

Court of Appeal case no.: 2025-002176

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL

Hodge Malek KC (chair), Sir Iain McMillan CBE FRSE DL, Timothy Sawyer CBE

[2025] CAT 41

BETWEEN:—

AUBREY WEIS

Appellant

-and-

GREATER MANCHESTER COMBINED AUTHORITY

Respondent

RESPONDENT'S SKELETON ARGUMENT

AIDAN ROBERTSON KC

4 December 2025

Brick Court Chambers

7-8 Essex Street

London WC2R 3LD

Aidan.Robertson@brickcourt.co.uk

A. INTRODUCTION

1. This is an appeal from a judgment of the Competition Appeal Tribunal (“the Tribunal”) under the Subsidy Control Act 2022 (“the 2022 Act”). The Tribunal held that the provision of loan finance under the Greater Manchester Housing Investment Loans Fund (“GMHILF”) by the Respondent (“the Authority”) to Renaker (“the 2024 Renaker Loans”) do not confer any subsidy under the 2022 Act. They are made on commercial terms and thus, under the Commercial Market Operator (“CMO”) principle under s.3(2) of the 2022 Act, do not constitute financial assistance conferring any economic advantage on the loan recipients within the meaning of s.2(1)(b).

2. An appeal under the 2022 Act lies to the Court of Appeal only on the ground of error of law. See s.75(1) of the 2022 Act which provides that:

“An appeal lies to the appellate court on any point of law arising from a decision of the Tribunal under the preceding provisions of this Part.”

3. As to what constitutes an error of law, this was addressed by the Court of Appeal (Green and Newey LJJ) *Le Patourel v BT* [2025] EWCA Civ 1061. This was an application for permission to appeal from the Tribunal under the Competition Act 1998 (“the 1998 Act”). As under the 2022 Act, appeal only lies from the Tribunal to the Court of Appeal under the 1998 Act on points of law.

4. The Court of Appeal explained at [11] that:

“The CAT refused permission to appeal, and the applicant now seeks permission from this Court. The issues arising are complex and the Court directed that the application be heard orally with the benefit of detailed written submissions.”

5. Although the Court of Appeal observed in *Le Patourel* at [5] that the appellant had “[a]t face value ... an attractive case”, after detailed analysis permission to appeal was refused: [96].

6. The Court of Appeal explained the approach to be taken to errors of law on appeal at [12]:

“The Court of Appeal has jurisdiction in appeals of this sort only on points of law: section 49(1) CA 1998. Where an issue focuses upon an evaluation of evidence it is, at least in principle, capable of amounting to an error of law in some circumstances: see e.g. *Airwave Solutions Limited v CMA* [2025] EWCA

Civ 54 at paragraphs [88] and *Cinven (ibid)* at paragraphs [161], [242]–[243]. Classic illustrations are where the CAT acted irrationally in its findings in the sense that no CAT could, acting reasonably, arrive at the conclusion that it did, or failed to address relevant considerations, or took into account irrelevant considerations. However, this Court has to ensure that it does not, without good and proper reason, interfere in the exercise of the legitimate discretion of the CAT to find facts and draw inferences from those facts. Both the nature of the evidence and the institutional composition of the CAT are factors affecting the breadth of the margin of discretion that must be accorded to the CAT and this impacts upon the sorts of alleged errors that the Court will recognise as amounting to viable grounds of appeal:

- i) First, many issues to be decided about the computation of Cost-Plus and the justification for the differential with selling prices are incapable of precise measurement or quantification. The complexity of the task is multiplied because many cases resemble large multi-piece jigsaws. The CAT has to form conclusions based upon data exhibiting varying degrees of accuracy and completeness which may also be based upon assumptions of uncertain precision and authenticity meaning that routinely it must make judgment calls about the reliability of multiple strands of divergent and inconsistent evidence. In doing this the CAT has to use its powers of informed, skilled, guesstimation, or, to use the more colourful analogy deployed in other cases, wield the broad axe.
- ii) Secondly, the CAT has an institutional ability on the Bench to meld legal, financial, business and economic experience, a range of skills not systemically replicated in an appeal Court, but which are especially important in cases such as the present given the nature of the evidence. Where a finding concerns how to identify relevant costs, or as to their attribution once identified to a line of business or, assuming it is to be attributed, as to the extent of the allocation, or as to the assessment of the value to consumers of various features of a good or service both in the index market and/or in a comparable market, or as to the relationship between value and final selling price, the appellate court is in a materially weaker position to form a fair and rounded conclusion, than

is the CAT. This is why its jurisdiction is limited to points of law and why, where disputes over evidence and fact are said to amount to appealable points of law, the Court exercises considerable reticence before interfering in the CAT’s evaluative judgment.”

7. In the present case, the Court of Appeal’s reference to “the institutional composition of the CAT” as a factor “affecting the breadth of the margin of discretion” is particularly apposite.

8. As to the Tribunal’s expertise in the present case, the Tribunal observed at [16] that:

“The Tribunal using its expertise, including the two members of the panel with extensive banking and lending experience [i.e. Sir Iain McMillan and Mr Sawyer], was able to understand the process and form a clear assessment as to the terms of the 2024 Renaker Loans.”

9. The relevance of the Tribunal’s expertise was also discussed by the Court of Appeal in its the judgment in *Cérélia v CMA*, cited in the Tribunal’s judgment at [125].

“In *Cérélia v CMA* [2024] EWCA Civ 352, [2025] Bus LR 94, a statutory judicial review under s120 Enterprise Act 2002 of a CMA merger control decision, on appeal from the Tribunal, Green LJ stated:

“40... the breadth of the deference to be accorded to the decision maker may vary as between different grounds of challenge. It is, however, important to recognise that, because of its expertise, it is quite possible that the CAT will be critical of relatively complex evaluations by the decision maker, even where a non-specialist court might not be. That is a necessary corollary of the CAT having been instituted as a specialist body tasked to conduct precisely that sort of exercise.

41. It is, though, important not to let semantics obscure the nature of the exercise. If, following a detailed review, the CAT concludes that the decision maker erred because, for example, it misconstrued the evidence or data, or failed properly to inquire into the evidence, then it is a matter of words only to say that the decision is in error because it was not supported by the evidence, or alternatively, that the decision was “irrational”. Finally, none of this involves the CAT substituting its own view for that of the decision maker. It is simply holding the CMA to a proper standard.” “

10. It is therefore clear that the present case is a paradigm example of a tribunal with a high level of directly relevant expertise and thus enjoying a broad margin of discretion in matters of factual evaluation going to the central issue of whether the Tribunal has materially erred in law.
11. The Authority submits that the Appellant's submissions come nowhere near to establishing any relevant error of law, still less any material error of law.
12. Moreover, unlike *La Patourel*, the Appellant is very far from presenting an attractive case: indeed, quite the opposite. The Appellant is essentially dressing up what are in reality recycled factual submissions as purported issues of law in an attempt to advance an impermissible appeal on the facts.

B. RESPONSE TO THE APPELLANT'S ALLEGED ERRORS OF LAW

13. The Appellant advances seven grounds of appeal, However (and unhelpfully), the Appellant's skeleton argument does not cross-refer to the grounds of appeal and instead appears to a large extent to be an impermissible attempt to reopen the Tribunal's factual determinations. Paragraph references hereinafter are to the Tribunal's judgment unless otherwise stated.
14. This unstructured approach precisely to identify and particularise alleged errors of law continues the Appellant's approach before the Tribunal as identified in the judgment below at [136]-[137].
15. The Authority sets out below the Grounds advanced by the Appellant, and (in so far as can be attributed) the relevant paragraphs of the Appellant's skeleton.

Ground 1 – The CAT erred in law in failing to apply orthodox judicial review principles to review the lawfulness of the GMCA Committee's subsidy decision of 22 March 2024 based on the information and advice that was before the GMCA Committee.

Appellant's skeleton ¶¶5-9, 41

16. There is nothing in this ground.
17. The Tribunal applied orthodox judicial review principles within the relevant legal framework: see [100]-[125].
18. No error of law in the Tribunal's explanation of relevant judicial review principles has been identified by the Appellant and, it is submitted, there is none.

19. The Tribunal was well aware that the review essentially turned on matters that were before the decision-making body throughout the whole of the decision-making process: see the detailed account of the process of pricing and awarding the Renaker Loans at [23]-[99] and the Tribunal’s correct statement of the law at [124] that:

“The views or knowledge of officers or other third parties are irrelevant, unless they were communicated to the decision-maker and actually taken into account by the decision-maker during the decision-making process”.

20. The Tribunal correctly stated at [153]:

“In determining the key issue in this case as to whether or not the 2024 Renaker Loans amount to financial assistance which confers an economic advantage, the Tribunal does not simply look at the terms of the GMCA Committee decision on 22 March 2024. It needs to consider the whole process including the various stages leading up to that decision as well as the due diligence and final terms of the 2024 Renaker Loans. It will also consider the internal records on the setting of the interest and other terms. ...”

21. Thus the Tribunal, applying orthodox judicial review principles, concluded as to the whole process at [185]:

“The process followed by the Respondent in reaching the subsidy decision and thereafter entering into the 2024 Renaker Loans (see paras 74 to 99 above) appears to the Tribunal to be a perfectly rational one and not inherently defective. It provides for decisions to be made in the light of input and consideration by officers experienced in making lending decisions and recommendations, as well as those on the Gateway Panel and the Credit Committee. It is only after that process has been followed that the matter goes before the GMCA Committee, which is provided with the Part A and more specific Part B Reports which includes the proposed commercial terms. Even once the decision has been made by the GMCA Committee, that is not the end of the process as before the 2024 Renaker Loans are entered into there is due diligence and legal review leading up to the actual loan agreements signed by the Treasurer under the authority delegated to him. The application for the loans was considered by the Gateway Panel on 11 December 2023 and 22 February 2024 and the Credit Committee on 7 March 2024. The GMCA gave its approval

on 22 March 2024 subject to due diligence and legal view and documentation. The Treasurer was given the authority to enter into the 2024 Renaker Loans at the end of that process, and he executed them on 22 November 2024.”

22. The Appellant seeks to take the GMCA Committee decision, on 22 March 2024 in isolation as being the subsidy decision: see ¶41 of the Appellant’s skeleton.
23. As the Tribunal found, that is flatly contrary to the whole due diligence process then carried out by the Authority. Until that had been carried out to the Authority’s satisfaction, execution of the Loans could not take place. As the Authority explained to the Tribunal, loans can, and do, fail to proceed to completion after reaching the GMCA Committee stage. There is simply no good reason only to take the GMCA Committee decision into consideration. The Tribunal did not err in law by considering the whole process.

Ground 2 – The CAT erred in law in having regard to, and relying upon, justifications for the interest rates produced by a junior officer that: (i) post-dated the Decision, (ii) was never placed before or considered by the GMCA Committee’s subsidy decision, and (iii) contained the views or arguments of the junior officer, not the GMCA Committee.

Appellant’s skeleton ¶¶31-38, 42, 45-49, 54-58

24. There is no error of law in the Tribunal’s reasoning.
25. The ‘junior officer’ to whom the Appellant refers (actually a senior officer responsible for managing this project, with extensive experience in public lending) is Mr Michael Walmsley who was a member of the Investment Team reporting to the Authority’s Director of Strategic Finance and Investment, Ms Laura Blakey. He was not the ultimate decision-maker.
26. The Tribunal explained Mr Walmsley’s role in the decision-making process at the following paragraphs of the judgment.

“[77] Mr Walmsley did not attend the Gateway Panel meeting held on 22 February 2024 as he was on holiday. He did however, in advance of the meeting, prepare the gateway paper (or ‘investment proposal’) which was presented to the Gateway Panel at that meeting. Before the meeting, he also received the presentation slides that Renaker presented to the panel.

[78] On 7 March 2024 there was a meeting of the Respondent's Credit Committee. This was attended by Mr Tony Goldrick. Mr Goldrick worked at The Royal Bank of Scotland for 30 years with much of this time in the real estate sector, rising to Head of the Corporate Real Estate Team covering the North of England. Mr Walmsley presented a paper summarising the request for approval of the loans.

[79] Mr Walmsley attended the Credit Committee meeting on 7 March 2024. As the GMCA lead transaction manager for the proposed loans, he presented the gateway paper as well as the 'GM Housing Fund – Credit Paper' which Catherine Edwards, transaction manager, drafted to the committee.

...

[87] Mr Walmsley explained in his witness statement that the IRSP [Interest Rate Setting Paper] is a standard part of the GMCA's loan approval process. The IRSP is drafted for each loan that is approved at a GMCA public meeting. It provides a consistent point of reference for each transaction to document that the Respondent has considered all the relevant matters and have tested all the information / assumptions which were used to present the development and terms of the loans in the relevant investment proposals and that these all remain valid or has been amended. The IRSP therefore reflects the information that has gone through the rigorous approval process (namely the Gateway Panel, Credit Committee and the public meeting). Ultimately this serves the purpose of showing whether the development proposal and loans stand up to assessment and diligence and therefore whether the pricing proposed is still appropriate."

27. As to ensuring that the 2024 Renaker Loans were made on commercial terms, the Tribunal explained that:

"[187] As Director of Strategic Finance and Investment of the Respondent, Ms Blakey heads a team responsible for handling loan applications and loans under the GMHILF. The Transaction Manager, Mr Walmsley and those working alongside him would have been well aware of the need to make loans on commercial terms. They would have been aware of the lending and rates used by the GMHILF in its lending and did not work in a vacuum. There is no reason to believe that the relevant members of the Investment Team were in effect

ignorant of rates commercially available. It was not necessary for a formal analysis to have been carried out on market rates prior to agreeing indicative rates.”

28. Thus, the Tribunal was clear that what the Appellant refers to as “the Walmsley Paper” and which is referred to in the judgment as the IRSP was not part of the decision-making process to approve the 2024 Renaker Loans. Rather, it was produced after the approval in principle by the GMCA Committee of those loans on 22 March 2024. It recorded matters which were within the knowledge of those participating in the decision-making process. That said, it should be noted that the lending terms, including the proposed interest rates, were put before the Gateway Panel and Credit Committee (the two committees involved in the approval process for the loan) via the 'Housing Fund – Investment Proposal' and 'GM Housing Fund – Credit Paper'. See further paragraph 40 of this Skeleton.
29. It is well-established that “there is no reason in principle to prevent ‘*ex post facto*’ evidence being admitted if its function would be “elucidation not fundamental alteration, confirmation not contradiction” (see the judgment of Hutchinson LJ in *R v Westminster City Council Ex p Ermakov* [1996] 2 All ER 302, 315h–j). That is the touchstone.
30. *Ermakov* and later authorities were helpfully reviewed by Stanley Burnton J (as he then was) in *Nash v Chelsea College of Art and Design* [2001] EWHC Admin 538
“[34] In my judgment, the following propositions appear from the above authorities:
 - (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in *Northamptonshire County Council ex p D*) “the adequacy of the reasons is itself made a condition of the legality of the decision”, only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.
 - (ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
 - (a) Whether the new reasons are consistent with the original reasons.

(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.

(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).

(d) The delay before the later reasons were put forward.

(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.

[35] To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.

[36]. Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members.’’

31. *Nash* was adopted by Elias J, as he then was, in *Herefordshire Waste Watchers Ltd v Herefordshire Council* [2005] EWHC 191 (Admin) at [45], observing at [46], it is “proper to allow further explanation in an appropriate case”, if the decision-maker’s reasoning lacks the “clarity or detail which is desirable”.
32. As to *Nash* at [36], see also *Morge v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268, Baroness Hale of Richmond at [36]:

“Democratically elected bodies go about their decision making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose would be defeated...”

33. These principles were summarised and applied by the Court of Appeal in *R (Sahota) v Herefordshire County Council* [2022] EWCA Civ 1640, [2023] Env LR 20 at [18]:

“The authorities on the admissibility of "*ex post facto*" evidence in judicial review proceedings were summarised by this Court (comprising Bean LJ, Sir Keith Lindblom SPT and Sir Stephen Irwin) in *R (United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197; [2022] RTR 2 at para 125. The authorities, many of which were cited to us also, include *R. v Westminster City Council Ex p. Ermakov* [1996] 2 FCR 208; *R (Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290; *R (Watermead Parish Council) v Aylesbury Vale DC* [2017] EWCA Civ 152; [2018] PTSR 43; and *Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302; [2021] Env. L.R. 8. It is unnecessary to recite all of the seven principles which were identified by the Court in *United Trade Action Group* but several pertinent points can be derived from them.

(1) The court has a discretion whether to admit evidence that has come into existence after the decision under review was made, as a means of elucidating, correcting or adding to the contemporaneous reasons for it.

(2) Evidence directly in conflict with the contemporaneous record of the decision-making will not generally be admitted. The touchstone is whether the evidence is elucidation not fundamental alteration, confirmation not contradiction.

(3) Sometimes, even where the evidence is merely explanatory, the court will have to ask itself whether it would be legitimate to admit the explanation given. Circumstances will vary. For example, when the court is dealing with a challenge to a planning inspector's decision it will have in mind that there is an express statutory duty on the inspector to give

reasons for his decision. As was common ground before us, there is no similar statutory duty on a local planning authority in a case such as the present. There was such a duty at one time but that has been abrogated: see the Town and Country Planning (General Development Procedure) (England) (Amendment) Order 2003 (SI 2003 No. 2047), article 5, which was brought into force on 5 December 2003 and was repealed with effect from 25 June 2013 by the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 (SI 2013 No. 1238), article 7. The history is set out more fully in *Dover DC v Campaign to Protect Rural England (Kent)* [2017] UKSC 79; [2018] 1 WLR 108, at paras 28-30 (Lord Carnwath JSC).”

34. As to the authorities to which the Appellant refers at ¶¶45-49 of its skeleton, both *Kenyon v SSHCLG* [2020] EWCA Civ 302 and *R (007 Stratford Taxis Limited) v Stratford on Avon District Council* [2011] EWCA Civ 160 concerned *ex post facto* attempts to rely upon evidence that was not before the relevant decision-maker.
35. By contrast, here the Tribunal referred to the IRSP as evidence as to the thinking of the Investment Team as to why the rates were appropriate. This was therefore properly taken into account by the Tribunal in reviewing the decision-making process.
36. This was explained by the Tribunal as follows:

“[160] In seeking to resist these proceedings, the Respondent has sought to advance justifications for the decisions based on after the event internal notes said to have been written by Mr Walmsley which: (i) were produced after the Respondent approved the loans, and (ii) were never put before the relevant decision-maker (namely, the GMCA Committee). This *ex post facto* reasoning seeks to justify the interest rates charged by the Respondent on the loans.

...

[196] The IRSP was not presented to the GMCA Committee. Rather it was an internal and evolving analysis for internal purposes as well as to provide the basis for compliance with the Facility Agreement which requires at least that the State Aid reference rate is charged by the Respondent with DLUHC receiving this level of interest and the Respondent receiving the remainder up to £2.5 million per year. It also provides a check against the 2022 Regulations and the

Reference Rate Communication. The Tribunal considers it is a well-reasoned and helpful analysis and goes to explain in Mr Walmsley and the Investment Team’s terms why the rates adopted were justifiable and how they were priced. It reflects the considerations that the Investment Team had in mind at the time of the indicative terms in February 2024 and the GMCA’s decision in March 2024, but subjected to further analysis as the loan progressed up until when the 2024 Renaker Loans were finally agreed. The further analysis reflected in the various drafts of the IRSP did not alter the position as in the papers before the GMCA Committee, instead they confirmed that the terms approved by the GMCA Committee were appropriate. Contrary to the position of the Appellant (at para 160 above), the IRSP is not irrelevant, it displayed the thinking of the Investment Team as to why the rates were appropriate and had the analysis changed the perception as to the appropriate rates then this would have had to be fed into what were to be the final terms of the 2024 Renaker Loans. In broad terms the key drivers for the rates and terms had not changed from those set out in the Part B papers before the GMCA Committee. The IRSP provided more detail and deeper analysis than in the more user friendly and practical Part B papers.”

37. The Tribunal’s conclusion as to taking the IRSP into account and the weight to be given to it is rational and does not disclose any error of law.

Ground 3 – The CAT erred in law in holding that it was not legally necessary for the GMCA Committee to be provided with and/or to consider any information or advice whatsoever as to whether the interest rates on the loans were consistent with the rates the borrowers might reasonably be expected to obtain from the market before making the Decision.

Appellant’s skeleton ¶¶43, 51-55

38. This is simply an incorrect mischaracterisation of the Tribunal’s judgment on the whether the loans were on commercial terms.
39. The Appellant again seeks to take the GMCA Committee meeting on 22 March 2024 in isolation and out of context.
40. Before being presented to that GMCA Committee meeting, the proposals for the loans had been developed by the Authority’s experienced Investment Team and had been

scrutinised by two committees established by the Authority for this purpose, the Gateway Panel and the Credit Committee, each of which included persons with considerable relevant lending experience as well-placed to form a view on this issue. The Gateway Panel consists of three independent external advisors who all have significant experience in the private housebuilding sector. Likewise the Credit Committee comprises of individuals with sector experience who are able to credibly review the information provided and determine if the pricing proposed is appropriate.

41. This process was in accordance with the GMHILF Revised Investment Strategy dated 25 October 2019 set out at [24]. The operation of the Gateway Panel is described at [30]-[33]. The operation of the Credit Committee is described at [34]-[38].
42. The process of setting rates is set out at [63]-[69].
43. It is unrealistic to suggest that just because the rates are not described as commercial rates in the minutes of those meetings that those committees did not consider the rates. Had they considered that the rates were not on market terms, they would have of course noted that. The whole decision-making process is relevant to setting rates on commercial terms, rather than just taking the GMCA Committee meeting in isolation as the Appellant seeks to do.
44. As to the outcome of the decision-making process in the rates, the Tribunal (two of whose members also had considerable relevant lending experience) concluded at [193(1)] that the interest rates “cannot be fairly categorised as low or obviously below market or commercial rates (bearing in mind the level of risk and security)” for the reasons then set out. The Tribunal then made detailed findings that the level of security was more than adequate to protect the Authority’s interests as a commercial investor: [193(2)-(6)].
45. The Tribunal concluded at [194] that:

“Like the GMCA, a commercial lender would no doubt regard the 2024 Renaker Loans as relatively low risk where there was only a minimal risk of loss even in the event of a default. There were a number of risks inherent in such lending: the SPVs going out of business, lower than expected sales, increased costs beyond budget. However, even if such risks materialised, the structure of the 2024 Renaker Loans, including covenants and security, and the low LTV [Loan to Gross Development Value] meant that in the event of a default, it was most

probable that the Respondent would recover the full amount of the loans plus interest.”

46. That was an entirely reasonable and proper conclusion for the Tribunal to draw on the evidence before it and exercising their obvious expertise. There is simply no basis for the Appellant to argue at ¶43 of its skeleton argument that the Tribunal has gone wrong in law by exercising what it describes as a “*de novo* analysis” contrary to s.70 of the 2022 Act.
47. The Tribunal is entitled to bring its expertise to assess the rationality of the Authority’s funding decision. See the observations of the Court of Appeal in *Le Patourel and Cérélia* cited above. In the latter judgment, the Court of Appeal stated at [41] that exercise of the Tribunal’s expertise to form a judgment on rationality did not involve the substitution of its view for that of the decision-maker.

Ground 4 – The CAT erred in law in holding that the Respondent had lawful regard to the Statutory Guidance.

Appellant’s skeleton ¶¶10-14, 59-63

48. The Authority’s approach to the application of the CMO principle in accordance with the Statutory Guidance was a rational one and did not involve any error of law.
49. The Tribunal approached the application of the CMO principle in accordance with the approach adopted to the equivalent principles of EU State aid law and the interim UK subsidy control scheme prior to the entry into force of the 2022 Act on 4 January 2023, following the Court of Appeal judgments in *R (Sky Blue Sports) v Coventry City Council (No 1)* [2016] EWCA Civ 453 and *R (British Gas Trading) v Secretary of State for Energy Security and Net Zero (Bulb Energy)* [2025] EWCA Civ 209, [2025] 1 WLR 3342: see [100]-[106]. It is submitted it was correct to do so and no error of law arises.
50. The Appellant seeks to distinguish those judgments at ¶¶60-61 of its skeleton argument. As to *Sky Blue Sports*, the Appellant states that in that case the Council had been provided with specific commercial and legal advice. But that is not a point of distinction when the Authority’s full decision-making process is considered in its proper context, as the Tribunal has done.
51. As to *Bulb Energy*, this is said to be a substantive challenge, but it is difficult to see what this means as it was, like *Sky Blue Sports*, a claim for judicial review. As to the

other argument it may be distinguished because it was a case under the Brexit interim regime, that regime existed to give effect to the UK's post-Brexit obligations on subsidy control under the UK/EU Trade and Cooperation Agreement ("TCA"). As the Tribunal explained at [114]-[119], the 2022 Act was adopted to give effect to the TCA through specific primary legislation as well as to the UK's pre-existing international obligations in the field of subsidy control through the World Trade Organisation. There is no good reason why the 2022 Act should have adopted a different approach in the CMO principle to that which was held to apply under the interim regime.

52. The Tribunal concluded that the Authority's process was "a perfectly rational one and not inherently defective": see [185]-[194].
53. The Tribunal's conclusion on the Authority's application of the CMO principle under s.3(2) having regard to the Statutory Guidance at [202]-[204] does not disclose any error of law in the interpretation and application either of s.3(2) or the Statutory Guidance. See in particular [203]:

"The Tribunal does not consider that in all the circumstances the GMCA had failed to have regard to the Guidance. They could have done more, but in not doing so, this did not constitute a breach of duty as in not taking specific steps suggested in the Guidance as the approach taken was rational and the rates adopted were justified and by no means appear to be low and unduly favourable rates outside those that other commercial lenders would most probably be willing to lend at."

Ground 5 – The CAT erred in law in its construction of the relevant terms of the EU Reference Rate Communication.

Appellant's skeleton ¶¶64-66

54. The Appellant seeks to argue that the EU Reference Rate Communication required the Authority to apply a 4% uplift to the interest rate charged on the loans in respect of the creditworthiness of the SPVs entering into the 2024 Renaker Loans.
55. The Tribunal considered the Communication at [131]-[135], [165]-[166], [179]-[180] and [198]-[199]. The Tribunal correctly found that the Authority's approach to the application of the EU Reference Rate Communication was rational and does not disclose any error of law.

56. The Tribunal correctly set out the non-binding effect of the Communication as follows:

[179] As the Reference Rate Communication makes clear on the first page under the heading “Reference and Discount Rates” “Within the framework of Community control of State aid, the Commission makes use of reference and discount rates.” The Notice therefore is a statement of practice by the Commission when dealing with State Aid notifications. It is not, and could not be, laying down binding rules of general application.

[180] Thus, as a matter of EU law, the Notice is and was not binding. As stated in Bacon *European Union Law of State Aid* (3rd ed, 2017) at para 2.56 the Reference Rate Communication “*is only a starting point and the particular circumstances may indicate that the market rate is lower or higher than the reference rate*”.

57. In summary, the Authority’s hands were not tied by the Communication. As the Tribunal’s assessment of the interest rates at [193]-[199] explains, the interest rates were on commercial terms and there was no reason to apply the 4% interest rate uplift referred to in the Communication.

Ground 6 – The CAT erred in law in holding that a rational private lender (or rational public body) would apply a margin of 1% rather than 4% to the loans in reliance on the creditworthiness of Daren Whitaker in circumstances where: (i) Daren Whitaker was not providing any guarantee or indemnity in respect of the loans, and (ii) the Respondent had not inquired into, or considered, any information whatsoever regarding Daren Whitaker’s liabilities, such that it was unable rationally to understand or assess what his creditworthiness was.

Appellant’s skeleton ¶¶67-68

58. The Tribunal was entitled to reach the conclusion it did on the evidence before it for the reasons stated at [193]-[199]. This was a rational conclusion by a properly informed and expert Tribunal. That does not disclose any error of law.

Ground 7 – The CAT erred in law in not holding that the Respondent failed to have regard to relevant considerations related to setting the interest rates on the loans, namely: (i) the Maslow Loans, and other information regarding the interest rates charged by private lenders to Daren Whitaker controlled SPVs, (ii) the concentration risk arising from the cumulative exposure to DW arising from the loans, and/or (iii) the

material inconsistency between the representations made by Daren Whitaker regarding the viability of the developments being pursued by the SPVs: (a) when seeking exemption from affordable housing contributions, and (b) when seeking the loans from the Respondent.

Appellant's skeleton ¶¶69-76

59. These are no more than attempts to re-run submissions considered and rejected by the Tribunal.
60. The Tribunal was entitled to reach the conclusion it did on the evidence before it and for the reasons given in the judgment:
 - (i) the Maslow loan (Crown Street) – the Tribunal found that this was not a useful comparator: see [191];
 - (ii) concentration risk – this was rejected by the Tribunal at [201];
 - (iii) the Tribunal rejected any obligation by the GMCA to consider applications by Renaker for exemption from affordable housing costs at [216] as these were prepared based on different information for an independent process and quite separate purposes.
61. None of these rational conclusions are vitiated by any material error of law or assessment.

C. CONCLUSION

62. The Authority respectfully invites the Court to reject the appeal and award the Authority its costs.