Neutral Citation Number: [2026] EWCA Civ 825

Case No: CA-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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2026

Before :

LORD JUSTICE NUGEE
LORD JUSTICE ZACAROLI
and
LORD JUSTICE MILES

- -

Between :

AUBREY WEIS **Appellant**

- and -

GREATER MANCHESTER COMBINED AUTHORITY **Respondent**

- -
- -

Joseph Barrett KC and Oliver Jackson (instructed by **Walker Morris LLP**) for the **Appellant**
Aiden Robertson KC (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing dates: 9 & 10 June 2026

- -

(NON-CONFIDENTIAL) JUDGMENT
Approved Judgment

This judgment was handed down remotely at 10.00am on 29 June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Zacaroli:

1. On 22 November 2024, The Greater Manchester Combined Authority (the "**GMCA**") entered into two loan agreements (the "**Loans**"), one advancing £60.7 million to Trinity Developments (Manchester) Limited ("**Trinity**"), the other advancing £59.3 million to New Jackson (Contour) Investments Limited ("**Jackson**").

2. Trinity and Jackson are special purpose vehicles ("**SPVs")** ultimately beneficially owned by Daren Whitaker ("**Mr Whitaker**"). The Loans were to finance the construction of two high-rise residential tower blocks (one known as Trinity Islands, the other known as Contour) in the Great Jackson Street area of Manchester.

3. Mr Whitaker, through one or other SPV in what is loosely referred to as the "**Renaker**" group, had been involved in numerous similar construction projects. Other companies in the Renaker group had previously been in receipt of loans from the GMCA.

4. The GMCA made the Loans from a fund, the Greater Manchester Housing Investment Loan Fund (the "**GMHILF**"), provided by Central Government pursuant to a "**Funding Agreement**". The primary objective of the GMHILF was the creation of new homes in the Manchester area. At the time of the making of the Loans, approximately £300 million remained in the GMHILF.

5. This appeal arises from an objection to the Loans made by the appellant, Mr Aubrey Weis, who owns and controls a number of companies with substantial property development investments and projects in and around Manchester. The appellant's complaint is that the Loans constitute an unlawful subsidy within the meaning of the Subsidy Control Act 2022 (the "**2022 Act**"). Under the 2022 Act, an interested party such as the appellant is entitled to seek the review of a subsidy decision made by a public authority by way of application to the Competition Appeal Tribunal (the "**CAT**").

6. The CAT dismissed the appellant's application for the reasons set out in its judgment dated 24 July 2025 (the "**Judgment**"). The appellant appeals against that decision with permission granted by me on 28 October 2025. This is the first case to reach this Court under the 2022 Act.

The statutory scheme

7. The 2022 Act replaced the EU state aid regime, which ceased to apply at the end of 2020, and the interim regime, which had been in place from then until the 2022 Act came into force on 4 January 2023. It was adopted to give effect to the UK's obligations under the Trade and Cooperation Agreement entered into at the end of 2020 (the "**TCA**"). It is common ground that the 2022 Act is to be interpreted in accordance with ordinary, purposive canons of construction, having regard to the provisions of the TCA: see s.89(2) of the 2022 Act, which applies s.30 of the European Union (Future Relationship) Act 2020, which requires a court or tribunal to have regard to Article 4 of the TCA when interpreting that agreement. Article 4 requires the TCA to be interpreted in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. Mr Barrett KC, who appeared for the appellant, emphasised that principles of EU law are irrelevant in the interpretation of the 2022 Act.

8. The appellant places particular reliance on Article 366 of the TCA which obliged the UK to "have in place and maintain an effective system of subsidy control" that ensures that the granting of a subsidy respected six principles, which are substantially the same as the subsidy control principles set out in the 2022 Act to which I refer below. References to section numbers in the remainder of this part are to the 2022 Act.

9. A subsidy is defined by s.2(1) as follows:

> "(1) In this Act, "subsidy" means financial assistance which—
>
> (a) is given, directly or indirectly, from public resources by a public authority,
>
> (b) confers an economic advantage on one or more enterprises,
>
> (c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and
>
> (d) has, or is capable of having, an effect on—
>
> (i) competition or investment within the United Kingdom,
>
> (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or
>
> (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom."

10. Financial assistance is treated as given to an enterprise if the enterprise has an enforceable right to the financial assistance: s.2(5).

11. It is accepted that the Loans were given from public resources by a public authority, that they benefitted Trinity and Jackson over one or more other enterprises and that they were capable of having an effect on competition or investment within the UK. It is common ground therefore that sub-paragraphs (a), (c) and (d) are satisfied. The only issue relates to sub-paragraph (b). As to that, s.3(2) provides:

> "Financial assistance is not to be treated as conferring an economic advantage on an enterprise unless the benefit to the enterprise is provided on terms that are more favourable to the enterprise than the terms that might reasonably have been expected to have been available on the market to the enterprise."

This is referred to as the "commercial market operator" principle (the "**CMO Principle**").

12. Where a public authority proposes to give a subsidy, it "must consider the subsidy control principles before deciding to give a subsidy": s.12(1)(a). Unless it is of the view

that the subsidy is consistent with those principles, it must not give the subsidy: s.12(1)(b).

13. The subsidy control principles (the "**SC Principles**") are set out in Schedule 1. The details of the SC Principles are not directly relevant on this appeal, which is concerned with the prior question of whether there was any subsidy in the first place. The SC Principles include matters such as: the subsidy should pursue a specific policy objective, for example in order to remedy an identified market failure; the subsidy should be proportionate to that policy objective; and the subsidy should be designed to achieve its specific policy objective while minimising any negative effects on competition or investment within the UK.

14. By s.79, the Secretary of State may issue guidance about the practical application of a number of matters, including the SC Principles. By s.79(6) "a public authority must have regard to guidance issued under this section … when giving a subsidy".

15. Guidance issued under s.79 may include, among other things, guidance dealing with "the determination of whether financial assistance constitutes a subsidy for the purposes of this Act": s.79(2)(a). The guidance issued by the Secretary of State is to be found in "Statutory Guidance for the United Kingdom Subsidy Control Regime" (4th ed, January 2025) (the "**Guidance**"). The Guidance is in materially the same terms as that which existed at the relevant time.

16. The Guidance includes guidance on the determination by a public authority of whether financial assistance constitutes a subsidy. At §2.20 of the Guidance, an example is given of financial assistance which may not be a subsidy:

> "a loan, guarantee or equity investment … given on the same terms at the same time as a significant private sector investment, or evidenced via benchmarking or profitability analysis, or both."

17. Further details of how a public authority should consider whether the CMO Principle is satisfied are contained in Annex 1 to the Guidance. §15.57 to §15.61 of Annex 1 address the question, how will an economic advantage be assessed?

> "15.57 If there is any doubt as to whether financial assistance confers an economic advantage, public authorities should carry out a detailed analysis, with regard to the market in question.
>
> 15.58 Terms of financial assistance will be considered in line with market terms (meaning it will not be considered more favourable than those that might be reasonably available on the market) where the financial assistance provided is on terms that could be considered to be made available on the market by a private operator that is driven by commercial objectives.
>
> 15.59 Throughout this guidance, this condition is referred to as the 'commercial market operator (CMO) principle'.

> 15.60 For the purposes of the CMO principle, it is only a public authority's commercial objectives that are relevant for the assessment. Any public policy objectives should not be included when assessing whether the financial assistance in question confers an economic advantage, on the basis that such objectives would not be applicable to private operators in the relevant market.
>
> 15.61 A private operator can include vendors, investors, and creditors. The relevant operator will depend upon on (sic) the type of financial assistance that the public authority is providing, which may include loans, direct funds or purchases of goods and services. For example, a loan provided by a public authority will not be considered to confer an economic advantage to an enterprise, if the loan might be provided by a private sector bank or private sector shareholders on the same terms."

18. The Guidance, at §15.62, states that the CMO Principle will consider the market at the time the financial assistance is given. §15.63 and §15.64 address the question how public authorities can show compliance with the CMO principle:

> "15.63 Where seeking to rely on the CMO principle, it is important that public authorities obtain sufficient evidence to show that the financial assistance provided could be made available in the market by a private operator with commercial objectives and is provided on terms that would be acceptable to such a private operator. In certain instances, public authorities can establish compliance with the CMO principle directly by using evidence that is specific to the financial assistance in question, for example where financial assistance is given at the same time and on the same terms as a significant investment by a private operator (also known as 'pari passu'). However, other evidence-based assessments may be undertaken, including the use of benchmarking and profitability analysis.
>
> 15.64 Any evaluation of compliance with the CMO should be undertaken with input from experts with appropriate skills and experience. In cases where the commercial assessment is not straightforward, it is recommended that public authorities commission a reputable third party to conduct a report as evidence that the actions proposed to be taken are in accordance with the CMO principle (as it would be in the case, for example, of co-investment with private operators on the same terms or the procurement of goods and services in accordance with public procurement rules). Where public authorities are operating schemes, the CMO assessment can be made at scheme level."

19. At §15.71 to §15.72, guidance is given as to how a public authority can demonstrate compliance with the CMO principle where it provides financial assistance on the same terms as a significant intervention by private operators. §15.74 refers to the possibility that a public authority might use indirect assessment methods, where direct evidence

relating to the financial assistance is insufficient in demonstrating compliance. These methods include benchmarking analysis (see §15.75 to §15.76) and profitability analysis (see §15.77 to §15.78). The former involves comparison with the terms on which financial assistance is provided by private operators in comparable situations. Using the latter method, financial assistance will be considered to comply with the CMO principle where the expected return is higher or equal to the return a private operator would require when investing in projects that have a comparable level of risk.

20. Where a public authority gives a subsidy, it is required to publicise it in a subsidy database, which is accessible to the public free of charge: s.32 and s.33.

21. An interested party who is aggrieved at the making of a "subsidy decision" may apply to the CAT for a review of the decision: s.70(1). A "subsidy decision" is defined by s.70(7) as "a decision to give a subsidy or make a subsidy scheme". This appeal is concerned only with the provisions of the 2022 Act as they concern subsidy decisions. Those relating to subsidy schemes are not relevant.

22. By s.70(5), in determining the application, the CAT must apply the same principles as would be applied, in the case of proceedings in England and Wales and Northern Ireland, by the High Court in determining proceedings on judicial review.

The decision making process

23. Where, as here, the decision of a public body is under scrutiny, it is essential to identify both the decision-making body and the actual decision in question.

24. It is common ground that the GMCA itself is the decision-making body, and that the only time the GMCA as a body determined to make the Loans was at a public meeting held on 22 March 2024, notwithstanding that the Loans were not in fact made until many months later in November 2024. The CAT found that the "**Decision**" in question was the decision to approve the Loans made by the GMCA on 22 March 2024, and there is no appeal against that finding.

25. The process by which the GMCA made loans under the GMHILF is reflected in the GMHILF Revised Investment Strategy dated 25 October 2019 (the "**Investment Strategy**"). The CAT referred to the process in detail at §24 to §62 of the Judgment.

26. The CAT found that this process was intended to allow the GMCA to perform a similar level of due diligence to a private sector lender. The Investment Strategy gave responsibility for managing the GMHILF to a "Core Investment Team". A "Gateway Panel" and a "Credit Committee" were set up to review proposals and provide the necessary approvals before recommending projects for approval by the GMCA. The role of the "independent Gateway Panel" was described as "critical to ensuring external scrutiny of projects being approved. The Panel is considered to include all the necessary expertise to provide the appropriate level of scrutiny to projects".

27. The Investment Strategy contained detailed provisions around risk management, requiring, for example, robust exit strategies, due diligence and that all loans be priced to reflect the risk of each project. It also required detailed ongoing monitoring of projects, ensuring "timely repayment of funds", and appropriate covenants to identify early warning signs of project distress. A separate monitoring team "with appropriate

skills and experience" was created within the Core Investment Team to provide "focused technical oversight of all loans being provided". At para 7.2 of the Investment Strategy, the following appears:

> "The pricing of all types of loans will be risk-based, following an assessment of the borrower's financial covenant together with the strength of collateral available for the loan. In order to ensure that lending complies with EU State Aid regulations, minimum interest rate margin will be determined using the state aid table published under 'Communication from the Commission on the revision of the method for setting the reference and discount rates (2008/C 14/02)'."

28. The EU State Aid document there referred to (the "**RR Communication**") provides that the applicable interest rate will be arrived at by combining a base rate and a margin. The base rate is published from time to time by the EU Commission for each member state and the UK. The margin is determined by applying a matrix set out in the RR Communication, based on the creditworthiness of the borrower and any collateral provided. I will refer to this as the "**State Aid Reference Amount**". In addition, the Funding Agreement required that at least the State Aid Reference Amount was charged by GMCA to borrowers (with central Government receiving that interest and GMCA receiving the remainder up to a cap of £2,500,000 per year).

29. The procedure mandated by the Investment Strategy involved a number of steps prior to a decision being made by the GMCA, including the production of a "gateway paper" by a transaction manager employed by the GMCA, consideration by the Gateway Panel, then the Credit Committee (which also included independent expertise). For projects which made it this far, two reports were generated for the GMCA: a Part A Report (a high-level overview) and a Part B Report (containing more detail and including elements such as the proposed commercial terms, the exit strategy and level of security). The application would then be considered at a GMCA public meeting. If approval was given, authority to review due diligence and sign off on commercial terms was delegated to the Treasurer, in conjunction with the "Monitoring Office". Further due diligence could then take place, including a formal 'red book' valuation, which might or might not lead to changes to the terms of the loan. The due diligence was reported back to the Treasurer who may then sign off on the loan. After that, the loan documentation was prepared and formal completion took place. It was only then that the borrower acquired a legal right to the funds and drawdown could take place.

30. At §74 to §99 of the Judgment, the CAT described the steps taken in this case. The following is a summary.

31. The Gateway Panel conducted an initial overview of the proposed lending on 11 December 2023. The Gateway Panel included three independent external advisors with significant experience in the housebuilding sector. On 13 February 2024, officers of the GMCA met with Mr Whitaker. There is no note of the meeting, but a subsequent email exchange recorded that they had agreed a margin of 3.65% for Trinity, reducing to 3.3% "if we move to sales covenants" and a margin of 3% for Jackson.

32. Mr Michael Walmsley ("**Mr Walmsley**") (the Senior Transaction Manager at the GMCA) prepared an investment proposal which was considered by the Gateway Panel at a meeting on 22 February 2024.

33. The Credit Committee met on 7 March 2024, to consider the investment proposal and a credit paper, drafted by Catherine Edwards, a transaction manager. The Credit Committee also included external advisors.

34. A meeting of the GMCA took place on 22 March 2024, at which a Part A Report (which was public) was considered along with a Part B Report (which was private).

35. The Part A Report recommended approval of a proposal to lend an aggregate total of £120 million, with the option to provide a further £20 million if surplus funding was available. In the event, the Loans did not include the further £20 million. It did not contain any reference to the interest rates proposed for the loans.

36. The Part B Report contained greater detail of the loans. As to the cost of the lending, it recorded:

> "Renaker will pay an Arrangement Fee at ■% of the facility amount. Interest on the Contour loan will be charged at a margin of 2% over the EU Base Rate (currently 5.65%). Interest for the Trinity D1 loan will be charged at a margin of 2.65% but reducing to 2.30% in the event that Renaker secures a forward sale of this scheme that would see the lending risk reduced further. A Loan Management Fee of ■% will also be charged against the outstanding balance of the loan."

37. The total interest rate (including the Loan Management Fee of ■%) was therefore ■% for Trinity (reducing to ■%) and ■% for Jackson, on the basis of an EU Base Rate of 5.65%.

38. The Part B Report recorded the following provision of security:

> "- A debenture over each SPV incorporating a fixed charge over the development properties;
>
> - A charge over the shares in the SPVs;
>
> - A fixed charge over additional Renaker property valued at £■m;
>
> - Collateral warranties incorporating step-in rights to the construction contract, sub-contracts and design team appointments."

39. It referred to previous lending made to Renaker, noting that the sales position on two other 'live' schemes was well above the level needed to cover the lending, and that it would be a condition of drawdown for the Jackson Loan that sales would need to be in place at the level needed to repay the loan. It also referred to the fact that Renaker would be funding £■ million or £■ million (depending on whether the option for the GMCA to lend a further £20 million was taken up) out of the total development cost of £■

million, and that the loan to value ratio was well below the 50% limit normally considered for city-centre schemes.

40. Under the heading, "Conclusions and Recommendation", the Part B Report stated as follows:

> "Renaker has a proven track record. The new lending is expected to represent the final commitment to lending for Renaker developments from GMHILF in its current form, and will support GMCA in being able to point to continuing high levels of deployment in making the case to Government for "Fund 2". The lending will also generate significant income to GMCA for reinvestment in support of wider housing priorities, and has been structured to mitigate risk around both completion of the developments and, in due course, repayment of the lending from sales.
>
> The Combined Authority is therefore recommended to approve the lending."

41. There was no reference in the Part B Report to the CMO Principle or the Guidance, and no express consideration of whether the test in s.3(2) of the 2022 Act was satisfied. There is no such reference in the minutes of the meeting of either the Credit Committee or the Gateway Panel.

42. The GMCA approved the Loans at the meeting on 22 March 2024 and delegated authority to the Treasurer, in conjunction with the GMCA's solicitor and Monitoring Officer "to prepare and effect the necessary legal agreements." The Loans were never referred back to the GMCA committee for further consideration. Further due diligence occurred, following which minor changes were made to the proposed terms of the Loans.

43. We were referred by Mr Robertson KC, who appeared for the GMCA, to a very recent decision of the CAT published on 5 June 2026, *Thomas v Durham City Council* [2026] CAT 47, in which doubt was cast on the CAT's conclusion in this case as to the date on which the Decision was taken. Mr Robertson did not rely on this case, and we heard no submissions from either party on it. Accordingly, I do no more than note that we were referred to it but have otherwise given no consideration to it.

44. It was only after the Decision had been taken that any document was prepared justifying the interest rate charged under the Loans. On 19 April 2024, which happens to be four days after the Appellant had sent an information request under s.76 of the 2022 Act seeking records of the GMCA's consideration of the interest rates on the loans, Mr Walmsley produced a first iteration of a paper entitled "Interest Rate Setting Paper" (the "**IRSP**"). The IRSP underwent numerous revisions, culminating in the final version dated 25 November 2024.

45. There is no evidence (and no finding) that the IRSP was ever referred to any relevant decision-making body within the GMCA. The CAT, at §87 of the Judgment, referred almost verbatim to the explanation given by Mr Walmsley in his witness statement (produced after the hearing before the CAT) for the IRSP:

> "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 [has] 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 [have] 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."

46. The IRSP, in its final form, set out three stages of consideration of the interest rates under the Loans.

47. Stage 1, entitled "State Aid Rate Setting" identifies an "EC Margin" rate. This was purportedly based on the recommendation set out in the RR Communication. Mr Walmsley added 100 basis points (or 1%) as "EC Margin". In so doing, he relied on the fact that the financial position of the wider Renaker business was categorised as satisfactory. That, combined with the conclusion that the collateralisation position was considered high, produced an EC Margin of 1% according to the matrix set out in the RR Communication.

48. Stage 2, entitled "Calculating the Fund Risk Premium", identified an appropriate number of basis points to be added to the margin to take account of various categories of risk. Following a detailed review of each of these, the IRSP concluded that for each of the following risks the basis points identified in parentheses should be added (in some case identifying a range): market risk (10 bps); developer risk (10-35 bps); construction risk (50-75 bps); security risk (10 bps); and sensitivity risk (10 bps). This produced an overall range of [redacted]% to [redacted]% for risk premium. It was noted that a condition of drawdown of the Jackson loan was that pre-sales had been achieved in an amount sufficient to repay the loan, and that Trinity had entered into a forward sale of the development for £[redacted]million.

49. Stage 3, entitled "pricing decision" states: "the final consideration for the interest rate setting process is the pricing and loan structures that are available in the lending market today". It referenced the margins applied on other Renaker developments, and the fact that in two cases the GMCA had participated in a club loan where the pricing was subject to independent analysis and found to be in line with the lending market. It identified a range of [redacted]% and [redacted]% from the fund interest rate setting analysis contained in the IRSP, based on: a base rate of 5.65%, EC Margin of 1% and a fund risk premium of between [redacted]% and [redacted]%. The conclusion was to set margins of 3% for Jackson (particularly in view of sales covenants applied to that facility) and 3.3% for Trinity, rising to 3.65% if the forward sale agreement in respect of that facility was terminated. These margins (being those set out in the Part B Report and agreed with Mr Whitaker on 13 February 2024) exceeded the minimum margin rates that the fund interest rate setting methodology contained in the IRSP determined to be applicable.

The grounds of the appellant's application to the CAT

50. The appellant's application to the CAT was squarely based on public law principles of rationality as to the *process* by which the GMCA reached the Decision. The grounds of the application were that the GMCA had misdirected itself in seven respects by failing (whether at all or lawfully) to enquire into or consider: (1) what alternative sources of third-party finance were available to Renaker; (2) the rates of interest charged by third-party lenders; (3) whether Renaker could be charged a higher rate of interest on the Loans; (4) the assessment of Renaker and/or its own constituent council (Manchester City Council) that the projects for which funding was sought were unviable; (5) concentration risk arising from its lending to Renaker; (6) the dissolution of the Renaker corporate entity for the purposes of risk assessment, the financial circumstances of Mr Whitaker and the financial status of each borrowing entity; and (7) the interest rates which it had previously charged for lending to Renaker entities.

The Judgment

51. Having addressed the timing point as to when the Decision was made, the CAT asked itself the following question (see the heading above §154 of the Judgment):

> "Would the [Loans] have been approved by a commercial market operator ("CMO") and did the rates of interest and other charges applied reflect the market rate?"

52. That question was framed, as Mr Barrett rightly submitted, as a question for the CAT itself to answer *de novo*. In answering it, however, the CAT appears to have adopted something of a hybrid approach. It both analysed, and approved as rational, the *process* followed by the GMCA, and the *outcome* of the Decision, concluding that, not only was the GMCA entitled to consider that the Loans were on terms that other lenders would offer, but that the Loans did comply with the CMO Principle. Examples of the former are the Judgment at §185, §189 to §192, and the section headed (c) at §195 to §204 where it concluded that the GMCA had not failed to have regard to the Guidance.

53. So far as the process is concerned, the CAT determined (at §153) that it needed to consider the whole process, both before and after the Decision, including the various stages leading up to the Decision, the due diligence, the final terms of the Loans and the internal records (including the IRSP) on the setting of the interest rate and other terms.

54. As to the outcome, the CAT concluded at §205:

> "Neither party chose to serve any expert evidence on the actual rates available on the market in 2024 for developers like the Renaker Group. That said, the Tribunal is in a position to conclude that the terms did fall within the ambit provided by s.3(2) of the Act to take the 2024 Renaker Loans outside being subsidies. The Tribunal is able to use its expertise to understand both the steps taken by the GMCA and why the 2024 Renaker Loans were low risk justifying the rates adopted. It has closely scrutinised the lending in this case and the evidence presented.

> There is nothing striking or extraordinary in the rates adopted. The Tribunal particularly notes:
>
> (1) The terms, security and conditions of the 2024 Renaker Loans.
>
> (2) The awareness of the GMCA's need to ensure that its lending was on CMO terms and to fall within s.3(2) of the Act.
>
> (3) The experience of the lending team, the Gateway Panel and Credit Committee. None of whom regarded the rates to be non-commercial or outside s.3(2) of the Act.
>
> (4) The comparators referred to in the IRSP, including the club loan where independent expert evidence had been obtained on market rates.
>
> (5) The actual rates in all the circumstances are within what the Tribunal would expect to be available on the market, where lenders would seek to make a rate of return giving it a margin over the base rate at a level which reflects the low-risk nature of this lending, given its terms, security and conditions."

The grounds of appeal

55. The first ground of appeal – and the main point raised by this appeal – is that the CAT failed lawfully to judicially review the Decision. That could only have been done on the basis of the material that was before the GMCA on 22 March 2024. The CAT, however, wrongly made its own decision as to whether the Loans complied with the CMO principle, relying on matters that went far beyond that which was before the GMCA.

56. The remaining grounds of appeal are on the basis that the CAT was required to review the process by which the GMCA reached its decision on rationality grounds. Thus: ground 2 is that the CAT erred in having regard to material (notably the IRSP) which post-dated the Decision and was never placed before the GMCA; ground 3 is that the CAT erred in holding that it was not legally necessary for the GMCA to be provided with information or advice that the rates of interest under the Loans were consistent with market rates; ground 4 is that the CAT erred in holding that the GMCA had not failed to follow the Guidance; and ground 7 is that the CAT erred in not holding that the GMCA had failed to have regard to various relevant considerations related to setting the interest rates on the Loans.

57. Grounds 5 and 6 might be said to be free-standing grounds of appeal, because they are framed as failures by the CAT properly to construe the RR Communication and in holding that a rational private lender would apply a margin of 1% rather than 4% to the Loans in reliance on the creditworthiness of Mr Whitaker. On a closer analysis, however, they are in reality also directed at the process by which the GMCA reached the Decision, as developed below.

58. Mr Barrett candidly accepted that, aside from contending that the CAT was wrong in law to reach its own decision as to whether the Loans complied with the CMO Principle, there is no appeal from the substance of the CAT's finding that the Loans *did* comply with the CMO Principle. Accordingly, if the CAT was indeed required or permitted to reach its own conclusion as to whether the Loans complied with the CMO Principle and thus were *not* a subsidy, the remaining grounds of appeal fall away.

Ground 1: the CAT failed lawfully to judicially review the Decision

The appellant's arguments in more detail

59. The principal contention under this ground is that the CAT was not entitled to decide for itself whether the Loans constituted a subsidy, but was confined to conducting a review of the Decision on domestic public law principles.

60. Mr Barrett submitted that s.70 does not confer a *de novo* jurisdiction on the CAT. He relied on the fact that s.70(5) requires the CAT, when determining the application made to it under s.70(1), to apply the same principles as would be applied in determining proceedings on judicial review.

61. Although s.70 relates to the review of a "subsidy decision", i.e. a decision to "give a subsidy", Mr Barrett submitted that on the true construction of the 2022 Act, referring specifically to s.3(2) and s.12, the limitation for which he contends on the function of the CAT applies also to the prior question as to whether there is a subsidy at all. The obligation on the GMCA (in s.12) to have regard to the SC Principles before deciding to give a subsidy would, he said, be significantly denuded if the GMCA was not under a prior obligation to give prior consideration to whether the CMO principle was satisfied in accordance with s.3(2).

62. He relied on the decision of the House of Lords in *R (G) v Barnet London Borough Council* [2003] UKHL 57; [2004] 2 AC 208, where it was held to be implicit in s.17(1) of the Children Act 1989, which imposed a duty on the local authority to "safeguard and promote the welfare of children within their area who are in need", that the local authority will take reasonable steps to assess the needs of any child in its area who appears to be in need: see §20 and §32 in the speech of Lord Nicholls and §110 in the speech of Lord Millett.

63. Mr Barrett submitted that this was further supported, first, by the fact that, under s.79(6) of the 2022 Act, the GMCA was obliged to have regard to the Guidance, including (*per* s.79(2)(a)) that part of the Guidance which explained how a public authority should determine whether financial assistance was a subsidy and, second, the fact that the GMCA's own policies (set out in the Investment Strategy and the Funding Agreement) required it to have regard to the RR Communication in setting interest rates.

64. He accepted that it would be open to the tribunal reviewing a public authority's decision to determine for itself that the financial assistance in question was not a subsidy, in order to demonstrate that whatever errors the local authority had committed in its decision-making process were not material to the outcome, and on that ground refuse to set the decision aside: see s.31(2A) of the Senior Courts Act 1981. He submitted that this argument was not open to the GMCA in this case, however, because it had not run

it before the CAT, and there was no respondent's notice seeking to raise it before this Court.

65. If it is correct that the CAT was confined to reviewing the Decision on public law grounds, then Mr Barrett submitted that that was in effect a complete answer. That is because such a review must be conducted on the basis of the materials that were before the decision-maker at the time of its decision, and there is nothing in the materials before the GMCA which indicates that it turned its mind to the question whether the Loans constituted a subsidy within the 2022 Act, or had any regard to the Guidance. Moreover, the CAT was wrong in law to have regard to the IRSP and other matters that either post-dated the Decision or were never referred to the GMCA as decision-maker. Cases such as *R (007 Stratford Taxis Limited) v Stratford on Avon District Council* [2011] EWCA Civ 160; [2012] RTR 5 and *Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWC Civ 302; [2021] Env LR 8 establish that: (1) if the decision-maker does not lawfully consider the legally required matters when making the decision, then the decision is unlawful; (2) the decision will not be rendered lawful because some party or body other than the decision-maker had already given consideration to those matters; and (3) it is not permissible for the reviewing court to have regard to documents advancing reasoning produced by officers after the date of the relevant decision or documents produced before the date of the decision but not referred to the decision-maker.

66. Mr Barrett accepted that a review of a decision on public law grounds is not limited to a rationality review, but can include determining whether there was an error of law. He further accepted that in some cases it would be for the CAT to determine for itself whether there was an error of law in connection with the decision that the financial assistance was a subsidy.

67. That would be the case wherever the error of law concerned an objective question where there was a right or wrong answer. Mr Barrett accepted that if the question had been whether the Loans satisfied the criteria in sub-paragraphs (a), (c) or (d) of s.2(1) of the 2022 Act, then it would be for the CAT to determine that question for itself. For example, if the question was whether the Loans were given from public resources, or whether the financial assistance given by the Loans was specific in that it benefitted one or more enterprises over others, then the CAT would be required to determine for itself whether that was so.

68. Mr Barrett submitted, however, that where the question is (as here) whether the criterion in sub-paragraph (b) is satisfied, the GMCA's decision on that issue is reviewable only on grounds of irrationality, and the CAT is not permitted to determine the question for itself. That is because, while the question is an objective one, there is a range of possible answers: there is scope for disagreement among reasonable decision-makers as to whether the terms of the Loans are more favourable to the borrower than the terms that might reasonably be available on the market.

69. That submission was based on a passage in the speech of Lord Mustill in *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23. That case concerned a decision by the Monopolies and Mergers Commission in relation to a proposed acquisition by one bus company of another. The commission could only investigate a merger if it satisfied the criteria established by s.64(3) of the Fair Trading Act 1973, which included the requirement that the reference

area was "a substantial part of the United Kingdom". One of the bus companies concerned applied for judicial review of the commission's decision.

70. It was contended by the respondent in the *South Yorkshire Transport* case that the court's role on an application for judicial review was different depending on the two stages of the commission's enquiry. It was accepted that once the commission was deciding on public interest and remedies it was exercising a broad judgment whose outcome could only be overturned on the ground of irrationality. It was contended, however, that the question of jurisdiction (i.e. whether the area was a substantial part of the United Kingdom) was, in contrast, a hard-edged question where there was no room for legitimate disagreement. There was only one correct meaning. Accordingly, if the commission had reached a different conclusion, that was wrong and the court can and must intervene. As to this, Lord Mustill said, at p.32F to 33A:

> "I agree with this argument in part, but only in part. Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v. Bairstow* [1956] A.C. 14. The present is such a case. Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment. Indeed I would go further, and say that in my opinion it was right."

Discussion and conclusions

71. These arguments were skilfully and attractively presented, but I do not accept them. As a matter of statutory construction, it is for the CAT itself to determine whether the public authority has given a subsidy before it has jurisdiction to review whether that decision was lawfully made, in accordance with the SC Principles, on public law grounds. Further, even if the CAT is limited to reviewing the Decision on public law grounds, the relevant question is whether the GMCA erred in law in deciding or believing that the Loans did not constitute a subsidy. While that is an objective question which admits of a range of reasonable answers, the question whether it falls within that range is nevertheless one for the reviewing tribunal to answer.

72. The point of statutory construction is a short one: the CAT's jurisdiction to determine an application under the 2022 Act is conferred by s.70(1), which empowers the CAT to review a "subsidy decision". That is defined by s.70(7) as "a decision to give a subsidy". A "subsidy" is defined by s.2 as financial assistance which meets all of the criteria set out in s.2(1).

73. In order for the CAT to be satisfied that it has jurisdiction under s.70(1), it must first be satisfied that the decision under review is a subsidy decision. It must determine that all of the criteria relevant to whether it *is* a subsidy decision are satisfied. As I have noted, Mr Barrett accepted that this was so for the criteria in s.2(1)(a), (c) and (d). The fact that criterion (b) can be satisfied in by a range of reasonable answers does not in my view require a different answer.

74. The obligation in s.70(5), to apply the same principles as would be applied in judicial review proceedings, relates to the review of a decision if it is one to give a subsidy. The limitation on the reviewing court's powers in that context is explained by the fact that, as the SC Principles make clear, a subsidy decision is a decision on matters on which a court has no or limited competence and for which Parliament has vested responsibility in the elected officials within the public authority. It involves consideration of, among other things, whether the subsidy pursues a specific policy objective, and is proportionate to it. This is a paradigm example of a circumstance where the decision should remain that of the public authority decision-maker, subject only to review on traditional public law grounds. That was the nature of the decision under review in each of *Stratford Taxis* and *Kenyon*.

75. That is not true of the prior question of whether there is a subsidy at all. That does not involve a consideration of the sort of policy issues which Parliament has left to the public authority. It involves instead an objective question as to whether the terms offered are within the range of those that commercial market operators would offer. Mr Barrett submitted that his argument that Parliament had vested this prior question, too, in the public authority was supported by the fact that a public authority was better equipped than a court or tribunal to determine it. The sting of this submission is somewhat lessened by the fact that the reviewing tribunal is the CAT, itself a specialist tribunal able to call upon (as in this case) members with particular expertise in the area. In any event, courts themselves are regularly required to decide questions of this kind, calling upon evidence from those expert in the relevant area for assistance.

76. I do not accept that s.12 and s.3(2) suggest any other conclusion. Wherever a public authority gives financial assistance which in fact constitutes a subsidy, it must of course have regard to the SC Principles before deciding to give it. If it wrongly decides, or assumes, that the financial assistance it is giving is not a subsidy and therefore does not consider the SC Principles at all, then it will have fallen foul of s.12. I accept that it is logically necessary for a local authority, in any case where it is giving financial assistance which might be thought to constitute a subsidy, to give consideration to the question whether it is a subsidy. Without that, it would not know whether to consider the SC Principles. But it is a *non-sequitur* to say that because it must decide whether it is giving a subsidy, its decision on that question is only subject to review on grounds of rationality.

77. Mr Barrett's argument does not gain any support from the *Barnet* case. The relevant aspect of the House of Lord's decision in that case was the conclusion that the general

duties conferred on a local authority by s.17(1) of the Children Act 1989 were not owed to each and every child in need individually. In fact, Lord Nicholls dissented on that question. The passage relied on was part of the reasoning behind his dissenting conclusion that the general duty imposed a duty in respect of an individual child. In any event, the point made in that passage is simply that a first step towards safeguarding a child in need by providing services for him is to identify his needs. Lord Millett made a similar point at §110, that the "existence of a power to provide assistance to a class involves a duty to consider whether a particular individual is eligible for such assistance". That is undoubtedly so, but it has nothing to do with the question that arises here: whether the fact that a public authority – in deciding whether a subsidy complies with the SC Principles – must first decide whether it is granting a subsidy at all, means that a tribunal tasked with judicially reviewing the local authority's subsidy decision cannot determine for itself whether there is a subsidy in the first place.

78. Mr Barrett's purposive construction argument, in reliance on the TCA, also does not help. He stressed that Article 366 of the TCA required the UK to put in place an "effective" system of subsidy control that "ensures" that the granting of a subsidy respects the SC Principles. He submitted that the 2022 Act must therefore be construed so as to provide an effective system of control. I agree, but a construction which enables a tribunal tasked with reviewing the decision of a public authority to determine for itself whether there is a subsidy in the first place is a perfectly "effective" system of control.

79. Nor does the fact that s.79(6) read together with s.79(2)(a) requires the public authority to have regard to the Guidance in determining whether financial assistance constitutes a subsidy mean that the CAT's role is limited in the manner for which the appellants contend. On its face, s.79(6) applies where the public authority is "giving a subsidy". As Mr Robertson, who appeared for the GMCA, pointed out, a public authority is likely to give financial assistance on many and various occasions which are far removed from the possibility of being a subsidy, and it cannot realistically be expected that the authority is to have specific regard to the Guidance in all such cases. There is a suggestion in the Guidance itself that one of the purposes of the guidance on determining whether financial assistance is a subsidy is to ensure that – before proceeding to go through the steps mandated by the 2022 Act (e.g. considering the SC Principles and publicising the subsidy) – the public authority can be sure that it is in fact giving a subsidy: see §2.13 of the Guidance which stresses the importance of being clear that the financial assistance meets "all four limbs" of s.2(1), so as to understand "whether to proceed to apply the subsidy control requirements."

80. I would accept that, since any Guidance provided under s.79(2)(a) relates to the point in time before it can be known for sure whether the financial assistance the public authority is proposing to give is a subsidy, it must be the case, at least where there is at least the possibility that it is a subsidy, that s.79(6) imposes a positive duty on the public authority to have regard to such Guidance.

81. Nevertheless, even where a public authority fails to have regard to the Guidance, that cannot in my judgment affect the conclusion that, on an application brought by an interested party, if the public authority disputes that it has made a subsidy at all, it is for the CAT to determine that question for itself.

82. A similar response can be made to Mr Barrett's reliance on the fact that the GMCA's own policies required it to have regard to the RR Communication in setting the interest

rate, and to set the rate at least as high as the reference rate derived from it. That can have no impact on the question of statutory construction I am addressing here. It may well be that a public authority that fails to follow its own policies opens itself up to a judicial review challenge to the decision to give financial assistance to an enterprise, irrespective of whether it amounts to a subsidy. That has nothing to do, however, with the 2022 Act, and any application would have to be made to the Administrative Court, as with any other judicial review of the decision of a public authority.

83. As I have noted at §71 above, even if the conclusion I have reached as a matter of statutory construction is wrong, and a public authority's decision that it was not giving a subsidy is only reviewable by the CAT on public law principles, I consider that the determination whether the Decision amounted in law to a subsidy remains one for the CAT itself.

84. Mr Barrett's contention that, whereas it would be for the CAT to determine whether the financial assistance satisfied elements (a), (c) and (d) of s.2(1) of the 2022 Act, it is different in the case of (b) where there is a range of possible answers, is based on Lord Mustill's speech in the *South Yorkshire Transport* case quoted above at §70.

85. He also cited in support *R (British Gas Trading and others) v Secretary of State for Energy and Security* [2025] EWCA Civ 209; [2025] 1 WLR 3342. At §97 of my judgment in that case (with which Underhill LJ and Dingemans LJ agreed), I was considering the court's role in reviewing a decision by the Secretary of State as to whether a subsidy had been granted to one energy company in order to assist its purchase of the business of another, failed, energy company. This depended on satisfaction of the market economy operator test (the equivalent of the CMO Principle under the pre-2022 Act law), in the context of the provisions of the TCO which applied in the interim period between the UK's withdrawal from the EU and the implementation of the 2022 Act. I there made the point that while this may be considered an objective question, it nevertheless admitted of a range of reasonable answers, so that state aid would only be found where it was clear that the transaction would not have been entered into on the relevant terms by any rational market operator. Where a challenge was brought to the Secretary of State's decision on this point, therefore, it is only if the decision is irrational that it would be set aside.

86. The critical part of the relevant passages in the *South Yorkshire Transport* and *British Gas Trading* cases is that the decision will only be interfered with if the reviewing court concludes that it is one that no rational person in the position of the decision-maker could reasonably make. In both cases the word "irrationality" is being used in that sense: i.e. focusing on the outcome of the decision and not the process by which it was reached: the court itself determines whether the decision falls within that range, as it does in exercising the *Edwards v Bairstow* jurisdiction in the context of appeals from findings of fact (to which Lord Mustill referred in the passage cited above). As I have noted above, Mr Barrett accepted that this would be the correct result where the decision-maker relies on s.31(2A) of the Senior Courts Act 1981. In my judgment, however, it is also the correct result for the reason that if the decision-maker has reached an objectively correct conclusion (even if by a flawed process) there is no error of law.

87. Mr Barrett further relied on *R (Sky Blue Sports & Leisure Limited) v Coventry City Council* [2014] EWHC 2089 (Admin); upheld on appeal at [2016] EWCA Civ 453. One of the issues in that case was whether a loan made by the council to the leaseholder of

Coventry City FC's ground was unlawful state aid under applicable EU law. On an application for judicial review of the decision to make the loan, Hickinbottom J determined that it was not state aid because, applying the applicable test under EU law, a rational private economic operator might have made the loan on the same terms it was in fact made (see §130 of the judgment in that case). That conclusion was upheld on appeal.

88. I observe in passing that Hickinbottom J reached his own determination on that question. Mr Barrett submitted, however, that this aspect of the decision is distinguishable because the case concerned the "market economic operator test" under EU law which has no place under the 2022 Act. I find it difficult to see why the difference in the substance of the test to be applied mandates a different approach to the question whether it is for the reviewing court or tribunal itself to determine whether the test is satisfied. It is far from clear that there is a substantive difference between the two tests: see the decision of the CAT in *The New Lottery Company Limited v The Gambling Commission* [2026] CAT 14 (Bacon J, Ben Tidswell and Derek Ridyard) at §73. I have in any event reached the same conclusion from first principles without relying on a comparison with the position that applied before the 2022 Act.

89. Mr Barrett relied on this case, however, for the decision on the second issue determined by Hickinbottom J, that it was necessary for the decision-maker to have regard to all legally relevant considerations, and not have regard to irrelevant ones. In other words, the court had regard to the process by which the council reached its decision, and not merely the outcome: see §139. That part of the decision, however, had nothing to do with the state aid question. It was a separate challenge by way of judicial review to the decision to grant the loans: see §80 of the judgment which sets out the separate grounds of challenge in that case. Accordingly the case provides no support for the proposition which the appellant advances here.

90. I have so far considered the case on the assumption that the decision-maker has in fact reached a conclusion that there is no subsidy. It might be said that the GMCA simply believed this to be the case, without giving any consideration to the question. I do not think that makes a material difference to the present issue. I accept that, on the findings made by the CAT, against which there is no appeal, the GMCA did not give any express consideration to s.3(2) of the 2022 Act. It is, however, implicit in the whole process by which it reached the Decision that the GMCA concluded that the Loans were on terms that were comparable with those that might reasonably be expected to have been offered by a private lender. I have described the process mandated by the Investment Strategy above. It was designed to ensure that the GMCA acted on a commercial basis, and only made loans from the GMHILF if they were on terms that would be offered by a commercial lender. That was the purpose of the scrutiny given to any proposal (described above) including the use of independent external advisors with relevant experience in the process prior to a recommendation being made to the GMCA.

91. Even if the correct characterisation is that the GMCA failed to make a decision, I do not accept that the failure of the public authority separately to consider whether the financial assistance it proposes to give is a subsidy deprives the CAT of the ability to decide that question for itself. A decision to grant a loan, in the belief that it does not constitute a subsidy, where it in fact does, would be as much an error of law as a conscious decision that the loan did not constitute a subsidy when it did. None of the cases cited by Mr Barrett (including the *South Yorkshire Transport* case, the *Sky Blue*

Sports or the *British Gas Trading* case) or the reasoning in them suggests a different answer.

92. Accordingly, for the reasons set out above, I conclude that the CAT was required to determine for itself whether the Loans constituted a subsidy, the fact that it did so involves no error of law, and the appeal on ground 1 should be dismissed.

The remaining grounds of appeal

93. In light of the conclusion that the CAT was entitled to determine for itself whether the Loans constituted a subsidy, and the fact that there is no appeal against its decision that they were not a subsidy, the remaining grounds of appeal necessarily fall away. Even if there were flaws in the GMCA's processes, such as a failure to follow its own policies or a failure to follow the Guidance, the CAT would have no jurisdiction over those issues and would lack the power to grant any relief. It follows that it would fall outside the scope of this appeal. As I have already noted, whether there might be grounds to pursue judicial review proceedings based on the failure by the GMCA to follow its own procedures, irrespective of whether the Loans constituted a subsidy under the 2022 Act, is irrelevant as that would also be outside the scope of the CAT's jurisdiction.

94. I nevertheless turn to deal briefly with the following aspects of the remaining grounds of appeal, on which we heard argument. The grounds are identified at §56 and §57 above.

95. As to Ground 2 (the CAT's error in relying on justifications for the interest rates on materials that post-dated the Decision and were not referred to the GMCA), for the reasons I have set out above, even had the CAT been confined to reviewing the Decision on the basis of judicial review principles, it was for the CAT to determine whether the Decision was one which a commercial operator might reasonably have reached. In that context, the process leading to the grant of the Loans by the GMCA is at most of only limited, evidential relevance. For the reasons advanced by Mr Barrett summarised above, I would accept that, if (contrary to that conclusion) the CAT had not been entitled to reach its own decision on the question whether the Loans constituted a subsidy, but had been limited to reviewing the process by which the GMCA reached the Decision, then the CAT would have been wrong to have regard to material that played no part in the actual decision-making process of the GMCA, including (*a fortiori*) material that post-dated the Decision.

96. I take grounds 3 and 4 together. Ground 4 is that the GMCA erred in failing to follow the Guidance. Ground 3 is a subsidiary aspect of it (whether it is legally necessary for the GMCA to be provided with and/or to consider information or advice as to whether the interest rates on the Loans were consistent with the interest rates the borrowers might expect to obtain from the market). I have already concluded (see §80 above) that in a case where there is a real possibility that financial assistance might be a subsidy, the public authority must have regard to Guidance which addresses that issue. The Loans in this case clearly fall into that class of case. Accordingly, I consider that the GMCA ought to have had regard to the Guidance. Since the Loans did not in fact constitute a subsidy, the failure to follow the Guidance in this regard cannot lead to any relief so far as the CAT (and thus this appeal) is concerned.

97. Ground 5 raises a point of construction on the RR Communication. I have referred to this at §28 above. After the table setting out the matrix of basis points to be added in respect of creditworthiness and collateral, the following appears:

> "For borrowers that do not have a credit history or a rating based on a balance sheet approach, such as certain special-purpose companies or start-up companies, the base rate should be increased by at least 400 basis points (depending on the available collateral) and the margin can never be lower than the one which would be applicable to the parent company."

98. The RR Communication is not in itself mandatory guidance, but is relevant because the GMCA was required by the Investment Strategy (see above at §27) to apply the RR Communication in accordance with its terms, and was required by the Funding Agreement (see above at §28) to set the interest rate at a minimum at the State Aid Reference Amount.

99. Mr Walmlsey, in the IRSP, purported to apply the RR Communication but did so on the basis that the creditworthiness of the borrowers should, by reference to the wider Renaker business, be regarded as satisfactory and therefore added only 100 basis points.

100. The CAT, at §198 of the Judgment, interpreted the passage from the RR Communication quoted at §97, specifically the words "should be increased by at least 400 basis points (depending on the available collateral)" as meaning that the addition of 400 basis points was not mandatory because, depending on the collateral, it could be reduced. In my judgment, that is not the correct reading of the RR Communication. The reference to increasing the rate by "at least" 400 basis points indicates that the flexibility introduced by the words "depending on the available collateral" is intended to relate to the amount to be added *above* 400 basis points. To that extent, therefore, I consider that the CAT was wrong.

101. It does not necessarily follow that the RR Communication required that 400 basis points be added to the interest rate on the Loans. The text after the table in the RR Communication refers to "certain" special purpose vehicles being examples of companies where there is no credit history or a rating "based on a balance sheet approach". We received no submissions on the meaning or impact of any of these words. Since the only relevance of this point, given my findings on ground 1, is to the possibility of a separate judicial review challenge (irrespective of whether the Loans constituted a subsidy), I need say no more about it.

102. Under ground 6, the appellant also contends that it was irrational and contrary to the RR Communication for the GMCA to rely, in adding only 100 basis points rather than the mandatory 400, on the fact that the borrowers were ultimately beneficially owned by Mr Whitaker, in circumstances where Mr Whitaker had provided no guarantee and the GMCA had conducted no due diligence on his overall financial position. I have already addressed the relevance of the RR Communication. These are, in my judgment, well founded criticisms. The CAT was entitled to have regard in its own consideration of whether the Loans constituted a subsidy, to the wider picture, which included the fact that Renaker was providing very substantial equity funding to both Trinity and Jackson, that this was a condition of drawdown, and that they were owned by someone who had a successful track record in terms of repayment of earlier borrowing from the

GMCA, and who still appeared to have substantial assets. That is not the same as correctly assessing the creditworthiness of the borrowers pursuant to the RR Communication. Given the lack of recourse to Mr Whitaker, such as via a guarantee of the SPVs' liabilities, his financial worth was irrelevant to the creditworthiness of the SPVs themselves. However, given my conclusions about the CAT's jurisdiction, this criticism has no present consequence.

103. Under Ground 7, the CAT is said to have erred in law in not holding that the GMCA failed to have regard to three considerations related to setting the interest rates: (1) the significantly higher rate of interest set under a loan provided by Maslow Capital to Renaker in 2020-2022; (2) the concentration of risk arising from the cumulative exposure to Mr Whitaker arising from the Loans; and (3) a material inconsistency between what Mr Whitaker said as to the viability of the developments when seeking the Loans and what he said when seeking exemption from affordable housing contributions. Each of these matters was considered and rejected on the facts by the CAT (see §191, §200 and §201). This Court could have interfered (had it been relevant to determine this ground) if there were any material error of law. The appellant's contentions in this regard, however, amount to a disagreement with the CAT's evaluation of the evidence and do not in my judgment reach the threshold for an error of law.

104. For the above reasons, I would dismiss this appeal.

Lord Justice Miles

105. I agree.

Lord Justice Nugee

106. I also agree.