have any comments on that answer or my question?

4 MR BYRNE: Well, again, my Lord, I would propose that the court needn't make any
5 order in this respect on the ground that the first and second defenders are
6 offering to provide this information in the proposed witness statement.

7 THE CHAIRMAN: Yes. But on the very technical point, as a matter of law, can you
8 help me on whether a party to a tribunal can make a freedom of information
9 request to that tribunal in relation to information held by another party to that
10 tribunal?

11 MR BYRNE: My initial view would be not, because the Freedom of Information
12 (Scotland) Act 2002 sets out a very specific statutory process for seeking
13 information under that scheme, and the pursuer would need to follow that
14 process. But in my submission, the issue doesn't arise because the matter is
15 going to be voluntarily produced.

16 THE CHAIRMAN: Thank you.

17 The second question I had for you, Mr Murray, was: what is the legal basis on which
18 you're requesting information from the Tribunal? I'm very aware of the power
19 under our rules, which starts about rule 60, to order production of documents,
20 but what is the basis for production of information rather than documents?

21 MR MURRAY: My argument would be in reply that I'm asking for a document which
22 contains the answers to these questions.

23 THE CHAIRMAN: Thank you.

24 These were my preliminary matters I set out in relation to whether your request on
25 22 March was competent as a matter of law. You've answered that, but
26 I don't want to prevent you making any other submissions you'd like to make.

1 So, having dealt with these preliminary matters, I'd just invite you to now
2 address us on your letter of 22 March.

3 MR MURRAY: Again, my Lord, I don't think I have anything to add to it that's not in
4 it. The one point I would make, in terms of whether something constitutes
5 a document or information, I think item 1 certainly refers to a document in the
6 normal sense of that word.

7 THE CHAIRMAN: Yes. But then in a sense that's already covered by your request
8 of 23 February, so it's not additional.

9 MR MURRAY: Hopefully. I mean, the purpose of getting this information was to try
10 and put issues of contention -- or get them sorted out early, get them agreed
11 and simplify things. And I believe that this information I've requested,
12 hopefully in a document, will make clear some of these points.

13 THE CHAIRMAN: Thank you.

14 Mr Byrne?

15 MR BYRNE: Well, my Lord, I think, despite the pursuer's valiant attempt to explain
16 that the information he seeks is actually a document, it doesn't refer to any
17 specified document; it's purely information he's looking for. And as I've
18 already said to the court, the way to address that application is for the court to
19 make no order, on the ground that the first and second defenders are going to
20 address those calls for information, which can be properly provided in a
21 witness statement.

22 THE CHAIRMAN: Thank you.

23 Mr Neil, I've not been asking you about this because this letter has just been
24 addressed to the first defender providing the information. So I've not been
25 asking you for your comments on that basis. But if there is anything you want
26 to say, I'm happy to hear it.

1 MR NEIL: No, I have no comments on this letter, my Lord.

2 THE CHAIRMAN: Thank you.

3 So now I'll just ask the members of the panel if they have any questions in relation to
4 this letter of 22 March.

5 MR YOUNG: No, I don't, my Lord.

6 MR ANDERSON: I don't either. Thank you.

7 THE CHAIRMAN: Thank you.

8 Well, in that case, what I would now propose is that the panel now retires to consider
9 what we've heard so far in relation to the letters of 23 February and 22 March,
10 and you'll be notified when we're ready to resume. So we'll now adjourn.

11 **(3.35 pm)**

12 **(A short break)**

13 **(3.48 pm)**

14

15 **Ruling**

16 THE CHAIRMAN: Good afternoon again.

17 We have now come to our decision and I am going to take each of the paragraphs in
18 the letters in turn. So I am going to start with the letter of 23 February and the
19 request in paragraph 1, which is a request for production of the share
20 purchase agreement and other documents by Weil Holdings.

21 The request in this paragraph is refused. The pursuer seeks an order for production
22 of orders from a third party, Weil Holdings. Documents from a third party are
23 governed by rule 63(3), which says that we may make an order under this rule
24 only where the documents of which disclosure are sought are likely to support
25 the case of the applicant or adversely affect the case of one of the other
26 parties and disclosure is necessary in order to dispose fairly of the claim or to

1 save costs.

2 We were not persuaded by Mr Neil's arguments as to the non-disclosure agreement,
3 confidentiality or GDPR. If we had thought that otherwise disclosure was
4 appropriate, there could be mechanisms under which these issues could have
5 been dealt with.

6 However, we are not satisfied that disclosure of these documents in relation to the
7 share sale is necessary. They raise an issue about the sale of the shares in
8 the third defender, and that issue is not relevant to the competition law issues
9 in this case and is merely collateral. The documents sought go only to the
10 issue of credibility of a witness, and the witness has made his position on the
11 sale of the shares clear. So paragraph 1 is refused.

12 I will next deal with paragraph 3(a), which was the copies of agreements, documents
13 and correspondence between OIC and JBT Distribution. We shall grant the
14 order for production of these documents in 3(a), we will grant that against and
15 the first and second defenders, and they will have to be produced by 5.00 pm
16 on Friday, 1 April.

17 Moving on to paragraph 3(b), in principle we agree that these documents should be
18 produced. We are going to amend the wording slightly: we are going to delete
19 the words in 3(b) "a sworn statement listing"; we are going to delete the word
20 "subsidised"; and we are going to delete the words "for example, how much
21 did each haulier receive in 2012 and 2014", et cetera, that last sentence being
22 an explanation rather than going to the root of what is being ordered.

23 So we shall order that the first and second defenders produce a list of all of the
24 hauliers that received discounted fares on the Sanday to Kirkwall routes in the
25 last ten years and, in the case of each haulier, the amount of these subsidies
26 broken down on a year-by-year basis. The deadline for production of these

1 documents will be 5.00 pm on Friday, 1 April.

2 Moving then to paragraph 2, which is the seeking of documents from Menzies
3 Distribution. We are going to refuse this -- and I am going to use the Latin
4 phrase here, so if you will indulge me in that, I will then explain what that
5 means -- we are going to refuse that in hoc statu, which means we are
6 refusing it at present but this can be revisited in the future.

7 The reason we are refusing it is that these documents are also being sought from the
8 first and second defenders and we have an order for these to be produced by
9 the first and second defenders. So if they comply with that order, then it will
10 not be necessary to make an order against Menzies Distribution. And
11 Menzies Distribution obviously are not a party to the action.

12 However, if the first and second defenders do not produce the documents which we
13 have just ordered them to do under 3(a) and (b), then we can revisit at a later
14 stage, if Mr Murray makes a motion, we can revisit paragraph 2 on whether
15 we should order these documents to be produced by Menzies Distribution.

16 Turning now to the letter of 22 March. The production of the information sought
17 under this letter is refused. As far as the Tribunal is concerned, the freedom
18 of information request is incompetent. The Tribunal is under no obligation
19 under the Freedom of Information (Scotland) Act 2002 to provide to the
20 pursuer the information requested.

21 Some of the questions which have been raised in the letter of 22 March will be
22 answered by the production of documents under the orders which we have
23 just made under paragraph 3 of the 23 February letter. The other requests
24 are not requests for the production of the documents under the disclosure
25 provisions of the Tribunal rules.

26 So these are our orders in relation to the information and the documents which are

1 sought. I will now proceed to the last item on our agenda, which related to
2 witnesses, and I shall ask Mr Anderson to take the lead on that.

3 Mr Anderson?

4 MR ANDERSON: Thank you very much. I'm much obliged to the Tribunal Chair.

5 Gentlemen and ladies participating in this hearing this afternoon, somewhat
6 unusually, because two of the three parties -- or two of the four parties,
7 I suppose, strictly speaking -- are not represented by lawyers and because
8 a question has arisen about methods of case preparation, the Tribunal is
9 going to provide some guidance. I'm going to read that out, a note having
10 been prepared, but I'm going to read it out because it will then appear in the
11 transcript, so that it will be available particularly for you, Mr Murray, and for
12 you, Mr Neil, to refer back to if you're looking for guidance on any of the points
13 which are going to be tackled in what I will say over the next five or ten
14 minutes.

15 Firstly, can I direct both of you, as well as the solicitors involved in this case, to
16 rules 21 and 22 of the Competition Appeal Tribunal Rules, which deal with
17 case preparation and, in particular, with organising the attendance of
18 witnesses and what may be required in the way in which that is gone about.

19 Following on from that, the further comments that I offer are now a response to
20 a request which was initially presented by Mr Murray on behalf of the pursuer
21 in an email to the Tribunal of 14 March 2022. That, I think, has not been
22 circulated to the parties.

23 Can I simply say, Mr Murray, for your benefit that the Tribunal cannot enter into
24 private communication with any individual party. Whatever is said to the
25 Tribunal by one party must be disclosed to any other party, so that there can
26 be no suggestion of some sort of private dealings going on between the

1 judges or the judges' administrators and any individual party. The point that
2 you have requested information about, however, is one which is of assistance,
3 I think, to more than yourself, and therefore the Tribunal is going to deal with
4 it.

5 The Tribunal does want to emphasise that it is not, and cannot ever be, in the
6 position of an adviser to any party. The Tribunal is a court just like any other
7 court and applies the same standards. Impartiality, with also the appearance
8 of impartiality, are fundamental planks of the standards the Tribunal operates
9 under. It is for each party to take their own advice, if it considers it needs it, in
10 order to understand the law and the practice and procedure of courts
11 generally, and this Tribunal in particular. It is the responsibility of each party
12 alone, unaided by the Tribunal, to present its evidence and to argue its case
13 to a conclusion.

14 As I've indicated however, in this case, where, somewhat exceptionally, there are
15 two litigants who have chosen not to involve legal advisers, the Tribunal --
16 which does want to enable litigants such as you, Mr Murray, and you,
17 Mr Neil -- is prepared to provide further generalised information, and that's
18 what I'm going to do in the following few minutes.

19 Firstly, under a main heading of witness evidence, case preparation is and remains
20 a matter for each party. They must first of all identify and then, as necessary,
21 provide witness statements from any person whose evidence they consider
22 can assist the Tribunal in reaching its decision.

23 There may be a common misunderstanding that a witness is for a party. In general,
24 courts take the view that a witness is just a witness providing information
25 which is hoped to be accurate, reliable and truthful about the facts of a case.
26 So a witness is never giving evidence for the party, although they will no

1 doubt be called by one party to give evidence which that party hopes will be of
2 assistance.

3 So evidence, other than expert evidence, should always deal with matters of fact and
4 should not be tainted by opinion of the person giving the statement, nor
5 should be it tainted by the opinion or the position of the person who has taken
6 information from the witness.

7 In ordinary litigation, and in cases typically before this Tribunal, witness statements
8 are obtained by solicitors, who obviously have professional training and
9 professional obligations. The way they do this is by firstly making relatively
10 informal contact with a potential witness, to invite that witness to provide
11 a statement in advance of any hearing of the case.

12 No person can be compelled or obliged to give a witness statement. A witness,
13 however, can be compelled to attend a court hearing. And again, I've made
14 reference to the rules about this. A witness citation issued with the authority
15 of the court -- this Tribunal -- is required if a witness is going to be obliged to
16 come, having indicated they have no immediate willingness to do so.

17 Usually, although not invariably, witnesses will attend voluntarily; and usually,
18 although not inevitably, they have given witness statements in advance.

19 Compelling a witness to attend without the benefit of a statement taken from them
20 carries obvious risks. The person who then puts questions to this reluctant
21 witness will have no reliable knowledge of what the witness may be about to
22 say in their evidence. Their evidence might be supportive, but it might
23 damage or destroy elements of the case which the questioner hopes to make.

24 A question has been raised to the Tribunal by Mr Murray, who wanted to know
25 whether it was appropriate for him to provide a copy of a witness statement
26 which he had already given to the Tribunal. There is, and I wish to make this

1 clear, a fundamental prohibition for solicitors -- and therefore, in the context of
2 this case for the parties, including Mr Murray, who has asked the question --
3 against rehearsing, practising with or coaching a witness about their evidence.
4 That means that it would not be proper practice for a potential witness to be
5 shown the evidence of another witness. It is ordinarily appropriate to allow
6 the witness sight of the written pleadings in a case, and possibly also
7 documentary productions, and that is done for the purpose of inviting their
8 express comment on these documents.

9 What a person such as Mr Murray or Mr Neil should do is to follow the same practice
10 and procedure as would be adopted by a solicitor. The party who wants to
11 bring a witness should contact that person in advance and ask them whether
12 they are prepared to give information in the form of a statement. It's entirely
13 proper, in making that contact, to explain in summary the basis of the dispute
14 and then to invite the potential witness either to meet directly or, in current
15 circumstances, perhaps remotely, by video or by telephone, to provide
16 information.

17 Mr Neil, Mr Murray or any other party following this procedure should then proceed
18 by putting questions to the witness. They should note carefully, ideally
19 verbatim, word for word, the answers given by the witness and reproduce
20 those in the form of a draft statement. The draft statement should then be
21 sent to the witness for comment, correction, additions or any other variations
22 that might be appropriate as far as the witness is concerned.

23 Once the witness has agreed the form of words, it's likely -- and indeed, there are
24 already directions in this case about the procedural rules and putting this into
25 the form of a sworn statement, so that this statement is likely to be the
26 evidence-in-chief from the witnesses. "Evidence-in-chief" means that the

1 statement would be assumed to be the evidence which the witness would give
2 verbally. The witness does still need to attend the hearing to confirm the
3 witness statement and provide any additional supplementary material which
4 may have been omitted, and to be available for cross-examination for by the
5 other parties.

6 If you'll bear with me for a moment. I think I have slightly ... I've lost a revisal which
7 I had to the statement which is of some importance.

8 Yes, it's that once the witness has agreed the form of word, the usual practice is to
9 require the signed witness statement to be submitted to the Tribunal in
10 advance of a hearing; and the Tribunal Rules, 55(2), makes reference to that.
11 And then, as I've said, the signed witness statement provides the
12 evidence-in-chief, and the witness does still need to attend and provide any
13 additional or supplementary material which may have been omitted, and
14 should be available for cross-examination by the other parties.

15 For the avoidance of doubt, therefore, it is not practice for Mr Murray or, for that
16 matter, Mr Neil to provide a copy of their own witness statement to any
17 potential witness, nor should Mr Murray or Mr Neil provide a copy of
18 a statement from any other witness.

19 The contact to be made by Mr Neil or Mr Murray with witnesses should confine itself
20 to asking questions, noting the answers, and then providing a statement
21 version which contains those answers in full. There should be no attempt to
22 edit the answers from a potential witness. And if the witness discloses
23 something material which is unhelpful to the case being advanced either by
24 Mr Murray or Mr Neil, it should nevertheless be included in the witness
25 statement. A witness statement must, so far as possible, be in the witness's
26 own words. And as I said earlier, there must no attempt to coach a witness,

1 to attempt to teach or influence them about the evidence they will give.

2 If either of you is looking elsewhere about information in witness statements, in
3 Scotland a witness statement is typically referred to as a "precognition".
4 A signed version of a precognition is less usual, but the two words are
5 effectively synonymous.

6 A word of warning: do not consult guidance for the US courts in relation to case and
7 witness preparation for litigation in the United Kingdom. The rules and the
8 approach in the United States are very different, and some of the approaches
9 which they adopt there would be considered unethical, and arguably even
10 criminal conduct, in the United Kingdom.

11 There are a couple of decided cases which, if either Mr Neil or Mr Murray felt it
12 helpful, you could look at to understand these principles that I've tried to
13 summarise. The two cases that I have in mind particularly, the first is called
14 Aquarius Financial Enterprises Inc v Certain Underwriters at Lloyd's. The
15 citation for that is [2001] 2 Lloyd's Reports 542, at page 547; and then
16 secondly, a criminal case again from England and Wales, the name of which
17 is R -- that's Regina -- v Momodou, [2005] EWCA -- that's England and Wales
18 Court of Appeal -- Crim -- criminal case -- 177.

19 What it also seemed helpful for us to do today is to indicate to you, Mr Murray, and to
20 you, Mr Neil, that if you're looking for general guidance about how to present
21 a case in court, the Bar Standards Board, which has the understandable
22 acronym "BSB", which is the board for the Bar Council for England and
23 Wales, has produced a handbook of rules. And in particular, you might want
24 to look at rules C6.2, C.9, gC6 and gC7, because the handbook would explain
25 and further elaborate upon what I've just said and would also give you, as
26 a party appearing in person, useful further guidance as to how to present

1 evidence and submissions to the court, including suggestions about how you
2 lead evidence and cross-examine witnesses.

3 I apologise for the rather tedious length of that, but it was necessary to put it into the
4 transcript and it's there for you for future reference if you need it.

5 MR NEIL: Thank you.

6 THE CHAIRMAN: Thank you.

7 That is looking ahead. I just want to clarify, in case you were wondering, that the
8 hearing we have listed on 26 May and 27 May is for legal arguments, without
9 witnesses. So what has been said about witnesses would be relevant to later
10 stages in the procedure.

11 Does that deal with all matters we have to deal with today or does anyone have
12 anything else that they wish to raise?

13 MR NEIL: No, my Lord.

14 THE CHAIRMAN: No. In that case, I'm obliged to you all. We shall adjourn and the
15 panel will adjourn to the retiring room.

16 **(4.11 pm)**

17 **(Hearing concluded)**

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Key to punctuation used in transcript

| | |
|--------------|--|
| -- | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking |
| ... | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence. |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| - | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there? |