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Case no.: 1642/12/13/24

IN THE COMPETITION APPEAL TRIBUNAL

Court 2,
Salisbury Square House,
8 Salisbury Square,
London EC4Y 8AP.

Tuesday, 27th May, 2025

Before:

HODGE MALEK KC (CHAIR);
SIR IAIN MCMILLAN CBE FRSE DL; AND
TIMOTHY SAWYER CBE.

BETWEEN: - - - - -

AUBREY WEIS
Applicant

-and-
GREATER MANCHESTER COMBINED AUTHORITY

Respondent

- - - - -
(Transcript of the Stenograph Notes of
Marten Walsh Cherer Limited, 2nd Floor, Quality House,
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- - - - -
JOSEPH BARRETT KC (instructed by Walker Morris LLP)
appeared for the Applicant.
AIDAN ROBERTSON KC (instructed by DLA Piper UK LLP)
appeared for the Respondent.

- - - - -
P R O C E E D I N G S
(DAY 1)
(TRANSCRIPT PREPARED WITHOUT ACCESS TO HEARING BUNDLES)
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2 THE CHAIR: Some of you are joining us livestream on our website
3 so I must start therefore with the customary warning. An
4 official recording is being made and an authorised transcript
5 will be produced, but it is strictly prohibited for anyone
6 else to make an unauthorised recording, whether audio or
7 visual, of the proceedings and breach of that provision is
8 punishable as a contempt of court. At the end of these
9 proceedings, we will be issuing a written judgment which will
10 be available on the court website.

11 Mr. Barrett.

12 MR. BARRETT: I appear this morning on behalf of the applicant,
13 Mr. Aubrey Weis, and my learned friend, Mr. Robertson KC,
14 appears on behalf of the Authority. Can I begin with three
15 matters of housekeeping.

16 THE CHAIR: Of course. Let us deal with housekeeping first.

17 MR. BARRETT: I hope the members of the tribunal have on their
18 desk a loose leaf copy of the EU reference rate document that
19 was omitted ----

20 THE CHAIR: This one?

21 MR. BARRETT: Yes.

22 THE CHAIR: We will look at that in a minute.

23 MR. BARRETT: I suggest that if you have the authorities bundle,
24 you may wish to slot that into tab 4.

25 THE CHAIR: Let us do that now so that it does not get lost. It

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HOUSEKEEPING

is authorities bundle, tab 4. My tab 4 starts at 349. Is that what it should be?

MR. BARRETT: I think that is correct.

THE CHAIR: That is the European Commission rates as of 1st June.

MR. BARRETT: It is. This is the complementary document where you have the rates.

THE CHAIR: I will put this at the front of it. I am going to call it 348F. Thank you, that is fine.

MR. BARRETT: Second, just in relation to the timings, my Lord, I aim to finish by 3.00 p.m. today. My learned friend is going to aim to finish by lunchtime on Thursday and then replies will be after lunch, if that is convenient.

THE CHAIR: Yes. Mr. Barrett, if I can just say where we are, obviously, I have read everything last time round. I read all the attachments, but this time round, remember we have current professional bankers here, so the pace will be different. When it comes to law, normally I would not need much assistance on the law, but I think we have to give a decision that everyone is happy with, so you will have to take us to the law in a different way to how we normally do it.

MR. BARRETT: Understood, my Lord.

THE CHAIR: As regards what we have read, we have read the pleadings, the submissions and the witness statements and not the underlying documents. If there is any underlying document

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that we need to see, you show us exactly what the document is and the passage. If the passage contains material subject to the CRO, all you do is tell us where it is and we will read it. For example, one of the key things that we will want you to show us is all the material in relation to the interest rate, the risk and all the ratings. If the level of interest rate is confidential, we need to see that document and have an understanding.

MR. BARRETT: Yes.

THE CHAIR: As regards the chronology, what would really assist us -- I do not know if you have a junior there -- is if someone produces a chronology of all the documents that are going to be referred to in this hearing and any other key documents, on a chronological level, cross-referenced to the actual documents. Where it is referred to in a pleading, it should be cross-referenced to the pleading and where it is referred to in a witness statement, where it is in the witness statement. That is Part 1 of the chronology.

Part 2 of the chronology is the chronology of the actual proceedings. You start off with your claim and then the witness statements so that we know where everything is. Hopefully, we can have that by Thursday.

MR. BARRETT: Yes.

THE CHAIR: What we see here is that you put your case out in

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detail.

MR. BARRETT: Yes.

THE CHAIR: And we do understand your case, but obviously you are going to have to take us through it at the hearing.

Mr. Robertson has not done the same detailed job, but I would expect that when he does his submissions, he does the same detailed job. I have no problem that if Mr. Robertson wants to file an additional skeleton in response to your skeleton, then he does it.

MR. BARRETT: Of course.

THE CHAIR: What we are not seeing is you fighting on the same level. You have done it in a lot of detail, and that is very, very helpful, and you have gone into the authorities. It is not clear to me what propositions of law that either he has made or that you have made are in dispute.

MR. BARRETT: Yes.

THE CHAIR: I want to know that by Thursday morning. It is just a marker for you, Mr. Robertson. That is what I want. You will have the opportunity between now and Thursday to put in a supplemental skeleton so that I can see where the battle lines lie on the law, for example, and where we rely on the underlying factors. There are some pretty fundamental issues as to how far apart you are.

MR. ROBERTSON: I was proposing to put in a chronology. I have

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one drafted.

THE CHAIR: Brilliant. That is really helpful. You have heard what type of chronology I want.

MR. ROBERTSON: That is what I have prepared.

THE CHAIR: Okay, that is absolutely fine. If you show it to Mr. Barrett, Mr. Barrett can look at it before you submit it. The ideal would be to have an agreed chronology. That is what I would hope. If you cannot have it agreed, then on the chronology put in different colours what is agreed and what is not agreed.

At the end of the day, we are going to have to write a judgment and it does seem that there is a fair amount of, let us say, differences between both parties as to what the relevant events are, as to what the relevant documents are, what the actual decision is, what the cut-off point is, what materials you are allowed to take into account in support of your case, and then you can see where all the battle lines lie.

When you read the skeletons, the positions have not yet crystallised. It is not a problem because it will crystallise by the time you two leave. Everyone is going to have a full opportunity to say anything they want to say. If Mr. Barrett does not finish by 3.00 p.m. today, it is absolutely no problem. I think he should aim to finish today and we will

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sit until he has finished, but I do not want anyone to feel that they are under any time pressure. Mr. Robertson, you know me well enough. All I care about is getting the right answer so as much help as you can give me the better.

We have left over one issue, which is the cost of the last hearing. Probably the best time to deal with that is once you get the judgment or the draft judgment on this and we will wrap up costs all in one. I have not taken a view one way or another as to where the costs should lie on that. We will come to a landing on that, but not now.

MR. ROBERTSON: Normally in this tribunal, costs submissions follow judgment and are dealt with in writing.

THE CHAIR: Yes, and we will do that on this one.

MR. ROBERTSON: On the chronology, I am well aware that the tribunal is not sitting tomorrow. Would it assist the tribunal to have my chronology before Thursday or is it the case that, in reality, you are not going to be turn to it until Thursday anyway.

THE CHAIR: No. What I would like is a document that you and Mr. Barrett are both happy with and if that is done by lunchtime tomorrow, that will be brilliant. Then we can have time to read it. The way it has come out, it is actually quite difficult to get round the chronology and the documents are in different places. With a chronology, it is going to

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become really clear.

MR. ROBERTSON: It is only when I got the hearing bundle on Friday morning that I could start to be able to extract where all the relevant documents are. I will let Mr. Barrett have my chronology after today's hearing.

THE CHAIR: Yes, sure. You want to concentrate on the hearing now.

MR. ROBERTSON: And then, with a fair wind, we can get that too and agreed and on to the tribunal by tomorrow lunchtime.

THE CHAIR: Mr. Barrett, do you have a junior or someone helping you?

MR. BARRETT: I do not, but we can manage that timetable.

THE CHAIR: You can; you are happy with that?

MR. BARRETT: Yes, I am sure.

THE CHAIR: I will direct that the chronology should be lodged by one o'clock. Just send it by email from one of you to the Registry. Thank you very much.

MR. BARRETT: Thank you, my Lord. The second matter, just on timing, we have a transcriber and I have been asked if we can have a short break at 12 o'clock.

THE CHAIR: That is absolutely fine. We will aim to have that at maybe 10 to 12 and then we can have a break between 10 to 12 and 12, but I tend to forget. I lose the time because I am concentrating. If someone on your side can remind you that it

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is 10 to 12, that would be great.

MR. BARRETT: Thank you. In that case, if it convenient may
I begin.

1 SUBMISSIONS - BARRETT

2 MR. BARRETT: This case applies under section 70 of the Subsidy
3 Control Act 2022 for judicial review of the respondent's
4 decision dated 22nd March 2024 to make, first of all, a loan
5 in the sum of up to £70.8 million to Trinity Developments
6 (Manchester) Limited. I will refer to it as "Trinity" in my
7 submissions. It was a loan in the sum of up to £69.2 million
8 to New Jackson (Contour) Investments Limited. I will refer to
9 that as "Jackson".

10 The loans, my Lord, were eventually signed on 22nd
11 November and that was done pursuant to the delegation that was
12 granted on 22nd March. Importantly, I submit, my Lord,
13 following the approval of 22nd March, there was no relevant
14 further substantive decision by any authorised decision-making
15 body in relation to the pricing of the loans.

16 Now, Trinity and Jackson did not take all of the lending
17 that had been approved with the result that the loans that
18 were eventually given had an aggregate value of circa
19 £120 million. That is by way of £60.7 million going to
20 Trinity and £59.3 million going to Jackson. The applicant's
21 case is that the decision-making process in relation to the
22 giving of the loans was flawed and unlawful and that this has
23 led to the award of unlawful subsidies contrary to the
24 respondent's public law duties and specifically contrary to
25 the requirements of section 12 of the Subsidy Control Act.

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The applicant accordingly seeks appropriate declaratory and also quashing relief.

As tribunal will see in the evidence, the pricing of the loans was negotiated and agreed at an unlimited face-to-face meeting between a Mr. Bill Enevoldson, (a senior officer of R), and a Mr. Daren Whitaker, the ultimate beneficial owner of Trinity and Jackson.

THE CHAIR: That is very helpful, but you will show us the relevant material. This is just the overview ----

MR. BARRETT: This is a short overview and I will take you quite closely through the documents.

THE CHAIR: That is brilliant. That is exactly what I want. That is good. Can you give me the date of that meeting?

MR. BARRETT: February 2024. I do not know the precise date. It has not been addressed in evidence or disclosure. Doing the best I can, I think it is 12th or 13th February.

This approach of the pricing being agreed upfront directly with officers was Daren Whitaker's wish and commercial strategy. He wished the pricing to be agreed with Mr. Enevoldson before he engaged with any of the respondents' governance processes. We submit, my Lord, that improperly, Mr. Enevoldson and his small team of officers acceded to that approach and that was not the approach required by the respondent's own processes and policies.

1 SUBMISSIONS - BARRETT

2 There are no records of the negotiation between
3 Mr. Whitaker and Mr. Enevoldson, but what we do respectfully
4 submit, my Lord, is that the evidence makes it entirely clear,
5 in advance of that agreement being struck, that there was no
6 analysis whatsoever by the respondent of whether the proposed
7 pricing was compliant with the requirements of the Subsidy
8 Control Act.

9 Now, my Lord we say that from this flawed starting
10 point, there then ensued a fundamentally flawed and unlawful
11 process. We do say it all flows from this unsatisfactory
12 route. There are two essential points. First of all, the
13 approval of the loans and the pricing was subsequently taken
14 through the respondent's decision-making processes without the
15 relevant decision-maker -- that being a committee comprising
16 council members and also the Mayor of Manchester -- first of
17 all ever being provided with any advice as to the basis on
18 which the loans were priced; secondly, ever being provided
19 with any advice as to whether the pricing was compliant with
20 the Subsidy Control Act; and, thirdly, as a consequence of
21 that, never being able to give any consideration as to whether
22 the pricing was appropriate or the requirements of the Subsidy
23 Control Act were met.

24 I do submit that it does follow from that, in my
25 respectful submission, that this is an unusual case where

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there has simply never been any decision, still less a lawful decision on the central issue that is under consideration. Secondly, my Lord, when the applicant sent its formal pre-action correspondence in respect of these proceedings in April 2025, the reality, because of the approach of ----

THE CHAIR: 2024.

MR. BARRETT: 2024, I am sorry, you are quite right. The position was that because of the approach which Mr. Enevoldson had adopted, there simply was no document recording any consideration of whether the pricing was compliant with the Subsidy Control Act. That then led to a most unsatisfactory situation where one of the officers, Mr. Walmsley, was effectively tasked to write up a justification ex post facto from what and agreed; he did that according to the documents around 19th April, he had his first go at that exercise.

The short point is, my Lord, this was after the Gateway Committee had sat and concluded whatever consideration it had after the Credit Committee had sat and conducted any consideration it did and very importantly, crucially in my respectful submission, after there had been a public meeting at which the council members and the Mayor of Manchester had approved the loans.

My Lord, while it is not necessary in my respectful submission for the tribunal to make this finding in order to

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uphold the applicant's case, I do submit when one considers the evidence what it demonstrates is a small group of officers who have become objectively too relaxed in the manner in which they deal with Mr. Daren Whitaker and in this case I do say that has come at the cost of maintaining a proper, transparent and lawful decision-making process in the matter of significant public interest, loans involving £120 million of public money.

Those are my introductory points. The structure of the remainder of my submissions, the main bulk of my submissions will involve taking you through the documents in detail. I will make some points on those as we go. I will then make some points on the legal principles and hopefully, relatively shortly I will try and encapsulate my main submissions.

THE CHAIR: When you have a topic that is covered in your skeleton, just give us the paragraph number of the skeleton as you go along as well. I will look at the document and at least in one side of my notebook I will put which paragraph in your skeleton that deals with it as well.

MR. BARRETT: I will try and do that, my Lord.

THE CHAIR: It is easier for me when it comes to writing up.

MR. BARRETT: A few short points, picking up at paragraph 5 of my skeleton. As the tribunal is aware, the applicant is Mr. Aubrey Weis, he owns and controls a group of companies

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SUBMISSIONS - BARRETT

with substantial property development interests in and around Manchester. Mr. Weis's fundamental concern is that the support and, in his view, advantageous treatment which the Authority has afforded Mr. Whitaker has and continues to distort the proper and fair operation of the market in Manchester.

I would ask you to turn up, my Lord, but I can give you the reference for your note, he explains his specific concerns, the second witness statement of Mr. Joel Weis and the reference is paragraphs 3.16-4.18 in the main bundle, at pages 205-209. The concern in essence, my Lord, is that the conduct of the Authority is creating an unlevelled playing field. That is the essence of the concern and that is what this case is about from the perspective of the applicant.

Trinity and Jackson are each privately limited companies and special purpose vehicles, they are ultimately beneficially owned and controlled by Mr. Daren Whitaker. Could I ask you to turn up, please, in the Phase 1 disclosure bundle.

THE CHAIR: Let me make a note. Trinity and Jackson are SPVs.
MR. BARRETT: Yes, ultimately beneficially owned ----
THE CHAIR: UBO.
MR. BARRETT: Yes.
THE CHAIR: Is Mr. Whitaker.
MR. BARRETT: Daren Whitaker.

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THE CHAIR: Have you got a sort of document which shows the family tree or whatever?

MR. BARRETT: I am going to explain there is no family tree in the way one would expect, because there is not a corporate group. What I am just about to ask you to look at is a very truncated structure to show you who owns Jackson.

THE CHAIR: Where is that?

MR. BARRETT: Phase 1 disclosure, bundle volume 2. It is the second of the two bundles if your bundles are configured as mine are, so it is the second of those, it is pages 862 and 863.

THE CHAIR: Are these all UK companies?

MR. BARRETT: To the best of my knowledge.

THE CHAIR: Let us look at Trinity.

MR. BARRETT: It is useful then next to mention and introduce a company called XQ Developments Limited, XQDL is a different ----

THE CHAIR: Where is that?

MR. BARRETT: It is not on this chart, my Lord, it is separate company. XQDL is a separate private limited company.

THE CHAIR: Is that the one that went into liquidation?

MR. BARRETT: Precisely so, my Lord. The first point to make really by reference to what I have just shown you is, you will have noted that it is not a company which owns or is connected

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to Trinity or Jackson, it is not related to them.

THE CHAIR: He has given no guarantee or anything, as I understand it, these are SPVs with no parent guarantee, no personal guarantee.

MR. BARRETT: We say very importantly no guarantee.

THE CHAIR: What you are saying about in company, is there a document you want to show us on that?

MR. BARRETT: Not at this stage, if I could just explain, my Lord. The point I want to make at this stage is, first of all, it is a separate private limited company that is not the parent or subsidiary of Trinity or Jackson. It is a separate entity owned and controlled by Mr. Whitaker. My Lord has preempted my second point, it has actually been liquidated before the loans were signed.

THE CHAIR: So, it is owned beneficially.

MR. BARRETT: Yes.

THE CHAIR: Do we know whether it is direct or indirect?

MR. BARRETT: I do not know that, my Lord.

THE CHAIR: I read somewhere that it has basically been closed down as part of the structural process, rather than it is an insolvent ----

MR. BARRETT: A very important point, if I may take that head on. My Lord has just said you read that somewhere, in my respectful submission, no part of the decision-making process

1 SUBMISSIONS - BARRETT

2 because no inquiry into that whatsoever was conducted.

3 THE CHAIR: It does not matter, I just want to find out what the
4 factual position is first, whether it is relevant or not.

5 I just wanted to have an understanding. Your case seems to be
6 that when they priced this case for interest rates, they
7 looked at the position of this company.

8 MR. BARRETT: Yes.

9 THE CHAIR: You say they should not have looked at the position of
10 this company because these are two SPVs and there is no, let
11 us say, corporate link in the sense of there is nothing that
12 leads into it. These are totally unbacked SPVs, that is what
13 your case is.

14 MR. BARRETT: Yes.

15 THE CHAIR: It is clearly something I would like to know as part
16 of the background as to whether this entity went into
17 liquidation leaving all sorts of creditors behind or not. The
18 other thing is that it is a timing point because whilst you
19 have the decision that you say is on 22nd March 2024, the loan
20 agreement is not signed until later. You presumably say by
21 the time the loan agreement was signed, which is when
22 everything is crystallised this company is no longer there.

23 MR. BARRETT: Precisely so.

24 THE CHAIR: It is relevant to me in one sense, subject to what
25 Mr. Robertson says later, that the company went into

1 SUBMISSIONS - BARRETT

2 liquidation, even though I do understand your point that
3 everything froze effectively in time on 22nd March.

4 MR. BARRETT: Yes.

5 THE CHAIR: I still think ----

6 MR. BARRETT: Can I try and deal with this.

7 THE CHAIR: Let me just explain, when you have loan approvals
8 which are subject to due diligence and the process of signing
9 something, quite often there is a gap between the two.

10 MR. BARRETT: Yes.

11 THE CHAIR: If things change in that gap and further information
12 comes in that relates to the pricing, you will find that banks
13 quite often will say, "Although we talked about this six months ago
14 , it is not this any more because circumstances have
15 changed". If this was a bank and they were looking at XQDL at
16 the time that they made the initial decision, and they are
17 faced with a situation they are about to sign and they are
18 told actually XQDL which you relied on for the purposes of
19 pricing is in liquidation, I would have thought a bank would
20 be perfectly entitled to consider that and decide what impact
21 that has, if anything, on whether they sign the loan agreement
22 and in which case on what terms. Banking is full of examples
23 where banks agree things in principle, but by the time it
24 comes to signing up, they have done the due diligence and
25 circumstances have changed.

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MR. BARRETT: Yes.

THE CHAIR: What you think was on the table is not on the table.

MR. BARRETT: Yes.

THE CHAIR: I do understand where this comes from, and I did want to find out whether this is an insolvent liquidation or not.

MR. BARRETT: I entirely understand that, my Lord. Can I just try and take that head on because I think this is a very important point and I want my submission to be as clear as possible. My Lord, if I explain, my primary submission is for the purposes of the legality of the decision-making process, relevant date is the 22nd March.

THE CHAIR: I understand that.

MR. BARRETT: If my Lord is against me on that, if the relevant date is 22nd November, then my submission in relation to this issue is as follows. The company was liquidated before the decision to sign or before the signature of the loans occurred. In my submission when one looks at the documents what we see is that there was no consideration by the relevant decision-making body, that being the committee of the Authority, the only body with the authority to approve the loans or decide about any variation of the pricing of the loans.

What happened is that Mr. Walmsley, just cutting right to it, belatedly appreciated this was occurring and the issue was quietly buried is what occurred at the officer level. It

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never went back to the committee, the Mayor and the council members, it never went to any of the relevant committees.

My submission, my Lord, is if I am wrong on that first stage of analysis, if one is looking at 22nd November my submission is that there was no lawful consideration decision of a potential change in pricing in light of the insolvency of XQDL. Further, there was no inquiry, I say very importantly, into what the reasons or consequences of liquidation were. When my Lord puts together, and I entirely understand, one would wish to know the precise reasons for this occurring and the consequences of it. I would say that would be an absolutely essential inquiry as part of a lawful decision-making process. What we will see in the evidence is that does not occur. Not only does it not occur, we see Mr. Walmsley effectively saying "I have made it my business not to look at this".

THE CHAIR: Can you give me the date it went into liquidation?

MR. BARRETT: As I understand the evidence, my Lord, it becomes liquidated on 15th November. The process, as I understand it, is well under way in October but finalised on 15th November as I understand it.

THE CHAIR: Okay. You just have to look at Companies House and you will get all the information that you need as to when the process started, whether it is insolvent or just a voluntary

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liquidation.

MR. BARRETT: No due diligence on this done whatsoever. You will see, you will be shown a report which is said to be a wrap-up due diligence report and you will see no reference whatsoever to this.

THE CHAIR: Let me get the dates in my head. It was signed a week later.

MR. BARRETT: Yes. I have rather leapt ahead there, my Lord, I hope that is useful. I do entirely recognise the point my Lord is raising, I do say it is an important issue in the case or it may be an important issue in the case.

THE CHAIR: Thank you.

MR. BARRETT: Thank you, my Lord. Daren Whitaker carries on his property development business through a series of different private limited companies trading under the name Renaker. Answering my Lord's question, he does that in a way whereby there is no corporate group, there is no Renaker parent company; rather you have a disparate range of different SPVs, sometimes with their own holding company, sometimes directly owned, as I understand it, by Mr. Whitaker, but no parent company and no corporate group. I will not turn it up, but the reference for that is core bundle page 25, paragraph 2.4, the first bullet point.

THE CHAIR: Core bundle, yes.

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MR. BARRETT: Page 25, paragraph 2.4, the first bullet point you will see that. As I say, I do not ask you to turn that up.

The loans were provided to Trinity and Jackson from the Greater Manchester housing investment loan fund. The capacity of the fund is £180 million, and I do not ask you to turn it up, but the reference for that is core bundle, page 1421. The Authority advertises the fund as providing loans with a value in the range of 1 to 30 million.

THE CHAIR: Just a minute, you're at paragraph 8 now, are you?

MR. BARRETT: I am, my Lord, yes. The Authority advertises the fund as providing loans with a value in the range of 1 to 30 million, much more than the loans which are granted regularly to Mr. Whitaker. The reference for that, my Lord, it is the Benjamin Rose exhibit bundle at page 134, the second bullet point. There is no formal application process.

THE CHAIR: The bundle, what is EXB, that is the witness, where do I find that in the bundle?

MR. BARRETT: There is a separate bundle, it should be behind you.

THE CHAIR: Which bundle am I looking at?

MR. BARRETT: There should be a bundle marked "Exhibit to the witness statement of Benjamin Rose, it is at page 134 of that bundle.

THE CHAIR: I want to make sure it works, when I come to look at it later. 134.

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2 MR. BARRETT: It should be the second bullet point, there is an
3 advertisement there for the fund, and if you see the second
4 bull point it should tell you that the advertised range at
5 which loans will be granted.

6 THE CHAIR: What is at the top of the page? I have different
7 numbers.

8 MR. ROBERTSON: Sir, my learned friend has been referring to the
9 internal pagination of the exhibit. The bundle reference is
10 page 71. If you have tabs it is tab 6, page 71.

11 THE CHAIR: Let me just look at that. Tab 6, so you saying no
12 formal application process.

13 MR. BARRETT: Yes. And advertised ----

14 THE CHAIR: It is the Rose exhibit.

15 MR. BARRETT: Yes.

16 THE CHAIR: That is tab 6, page 71.

17 MR. BARRETT: Yes.

18 THE CHAIR: Okay. Let me read it.

19 MR. BARRETT: The point I am taking you to is the value of the
20 loans being advertised is £1 million to £30 million.

21 THE CHAIR: Yes.

22 MR. BARRETT: And the point, my Lord ----

23 THE CHAIR: There are other points in there that could be
24 relevant.

25 MR. BARRETT: Yes.

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2 THE CHAIR: Yes.

3 MR. BARRETT: The point I draw your attention to at the moment is
4 loans being granted repeatedly to Mr. Whitaker with a value
5 far, far in excess of that.

6 THE CHAIR: Yes.

7 MR. BARRETT: The approach to pricing of the loans is governed by
8 the updated ----

9 THE CHAIR: Can I put this bundle away?

10 MR. BARRETT: Yes, please, my Lord. The required approach to the
11 pricing of loans under the fund is governed by the revised
12 2019 investment strategy. Could I ask you to turn that up, it
13 is in the main bundle.

14 THE CHAIR: Yes.

15 MR. BARRETT: At page 281, it is paragraph 7.2.

16 THE CHAIR: Paragraph?

17 MR. BARRETT: 7.2. Can I ask you to take a moment to read that.

18 THE CHAIR: (Pause for reading) I will look at 6.1 for a moment.
19 I looked at this before, 6.1 is quite relevant, is it not?

20 MR. BARRETT: It may well be, my Lord. The point I am going to
21 make at the moment is 7.2.

22 THE CHAIR: Presumably you rely on 6.1 and 6.2. Let me see what
23 it says there. I have read 7.2, I have looked at this before.
24 What I thought was my eyes looked at 6.1 and 6.2.

25 MR. BARRETT: Can I draw your attention to two what I say are

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important features of 7.2. First of all, it is the first sentence, and it is the statement that the pricing is risk-based, but the assessment is the borrowers' financial covenant. I do say, my Lord, that is of central importance, what one is dealing with here is an assessment of risk, you are not dealing with the sunny times, you are dealing with the situation where there has been rain, and what is important is the covenant of the entity against which you are or are not getting (unclear) recourse.

My Lord, having look at those introductory points, turning to the decision-making process, if I may. The starting point, my Lord ----

THE CHAIR: I can put this away now?

MR. BARRETT: Please, my Lord. The starting point is Daren Whitaker's strategy for his commercial negotiations with the Authority was specifically to obtain agreement on the pricing on the interest rates that would be applied before any engagement with any of the Authority's governance processes or committees. Can I ask you to turn up the core bundle at page 740.

THE CHAIR: Where is this in your skeleton?

MR. BARRETT: This is paragraph 12.

THE CHAIR: Okay. What do you want me to look at now?

MR. BARRETT: Core bundle, page 740.

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THE CHAIR: Is that bundle 1?

MR. BARRETT: It is, my Lord, towards the back of bundle 1 for me.

THE CHAIR: Mine stops at 726.

MR. BARRETT: I get 740 in bundle 1, sorry. It must be bundle 2.

THE CHAIR: Where does your bundle 1 end?

MR. BARRETT: 746.

THE CHAIR: That is halfway through documents. I will leave mine where it is at the moment.

MR. BARRETT: Thank you, my Lord.

THE CHAIR: Okay. So, the page reference you want?

MR. BARRETT: 740 please. This is an e-mail of 15th January, it is Mr. Enevoldson to Ms. Blakey, and he is reporting on a meeting he has had with Daren Whitaker. He explains to Ms. Blakey relevantly, he, that being Daren Whitaker, wants to agree the pricing and terms beforehand. We can pick up on this tomorrow if you have time.

THE CHAIR: At the very top of the page.

MR. BARRETT: Yes. If my Lord reads down, you will get the context and you will see how this statement comes to be made.

THE CHAIR: Okay. (Pause for reading) Yes.

MR. BARRETT: We do say this is very important in our respectful submission. The process that is supposed to be followed is that there is no agreement made bilaterally with officers with a borrower before matters go into governance, it is always

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supposed to be looked at properly by governance. The thing is
turned on its head is what we are going to see here.

THE CHAIR: Do you have any document that supports your
proposition that is contrary to ----

MR. BARRETT: Yes, I seek to make that good.

THE CHAIR: Everything in black and white is easier for me.

MR. BARRETT: I am going to get to it, if I may, my Lord. We say
that is very important and quite wrong. Mr. Enevoldson got it
quite wrong unfortunately on this occasion. The response to
this strategy of Mr. Whitaker needed to be, "I cannot do a
deal with you on this now. It has to go through governance,
discuss things through that process and once governance has
looked at it, then there will be an in principle agreement.
I cannot sit down with you in a room now and do a deal with
you on this, Daren Whitaker", that is what ought to have been
said.

My Lord, we see that an agreement was made at this stage
between Mr. Enevoldson and Mr. Whitaker. That is in the core
bundle, it is volume 2, at page 1231. Again, this is an
e-mail from Mr. Enevoldson to Ms. Blakey, he is reporting, and
there is a negotiation agreement with Mr. Whitaker.

THE CHAIR: Where do you want me to look?

MR. BARRETT: 1231, my Lord, if you look around the bottom of the
page you will see this is Mr. Enevoldson writing to

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Mr. Whitaker, at 3.54 on 13th February, and the material part for my purpose if your Lordship looks towards the bottom of that paragraph you will see, I shall not read out numbers, you will see a figure margin for D1, reducing to another figure, if we move to sales covenants, and you will see a figure margin for Contour. It is Mr. Enevoldson ----

THE CHAIR: Let me just read it.

MR. BARRETT: Yes, my Lord.

THE CHAIR: (Pause for reading) You have interest rate, what it says, X per cent margin, is that over LIBOR or what is it over?

MR. BARRETT: The Authority is a slightly odd terminology. As I understand the Authority's terminology, it refers to this essentially as the sum that one adds to the EU base rate, which is 5.65.

THE CHAIR: You add at the bottom and then add on whatever the percentage is. Let me try and get my head round this, this is quite important. Interest rate is, it says EU -- what is it called?

MR. BARRETT: Base rate which at the relevant time was 5.65%.

THE CHAIR: Was it 5.65% as of November 2024?

MR. BARRETT: It was, yes.

THE CHAIR: As well as in March?

MR. BARRETT: Yes.

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2 THE CHAIR: As at 22nd March 2024 and 22nd November 2024, both
3 dates. You have the EU base rate 5.65 plus you have a margin
4 which we have. Let me look -- do not say what the figures
5 are. You have the arrangement fee, which is obviously another
6 charge, quite often the arrangement fee you take that into
7 account in assessing what the level of interest is. At the
8 end of the day what really matters is how much the borrower is
9 paying overall. On these figures, these margin figures, did
10 they change?

11 MR. BARRETT: Never changed.

12 THE CHAIR: Let me just note that down. (Pause) D1 is Trinity, is
13 it?

14 MR. BARRETT: Yes.

15 THE CHAIR: Did they ever move to sales covenants?

16 MR. BARRETT: They did. The terminology here is not very precise.

17 THE CHAIR: Because they had a forward sale, did they not?

18 MR. BARRETT: Precisely so.

19 THE CHAIR: It is [REDACTED] moving to, whatever the figure is.

20 MR. BARRETT: Yes.

21 THE CHAIR: Whatever that figure is, moving to a lower figure, in
22 the event of forward sale, yes, which materialised?

23 MR. BARRETT: Yes.

24 THE CHAIR: Which materialised.

25 MR. BARRETT: Yes.

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2 THE CHAIR: Later, you will show us the loan agreement so that I
3 can see it all fed through.

4 MR. BARRETT: Yes.

5 THE CHAIR: Can we do that so that I can see it through? At the
6 end of the day, your key point is going to be on the rates.

7 MR. BARRETT: That is what this case is all about, my Lord.

8 THE CHAIR: If the rates are within section 3(2), you have a
9 problem. If they are not within section 3(2), they have got a
10 problem.

11 MR. BARRETT: Trying to put my case as precisely as I can, my
12 Lord, if there has not been a lawful decision that they are
13 within section 3(2), then they have a problem. If there has
14 been a lawful decision, but they are within section 3(2), then
15 I have a problem. That is how I put my case.

16 THE CHAIR: I understand that. It is shorthand. I understand
17 what you are saying. I am just noting this down. I presume
18 the arrangement fee is confidential. I presume that is as
19 well, is it?

20 MR. BARRETT: I think it is shown as coloured in the document
21 I have, my Lord. It is probably more a question for my
22 learned friend, I think. What I am trying to figure out is
23 that it has a figure for the arrangement fee and then it says
24 "paid 0.25%" ----

25 MR. ROBERTSON: It is a quarter and one and a half will be paid at

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2 ----

3 THE CHAIR: So when you look at those percentages, are they just
4 percentages of the first figure?

5 MR. BARRETT: That is my understanding. Again, it is probably for
6 my learned friend to speak to them.

7 THE CHAIR: I understand. It will be clear when I look at the
8 actual loan agreement.

9 MR. BARRETT: You have been focusing on Mr. Enevoldson's email at
10 the bottom. If you look at the next email up in the chain
11 from Dan Whitaker, you can just see in the middle of that that
12 he says, "We agreed to your understanding of what we agreed."
13 So, there are three points, my Lord, that I wish to make in
14 relation to this document.

15 THE CHAIR: Can I put it away? I have it in my mind.

16 MR. BARRETT: Of course. There are three points in relation to
17 this document which I do say is a very important document in
18 this case. First of all, I say that the document makes clear
19 that the pricing was indeed agreed at this stage. You will
20 see that in the documents I am going to show you as we work
21 through the chronology. It is never revisited. It is never
22 explained. It is simply taken as a given. The agreement was
23 indeed, at this point in time, between these two gentlemen.

24 The second point is that there was no analysis or
25 consideration whatsoever of compliance with the Subsidy

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2 Control Act, on even the fund's internal methodology.

3 THE CHAIR: No analysis of compliance with the Act, yes.

4 MR. BARRETT: Or indeed the Authority's own internal methodology,
5 which we will come to look at. There was no consideration of
6 any of that. This was Mr. Enevoldson and Daren Whitaker
7 sitting in a room and doing a deal. The striking point -- I
8 do say it is striking and it is deeply unsatisfactory -- is
9 that this e-mail and this meeting has not been addressed in no
10 fewer than five witness statements that have been served by
11 Ms. Laura Blakey. I do say, respectfully, that does speak for
12 itself in the context of a judicial review claim where the
13 Authority has a duty of candour.

14 THE CHAIR: Presumably they are the ones who disclosed it to you?

15 MR. BARRETT: They disclosed the document. In my submission, that
16 goes nowhere near to discharging the duty of candour. The
17 Court of Appeal has been very clear. It is not a case of
18 coughing up unhelpful documents in disclosure. You have to
19 deal with them head on in the witness statement, you need to
20 explain what happened and why, and the tribunal and the other
21 party needs to be given a fair opportunity to understand that
22 and deal with it. That has not happened.

23 THE CHAIR: If you are inviting them to deal with it, that is
24 fine, but we will see. We have plenty of time to sort this
25 out. You are saying that they have an opportunity to deal

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2 with this. Obviously, they are going to come back on
3 Thursday. If there is no explanation coming by then, then you
4 will say you rely on that. If there is a proper explanation,
5 we will look at it. You may say it is a bit late to do it
6 now, but I am prepared to look at whatever they do. You are
7 saying you are putting your gauntlet down and you have made it
8 very clear that it is for them to address this and you say
9 they have not. You may say that the reason why they have not
10 addressed it is because they have no answer. They may say
11 that they are not doing it because it is irrelevant legally
12 and it does not take you anywhere. Let us figure out where
13 everyone is.

14 MR. BARRETT: Can I make my submission clear on this, my Lord.
15 I am not inviting them to serve a witness statement at this
16 stage. I say it is much too late to do so. What they have
17 done is to serve five witness statements seeking to give this
18 tribunal the impression that the agreement on the pricing of
19 these loans was reached by a detailed governance process and
20 following, and in the course of that detailed governance
21 process. That is what they have done. I would ask my Lord to
22 read carefully the first witness statement and the fifth
23 witness statement that has been served by Ms. Laura Blakey.
24 That witness evidence is not consistent with what the
25 documents show and that is why it has not been addressed in

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the witness statements. That is my submission.

THE CHAIR: You are asking us to draw an inference and we have had a pretty truncated process for this last stage. We will just have to see what the Authority say about it.

MR. BARRETT: Yes. My Lord, I would respectfully ask you to read the witness statements that have been served very carefully because, if I can put it bluntly, the Authority has staked out its position in no uncertain terms. My learned friend's skeleton argument repeatedly refers to the pricing to be determined by a detailed decision-making process. That is not what happened in this case. The pricing was agreed by two gentlemen sitting in the room and there was no lawful or proper process in relation to that critical element.

THE CHAIR: Let me just make a note. I have noted down that you say that this is contrary to the case that the pricing followed a detailed and proper decision-making process, as set out in Blakey 1 and 5.

MR. BARRETT: Yes.

THE CHAIR: When I read that again tonight, I will bear that in mind. Thank you.

A SPEAKER: Can I just ask this, Mr. Chair. There is no dispute that Mr. Envoldson is an officer of GMAC because I notice he is using a Gmail address, which is unusual, but both sides agree that he is an appointed officer of GMCA?

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MR. BARRETT: I must say, my Lord, that I am not certain, but my understanding, based on looking at public sources, is that he certainly has been an officer. Whether he is still an officer as of today, I do not know if my learned friend can help you with that.

MR. ROBERTSON: At all relevant times, he was an officer at GMCA. He has since left GMCA.

THE SPEAKER: Thank you. I just wanted to check that.

MR. BARRETT: My Lord, on 22nd February, there is a meeting of the Authority's Gateway Panel. The Gateway Panel is an advisory body, not a body of the Authority.

THE CHAIR: So it is an advisory body and then they can kill a proposal. They cannot actually grant it and then it goes up to the Credit Committee. As I understand it, it is part of that process.

MR. BARRETT: It is an advisory body with no decision-making functions. It comprises external parties and therefore has no authorisation or no power to make any decisions.

THE CHAIR: No decision-making power.

MR. BARRETT: No.

THE CHAIR: Do you accept that they can kill a project?

MR. BARRETT: I do not, my Lord, in the sense that legally ----

THE CHAIR: That is the evidence we have seen.

MR. BARRETT: Yes, what I say, my Lord, is that it is very

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2 important, in my submission, to be very precise about this.

3 They are an advisory body. De facto, it may be the case that

4 if they express a concern, somebody will make a decision that

5 something is not going to proceed, but they are not a

6 decision-making body. That, in my submission, is a very

7 important point. The minutes of the meeting are, in my

8 submission, very important, my Lord. Can I ask you to turn

9 those up. You will find those in the core bundle. For me, it

10 is volume 1, but for you, it may be volume 2. It is page 743.

11 THE CHAIR: That is in my volume 2.

12 MR. BARRETT: It is a three-page document. You can see that there

13 is an oral presentation by Daren Whitaker. There are some

14 questions asked of him. There are some responses in italics.

15 On the final page, we see that the panel met without the

16 Renaker team and the formal additional points were made.

17 THE CHAIR: Can I just look at it?

18 MR. BARRETT: Of course.

19 THE CHAIR: I am just going to read this. I just want to read the

20 whole document if that is all right.

21 MR. BARRETT: If that is convenient, my Lord, of course. (Pause

22 for reading)

23 THE CHAIR: Yes, okay.

24 MR. BARRETT: Thank you, my Lord.

25 THE CHAIR: Which are the bits you want me to concentrate on?

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MR. BARRETT: The point I wish my Lord to concentrate on is what is not in the document. There is not a single point referring to discussing and considering the pricing of the loans or whether the pricing is at a market rate.

My Lord will have read 85. You will have read my learned friend's skeleton. Very substantial reliance is sought to be placed on the detailed consideration by the Gateway Panel. You have the contemporaneous document. The Gateway Panel did not look at the pricing of the loans or consider whether that pricing was consistent with the market rate. My Lord will recall ----

THE CHAIR: Can I just make a note?

MR. BARRETT: Of course. (Pause)

THE CHAIR: You do not need to answer now, but if you are right about all of this and at the end of the day, it is decided -- we have not made any decision and we have not discussed it amongst ourselves -- that the rate is market rate, you say that you win in any event because you say they have not followed the procedure. They did not do the basic work; is that right?

MR. BARRETT: Yes. Let me deal with that head on. It is precisely as my Lord put it, but it actually goes a little further than that. What my Lord has raised there is unlawful process, but the tribunal might be of the opinion that the

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rate itself in the end, if there had been a lawful analysis, would have been held to have been at the market rate. So, my Lord, that is a no difference point in the context of these proceedings. It is relying on a specific legislative provision within the Act. There is no point relied upon or no point advanced in the pleadings or the skeleton argument on behalf of the respondent. That point is not available to the respondent in this litigation, in my respectful submission.

THE CHAIR: Fair enough. Obviously, Mr. Robertson will deal with that, but you say that it is all academic because when you look at it, when you look at what the figure actually are, you say that the margin is far too low given the risks that you have explained and the company structure and the approach. We will come to all of that later. You will have to pull all the threads together. We have to look at this case on a number of levels, one on a procedural level and the other on what I would call an output level. I think that if you are right on the output level, it just automatically flows that the decision is going to have to be set aside.

MR. BARRETT: I do say that is this sort of case.

THE CHAIR: You have put your points. You will have to show the whole tribunal what those points are. You have your points fairly clear in your skeleton, but it is important that the tribunal look at the evidence for that and see whether the

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2 evidence itself supports what you have in your skeleton. It
3 is going to take time, but what you are doing at the moment is
4 very, very helpful so do not feel under any pressure that you
5 have to rush it.

6 MR. BARRETT: I am grateful.

7 THE CHAIR: The way you are presenting it is extremely helpful, if
8 I may say so.

9 MR. BARRETT: Thank you. So, my Lord, you have my principal
10 point. It is not discussed or considered and no decision
11 about that specific point on the pricing is reached. I would
12 ask my Lord to bear that very firmly in mind because it is the
13 case that repeatedly in Ms. Blakey's fifth witness statement
14 and my learned friend's skeleton argument, it is asserted that
15 there was some sort of decision or some sort of approval
16 regarding pricing by the Gateway Committee. We have the
17 benefit of the contemporaneous record.

18 THE CHAIR: I have read what they say, but you are saying that you
19 are right because you just look at the minutes and we will
20 have to hear what Mr. Robertson says when he comes to his
21 reply and then you will have your right of reply later.
22 Clearly, it is something that we would all like to get to the
23 bottom of.

24 MR. BARRETT: Of course. I say the contemporaneous document is
25 reliable evidence. The second point I make on this is that

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you will see that that position, the fact that the pricing is not addressed precisely, follows Mr. Whitaker's strategy that we saw in the first email that I showed you. It is precisely the position he wished to secure. Unfortunately, it is the position that the officers acceded to. They should not have done that.

On 7th March, there was a meeting of the Credit Committee. The minutes of that meeting are in the core bundle at pages 746-747. Can I ask you to turn that up?

THE CHAIR: Yes. Let me just get this right. (Pause)

MR. BARRETT: My Lord may wish to take a moment to read those two pages.

THE CHAIR: I would, yes. What is the significance of the colour yellow?

MR. BARRETT: As I understand it, my Lord, that is confidential information.

THE CHAIR: And green is obviously the -- I just want to know the distinction between green and yellow.

MR. BARRETT: I understand these are my learned friend's colours.

THE CHAIR: Mr. Robertson, can you just explain the difference between green and yellow?

MR. ROBERTSON: I think the green is a consequence of putting yellow on blue.

THE CHAIR: That is fine. That is absolutely fine. You are

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saying everything that everything that is coloured I just
treat as CRO material. That is absolutely fine. Let me just
read the whole thing. (Pause for reading) Yes.

MR. BARRETT: There are two key points. You can guess what they
are going to be. The first point is no consideration
whatsoever of the pricing of the loans or whether the pricing
of the loans reflects market rate. It is not discussed or
considered contrary to the impression that is sought to be
created.

The second point, my Lord, is that this is the end of
the governance process before the formal Authority meeting
approving the loans. Mr. Whitaker's strategy has been
successfully implemented. The governance process is
concluded. The public meeting is the next stage. There has
been no scrutiny. There has been no consideration by the two
relevant panels of the pricing agreed by Mr. Enevoldson by way
of direct negotiation on the loans. My Lord, if it is
convenient?

THE CHAIR: There is just one point and it really ties in with
this question of what is the significance of the date of
22nd November. Here, it refers to a red book valuation which
obviously needs to be done and it was done. If that came back
and it was adverse, one might say that a prudent lender would
say, "The risks are such that we need to adjust that and

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factor that in in the interest rate" and it would be very difficult for a borrower to turn round and say, "No, you are stuck with whatever the rate was that we agreed in principle."

When you make lending decisions, no one is formally bound until the loan agreement has actually been executed on both sides. Banks tend to keep their options open right up until that moment. As you know, I have done a lot of work to do with housing associations and facility agreements. That seems to be the pattern. You think you are where you are, but then due diligence is continuing and then things start moving towards the end of the process. What you are saying is that no, everything crystallises on the 22nd March. I can see arguments that support your view and arguments that support the opposite view, but it may be that you are both right in a way.

MR. BARRETT: Yes, my Lord, can I deal with your first point?

THE CHAIR: We will deal with that when we come back. I just give you the opportunity to think about it. When we come back at two minutes past 12 or whenever, you can just address me on that. It is something that is pretty fundamental between both of you.

MR. BARRETT: It is.

THE CHAIR: It is counterintuitive for me to say that you are stuck with whatever has been agreed in principle six months

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before when you have perhaps a fluid market and things move.

MR. BARRETT: I entirely understand. I will address that my Lord.

(A short break)

THE CHAIR: We lost a few minutes because of the difficulties with the transcribers, but we will go on until ten past one.

MR. BARRETT: Thank you. Can I deal with the points my Lord put to me before the short adjournment. I think, my Lord -- tell me if I am misunderstanding -- the concern is, surely it is not the case that the Authority is stuck with the position and something materially changes following the public meeting. Surely there is scope to address that.

Of course there is, in my submission. Blaming the obvious way it is dealt with, if there is a material change then there is a report about that. It goes through the proper governance process. I will show you in due course, my Lord, a minute of the meeting of the Oversight Committee which Ms. Blakey attends where she describes exactly that approach. That is what is supposed to happen.

THE CHAIR: So the authority can deal with material changes between approval and signature.

MR. BARRETT: It does that by ----

THE CHAIR: By a formal process.

MR. BARRETT: You put before the relevant decision-making body and

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making a lawful decision about what, if any, response is
merited. I will show you Ms. Blakey describing exactly that
process to the Oversight Committee of the Authority.

THE CHAIR: Okay.

MR. BARRETT: The base of this process, as I have been seeking to
explain, is that before the public meeting, there was no
lawful consideration of whether the pricing was at market
rates and subsequently after the approval, there was no
consideration of that critical question. It certainly was
never brought before any lawful decision-making body.

THE CHAIR: You are saying before and after approval, and who is
the committee? Is it by the ----

MR. BARRETT: By the GMCA committee, which comprises council
members and the mayor.

THE CHAIR: By the GMCA committee.

MR. BARRETT: Yes. We are about to look at those minutes, if we
may.

THE CHAIR: You are saying no consideration as to ----

MR. BARRETT: Whether pricing was at market rate.

THE CHAIR: As to pricing. Obviously, they would have been aware
of what the rates were, but you are saying that they did not
do the relevant exercise of seeing whether it was a subsidy or
not.

MR. BARRETT: Putting it perfectly bluntly, my Lord, what there

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needs to be in these cases and what there is in any properly run process is a report, annexed to the report that goes to the relevant council cabinet, which says, "Here is the evidence, here is the exercise we have done, here is the evidence that supports the fact that these rates are consistent with market rates." It is not happened here and I have sought to explain why it has not happened.

That takes us to 22nd March, which is the meeting of the relevant authority committee. Can I ask my Lord to turn up, first of all, the Part A report for the meeting?

THE CHAIR: Sorry, wait. 22nd March 2024, the GMCA committee. It has two reports, a Part A report and a Part B report.

MR. BARRETT: Precisely, if we can start with Part A, that is in the core bundle. Can I ask my Lord to start at page 5, the first paragraph. We see that what is being sought is the approval for the loans. Then if you look at paragraph 4 on page 6, this is important, my Lord, in the light of the debate which has been had ----

THE CHAIR: Can I just look at this. (Pause for reading) Yes.

MR. BARRETT: If I can draw your attention, my Lord, to paragraph 4, it is a delegation. It is important to identify who the delegation is to and the scope of the delegation. There is delegation of authority to the treasurer in conjunction with the monitoring officer to prepare and effect

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the necessary agreements, so no wider delegation, my Lord, not
said ----

THE CHAIR: Just give me the actual names.

MR. BARRETT: It is the GMCA treasurer.

THE CHAIR: The actual names.

MR. BARRETT: I think it is Mr. Wilson, but I am not certain about
that.

THE CHAIR: Mr. Robertson, can you deal with it when we come to
the relevant point. I want to write on my copy who they are.
Thank you.

MR. BARRETT: To prepare and effect the necessary legal
agreements. So, there is no delegation of any wider
decision-making authority in respect of the loans. There is
no delegation of any authority to consider material changes or
make decisions about material changes. That is not the
structure of the decision-making process. All of that is
retained by the committee. The delegation is to execute the
relevant documentation. Can I ask my Lord to turn to 11.
This is just to draw your attention that there are no
attachments to the report.

THE CHAIR: This is all part of ----

MR. BARRETT: It is all part of Part A, my Lord. There are no
attachments so there is no other advice or analysis provided
to the committee. If you look at ----

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2 THE CHAIR: Just give me a moment.

3 MR. BARRETT: Of course, (Pause for reading)

4 THE CHAIR: I am just looking at the impacts questionnaire because
5 isn't one of your points on this, unless I have missed
6 something?

7 MR. BARRETT: It is one of my points. I will deal with that in my
8 submissions. It is a short point.

9 THE CHAIR: I do not want to keep coming back to documents.

10 MR. BARRETT: Of course.

11 THE CHAIR: I am now on page 11, yes.

12 MR. BARRETT: Page 11, my Lord, it is a very procedural short
13 point, a number of attachments to the report done, so there is
14 no further advice or analysis provided. Page 12, tracking
15 process.

16 THE CHAIR: You are just going too quickly.

17 MR. BARRETT: Sorry, my Lord.

18 THE CHAIR: What do you mean by the borrowers will be required to
19 meet the fund's legal due diligence and monitoring costs?

20 MR. BARRETT: As I understand it, it is in terms of the deal. The
21 deal is the costs of doing that work in the end are folded
22 into what the borrower is going to pay, that is my
23 understanding of it.

24 THE CHAIR: Nothing else. Okay. We will see if Mr. Robertson
25 says anything on that. Okay.

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2 MR. BARRETT: Yes.

3 THE CHAIR: No attachments.

4 MR. BARRETT: No attachments, that is the rather short but
5 important ----

6 THE CHAIR: They have background papers.

7 MR. BARRETT: These are historic documents, no reliance on those,
8 nothing of relevance in any of those, not that anyone
9 suggested.

10 THE CHAIR: Surely the second one is relevant.

11 MR. BARRETT: Well, it may be relevant, my Lord. I do not place
12 ----

13 THE CHAIR: The investment strategy.

14 MR. BARRETT: Yes, it does not help on the point.

15 THE CHAIR: It does not. Okay.

16 MR. BARRETT: It does not help on the point I am addressing at the
17 moment. Page 12, my Lord.

18 THE CHAIR: Then, on that, in so far as any of these four things
19 are in the bundle, Mr. Robertson, on page 11, if they are in
20 the bundle, just give me a cross-reference when you give your
21 submissions on Thursday. Thank you. Yes. Carry on.

22 MR. BARRETT: Thank you, my Lord. Page 12, a point of some
23 importance, you can see tracking process, does this report
24 relate to a major strategic decision as set out in the GMCA
25 constitution. Yes. That is the point, in my submission,

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£120 million of public money it is a matter that needs to be dealt with by the committee. Then, page 15, my Lord, you will see there is the cross-reference to the Part B report.

THE CHAIR: Okay, give me a minute.

MR. BARRETT: Of course.

THE CHAIR: (Pause for reading) 2.4 is relevant.

MR. BARRETT: Yes.

THE CHAIR: Yes.

MR. BARRETT: If we turn up the Part B report, you find that at page 17. On page 17 we see again no attachments and no further documents or advice.

THE CHAIR: Wait a second.

MR. BARRETT: Of course.

THE CHAIR: (Pause for reading) What about 5.3, though?

MR. BARRETT: My Lord, on page 16.

THE CHAIR: Yes. You see, to me, it is pretty axiomatic when you approve something like this it is subject to due diligence.

MR. BARRETT: Yes.

THE CHAIR: What I would normally expect is, you have an agreement in principle, then the team go out, they get all the relevant reports. When you look at syndicated loans quite often it may be a condition of a syndicated loan that various things happen, various documents are done, and they are all dated on the day the loan agreement is actually executed, but everyone

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2 understands that is how it works.

3 MR. BARRETT: Yes.

4 THE CHAIR: Here, it is saying you have a due diligence, it is
5 pretty basic that if the due diligence process comes up with
6 something, that means things have got to change. Your point
7 is saying, look, if there is a fundamental change, and rates
8 need to change, then they come back to the committee and there
9 is a distinction between just doing the normal due diligence
10 process and what comes out of that process. So, they are free
11 to do the due diligence process, but if something comes out of
12 it that means the decision needs to be revisited as to rates,
13 that is when you come back to the committee.

14 MR. BARRETT: That is what I say, my Lord. Just to be clear, my
15 understanding of 5.3 is that 5.3 is actually referring to the
16 specific delegations in 5.1 and 5.2.

17 THE CHAIR: Okay.

18 MR. BARRETT: They are about specific matters, my Lord, that is
19 basically around changing the source of funds and so on.

20 THE CHAIR: That is fine, you are just saying that is not a
21 general delegation.

22 MR. BARRETT: It is not.

23 THE CHAIR: Okay. We now look at the Part B report.

24 MR. BARRETT: Which we see again at page 17.

25 THE CHAIR: Some of this may be subject to the CRO.

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MR. BARRETT: I am not going to read out anything ---

THE CHAIR: You need to tell me what to mark up.

MR. BARRETT: The short point on 17, no attachments and no further advice of analysis, it is what is in the Part B. If my Lord turns to page 20, you will see the relevant information.

THE CHAIR: Just a second. Yes, so you have the track record point at the bottom of page 18.

MR. BARRETT: Yes.

THE CHAIR: (Pause for reading) These margin figures are not the same margin figures we looked at.

MR. BARRETT: They are indeed, my Lord, it is just the fact that the authority expresses it in a slightly confusing way, if I can help.

THE CHAIR: If it is clear, it is fine. The same as the previous one which is expressed differently.

MR. BARRETT: Just to warn you, this is a recurring theme, my Lord, will find this as we work through the documents. It is expressed in different terms but it is the same numbers.

THE CHAIR: Obviously, we will be looking at the security. You have the LTV figure but then do we know, and maybe we do not know, how Renaker was getting the remainder of the equity and, if so, was that equity secured against any of the same assets that they are relying on as security, and is there a pari passu or a preference clause as to whether they had priority

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or not? Because if you have an investment and, let us say, you have 30% LTV on your lending and someone else is lending 70% of the balance, it is not great comfort to you if they have an interest in exactly the same security particularly if it is in priority to you. Do we know that or not, or is it just not known?

MR. BARRETT: I think doing the best I can to answer that question, I believe the structure is that the Authority will have priority in respect of the development assets.

THE CHAIR: Yes.

MR. BARRETT: I do not take any point.

THE CHAIR: I need to know what the answer is, that is all.

MR. BARRETT: That is my understanding, my Lord. Perhaps Mr. Robertson probably will ----

THE CHAIR: It is fair to take the LTV at face value when you are looking at the security.

MR. BARRETT: Yes.

THE CHAIR: That is fine, yes. Any bits you want to highlight there?

MR. BARRETT: Yes, my Lord. I say that the critical part of page 20 is the paragraph right in the middle of the page beginning "Renaker will pay an arrangement fee at [redacted]%. " This paragraph is the only information provided to the GMCA committee about the pricing of the loans that does

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2 state what the pricing is going to be. It does not explain
3 the basis on which that pricing is formulated. It does not
4 address at all whether that pricing is consistent with the
5 market rate.

6 THE CHAIR: Irrespective of this point, is there a document prior
7 to signature whereby the Authority does that exercise?

8 MR. BARRETT: No.

9 THE CHAIR: Not even -- so, irrespective of the issue as to
10 whether or not that exercise is shown to the relevant
11 committee and taken into account at the last stage, you are
12 saying that exercise has never been done?

13 MR. BARRETT: If I can be as precise as I can be, my Lord. There
14 is absolutely a paper we will go to shortly, written by
15 Mr. Walmsley.

16 THE CHAIR: We will look at that then.

17 MR. BARRETT: Other than that document, there is no report, no
18 advice to the GMCA committee or any other decision-making
19 body which does that exercise, are these rates consistent with
20 market rates.

21 THE CHAIR: I would like to look at the Walmsley report and see
22 what it says.

23 MR. BARRETT: Yes.

24 THE CHAIR: He has not given a witness statement.

25 MR. BARRETT: He has not.

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THE CHAIR: It is just Ms. Blakey who has done that.

MR. BARRETT: Yes. Looking at documents, there is no suggestion, it is said by Ms. Blakey it never went to the decision-maker. So, my Lord, I do not intend to turn it up unless you would like me to, the formal record of the committee's decision is in the core bundle at page 1442.

THE CHAIR: I would like to look at that.

MR. BARRETT: It is in volume 2 of the core bundle, page 1442. My Lord will see it is very familiar, the repeats, the language we have seen.

THE CHAIR: You are saying 1442.

MR. BARRETT: 1442, please.

THE CHAIR: Okay. I can see that.

MR. BARRETT: Sorry, that is the front page, the relevant section begins at page 1452.

THE CHAIR: I have a lot of things to consider. Let us have a look at this one. Yes. 28.

MR. BARRETT: 28 my Lord.

THE CHAIR: (Pause for reading) Thank you.

MR. BARRETT: If I can just pause there, this is my primary submission in this case, not considered by the relevant decision-making body, it was never subsequently considered by the relevant decision-making body, I do submit it follows there has not been a lawful decision in this case ----

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2 THE CHAIR: Your case, it never went back to the committee.

3 MR. BARRETT: Yes.

4 THE CHAIR: Let me just note that down. (Pause) Did it ever go
5 back to the Credit Committee?

6 MR. BARRETT: Not on this issue, no. Very interesting, it goes to
7 the Credit Committee on certain issues, it does not go to the
8 Credit Committee on this, I say, very important issue.

9 THE CHAIR: Did not go back to the Credit Committee, let us say on
10 interest rate.

11 MR. BARRETT: On pricing.

12 THE CHAIR: That is simple. Yes. Thank you.

13 MR. BARRETT: I say in due course, my Lord, that is again
14 indicative of something that is going wrong here.

15 My Lord, that takes us then ----

16 THE CHAIR: You say something went wrong and we do not need to
17 look at, let us say, the motives.

18 MR. BARRETT: Precisely.

19 THE CHAIR: At the last hearing I read what Grosvenor Law has been
20 saying, we do not need to adjudicate on that, do we?

21 MR. BARRETT: No, you do not.

22 THE CHAIR: Okay. Yes.

23 MR. BARRETT: My Lord, the next important development then is the
24 pre-action correspondence begins. On 21st March, the
25 applicant writes to the respondent explaining its concerns

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regarding the loans to Trinity and Jackson being approved.
Can I ask you to quickly turn that up, that is in the main
bundle at page 1736.

THE CHAIR: I think I looked at this last time. Yes.

MR. BARRETT: Yes.

THE CHAIR: It is a letter of 21st March.

MR. BARRETT: It is really so you are aware the correspondence was
started, a concern has been raised and I say importantly there
is a request for disclosure of the key contemporaneous
decision-making documents.

THE CHAIR: I have that. Yes. Wait a second.

MR. BARRETT: Of course.

THE CHAIR: (Pause) You have a nil return.

MR. BARRETT: We have a nil return.

THE CHAIR: You got an answer but a nil return in real terms.

MR. BARRETT: Yes.

THE CHAIR: I will just note down, "not supplied".

MR. BARRETT: Thank you.

THE CHAIR: Yes.

MR. BARRETT: That was 21st March, nil returns as my Lord noted.

We therefore followed that up on Monday, 15th April, in the
main bundle at page 1742. Can I ask my Lord to turn that up.

THE CHAIR: So that is the 16th -- 15th April.

MR. BARRETT: 15th April, a Monday.

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THE CHAIR: Yes.

MR. BARRETT: Paragraph 4, if my Lord has page 1742, you will see we requested the documents evidencing compliance with the CMO principle.

THE CHAIR: Yes.

MR. BARRETT: That was obviously a highly problematic request from the Authority's perspective because, as we have seen, there were no such documents that existed. On Friday afternoon of the same week, around 5 p.m., Mr. Walmsley sits down at his computer and writes up his internal note addressing interest rates. If my Lord could turn up in the core bundle, to show you first of all the date stamps so you have the chronology, it is at page 72, this is Mr. Walmsley's first role as it were, his notes.

THE CHAIR: Where do I get this ----

MR. BARRETT: If you see on the right-hand side of the page there are some date and time stamps.

THE CHAIR: I have to turn the thing around. Let me have a look. Okay. What do you want me to look at?

MR. BARRETT: If my Lord has page 72 on the right-hand side of the page.

THE CHAIR: You look at created date.

MR. BARRETT: Created dates, you see created indeed it is just before 5 o'clock on Friday, the 19th.

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THE CHAIR: Okay. (Pause for reading) Yes.

MR. BARRETT: So my Lord understands the chronology and the point I make about this, this is a document being created after the public meeting and decision has been made. What has been done in response to threatened litigation is that one of the officers responsible for the flawed process which has been conducted up to this date is writing a document effectively to seek ex post facto to justify what has been done.

THE CHAIR: (Pause for reading) Yes.

MR. BARRETT: There is also a point, my Lord, in relation to how this document was presented in the Authority's evidence. The Authority in its evidence presented a version of this document, actually a later iteration of this document from November, and in my submission to get the evidence indicating that this document, if you like, is something that had been live throughout the decision-making process; i.e. this document existed before the public meeting. We then pressed in correspondence about that and were provided with these other iterations. It is only when we pressed in correspondence and obtained that additional disclosure that it has been apparent that the document ----

THE CHAIR: When was the additional disclosure, was that after the last hearing?

MR. BARRETT: It was after the last hearing.

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2 THE CHAIR: I remember looking at the final version and I asked
3 the question, I think.

4 MR. BARRETT: You did, my Lord.

5 THE CHAIR: I was given an answer that it is a living document.

6 MR. BARRETT: Yes.

7 THE CHAIR: And you followed that up by trying to pin it down.

8 MR. BARRETT: Yes.

9 THE CHAIR: Yes. Okay. You have a created date, as you say that
10 is like a signature.

11 MR. BARRETT: Yes. My Lord, dealing with this document, can I ask
12 you to turn to page 95, if I can use the version we see at
13 page 95, I understand that is one of the versions.

14 THE CHAIR: What I am going to have to do at some stage is to go
15 through, and hopefully today, to go through one version of
16 this in some detail with the other panel members. It would be
17 ideal if I know which one I need to concentrate on. No doubt
18 that can be dealt with amongst yourselves and you tell me
19 before I leave today which version you want us to sort of
20 concentrate on.

21 MR. BARRETT: Yes. For my purposes I think you need to look at
22 two.

23 THE CHAIR: I do not mind how many, just so long as I know what
24 we need to look at. We have the whole of Wednesday to work
25 together. We just need to know, I do not mind which ones we

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look at and if you want us to look at all of them we will do.

If you can agree between yourselves which versions of these we need to master by Thursday, that would be great.

MR. BARRETT: Yes, of course. My Lord, if we have 95.

THE CHAIR: Which one do you want to start on?

MR. BARRETT: Page 95.

THE CHAIR: How do I figure out, is it 94 which tells me which date this one was created?

MR. BARRETT: Unfortunately it is the page at the end of the document, it is page 105.

THE CHAIR: 105. Just tell me the date and I will mark it.

MR. BARRETT: 24th April 2024.

THE CHAIR: I will put that on the first page. Yes. (Pause) Yes.

MR. BARRETT: Two short points, you will see the title of the document is "Interest rate setting proposal", I say that is entirely revealing and ironic because it is not a proposal. It has already been through governance and subject to a public meeting, it should have been done at the start and considered by those bodies. That is not what has happened, it is after the event.

The second point, if my Lord looks at the table in the bottom half of the page, we will see, I do not place too much weight on this, but I do suggest it indicates a certain confusion on the part of Mr. Walmsley. In relation to the

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item "Guarantor accounts information" he says "yes". The reality is there is and never was any guarantor. I do not say Mr. Walmsley did not understand that basic fact, he evidently did when one reads the document. I suggest it is indicative of what I say is the intellectual muddle that you see in the reasoning of this document, he proceeds on the basis as if a guarantee was being granted.

THE CHAIR: How many versions are there of this document?

MR. BARRETT: There are nine I think, my Lord. I do not think the tribunal needs to look at all nine.

THE CHAIR: I do not want to look at all nine, no. It would be nice to have a piece of paper that lists all nine and the dates and where they are in the bundle. Thank you.

MR. BARRETT: My Lord, we will do that. Can I begin on page 102, this is the strand of the reasoning that contends that the CMO principle is complied with because the interest rates applied are higher than the rate produced by a calculation performed under the 2022 regulations.

THE CHAIR: You will take us to the 2022 regulations when you deal with the law, will you?

MR. BARRETT: I will. If my Lord could begin just above the level with the top hole punch on page 102, if I can ask you to read that to yourself.

THE CHAIR: I want to read the whole thing.

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2 MR. BARRETT: Of course.

3 THE CHAIR: (Pause for reading) On the paragraph where it says
4 the second element, given that it went into liquidation on
5 15th November, how would that have worked out?

6 MR. BARRETT: It does not, in my respectful submission. It does
7 not and that is a big problem for the respondent is my
8 respectful submission.

9 THE CHAIR: (Pause for reading) Yes.

10 MR. BARRETT: If I can make three points in relation to this. The
11 first point, my Lord, is there is simply an error of law in
12 this direction.

13 THE CHAIR: Appendix 1 we will have to go through, but you will
14 tell us which Appendix 1 we need to look at.

15 MR. BARRETT: Sorry, my Lord, I have lost, where is Appendix 1?

16 THE CHAIR: Look at page 103, I will have to look at that.

17 MR. BARRETT: It is a second point, my Lord, I will come back to
18 that in due course.

19 THE CHAIR: As long as you do, do not forget.

20 MR. BARRETT: Of course. We are dealing now with the 2022
21 Regulations and Mr. Walmsley's thinking under this heading.
22 First of all, a basic misdirection error of law, Mr. Walmsley
23 understands the legal effect of the 2022 Regulations to be
24 setting a methodology to establish compliance with the CMO
25 principle. That is not what the regulations do at all. They

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establish a methodology in circumstances where it is accepted something is a subsidy to calculate a proxy amount for the valuation of the subsidy. It simply does not have the legal effect that he erroneously understands. I so say that is a fundamental error of law in his decision-making process.

The second point is, he then fails to apply the legal provisions of the regulations, they require consideration of the creditworthiness of the entity to which the loan is granted, not a separate entity which is not the entity to which the loan is granted or a guarantor.

THE CHAIR: That is under the regulations. Wrong to look at, what is the company called, XQ Developments, rather than the SPVs, yes.

MR. BARRETT: Yes.

THE CHAIR: SPVs will normally have 400 basis points on the back.

MR. BARRETT: That is the EU which we will come on to. This is the 2022 Regulations.

THE CHAIR: All right. The 2022 Regulations.

MR. BARRETT: A slightly different point. So, wrong entity. The third point, because it is not the applicable legal regime for the purpose he seeks to use it and because it is the wrong entity, produces an obviously absurd outcome. If you look at the calculation that is before, my Lord, Mr. Walmsley comes to the conclusion that there is compliance with the CMO principle

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if the rate of lending is 5.3%, that is a rate below the EU reference rate. Completely and absolutely absurd.

THE CHAIR: You say the EU reference rate is the one to look at?

MR. BARRETT: Whether it is the EU reference rate, my Lord, or whether one wanted to talk about the Bank of England rate at the relevant time, it was around 5.2 or 5.3%. The punchline would be the same. The punchline is the apparent conclusion that a market rate for lending of this sort and these sums is anything above 5.3 is completely absurd. Anyone conducting an objective, rational analysis would have immediately said, "Hold on a minute, it does not sound quite right, is this methodology actually applicable to this in the way I have assumed?" That is not what happened.

THE CHAIR: Yes.

MR. BARRETT: The final point, my Lord put to me, this is the dissolved entity at the date of signature. Even if I was wrong about everything else, it is a dissolved entity at the date of signature, the whole thing collapses.

THE CHAIR: Okay. What you say is: not correct benchmark; wrong to look at XQ Developments (and within that it will have it was dissolved at the date of the signature); you say it produced an absurd outcome; fourth, never considered by any committee. Is that right?

MR. BARRETT: Yes.

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2 THE CHAIR: It was never considered by GMCA committee or even the
3 Credit Committee, is that right?

4 MR. BARRETT: Even the Credit Committee.

5 THE CHAIR: Okay. Yes.

6 MR. BARRETT: My Lord, that is the 2022 regulations. I do say
7 that is very important because I will ----

8 THE CHAIR: We will look at those. I do want to look at those at
9 some stage.

10 MR. BARRETT: The factual reason I say it is very important is
11 that I will show you the pre-action correspondence in due
12 course and you will see that that is put as the basis ----

13 THE CHAIR: I saw that last time.

14 MR. BARRETT: On the pre-action correspondence settled by DLA on
15 behalf of the Authority, this is the legal justification for
16 what has been done. I say, for the reasons I have sought to
17 summarise, that is fundamentally flawed.

18 THE CHAIR: Where are we in your skeleton so I can put a cross
reference?

19 MR. BARRETT: We are (a) of paragraph 25.

20 THE CHAIR: Okay. I will put skeleton argument, paragraph 25(a),
21 yes?

22 MR. BARRETT: Yes. (Pause).

23 THE CHAIR: Yes.

24 MR. BARRETT: That takes me on to the second strand which my Lord
25 has preempted. Mr. Walmsley also performed an interest rate

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2 calculation based on the methodology characterised as the GM
3 Housing Fund Interest Rate Setting Procedure. My Lord will
4 see this if we turn to 96-97.

5 THE CHAIR: Where do I look?

6 MR. BARRETT: 96, my Lord.

7 THE CHAIR: Of which bundle?

8 MR. BARRETT: Of the core bundle, sorry. It is the same document,
9 just a few pages on.

10 THE CHAIR: Page again?

11 MR. BARRETT: 96.

12 THE CHAIR: Yes.

13 MR. BARRETT: So, my Lord, this is stage 1 of the process. This
14 is the application of the EU reference rate communication, the
15 document which I handed up at the start of the hearing this
16 morning. This involves, my Lord, the communication setting an
17 interest rate by reference to two inputs.

18 THE CHAIR: We are looking at stage 1.

19 MR. BARRETT: We are looking at stage 1 described as a state aid
20 rate setting. There are two elements to this calculation,
21 my Lord. The first element is the EU reference rate. That is
22 a base rate identified by the EU Commission and the reference
23 rate communication as applicable by the reference rate in the
24 UK at the time. That is correctly identified by Mr. Walmsley
25 as being 5.65%. You will see that if you flick to page 101.

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2 In the table at the bottom, you will see EC reference rate
3 5.65%, so that is done correctly.

4 THE CHAIR: So, okay, we are now looking at ----

5 MR. BARRETT: Back to 96. (Pause)

6 THE CHAIR: Yes.

7 MR. BARRETT: The second element is the margin. That is a risk
8 margin required by the Commission reference rate communication
9 based on two elements. The first element is the
10 creditworthiness of the borrower. The second element is the
11 level of collateral being provided for the loans. I do not
12 know if you want to turn it up, my Lord. That is in the
13 document I handed up this morning.

14 THE CHAIR: In the authorities bundle?

15 MR. BARRETT: Yes.

16 THE CHAIR: Where does he give the EC reference rate of 5.65 here?

17 MR. BARRETT: He does not in this section, my Lord. You have to
18 look at 1.01.

19 THE CHAIR: I looked at 1.01. It is not on this section.

20 MR. BARRETT: Not on this section, just at 1.01 in the table at
21 the bottom of the page.

22 THE CHAIR: I have this.

23 MR. BARRETT: This table on 96 is dealing just with margin. That
24 is the second element. It deals with the two components --
25 security and collateralisation. That is one element. We do

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not take an issue in relation to that. Put that to one side.
The second element which we do take issue with is
creditworthiness. You can see that on the second row,
carrying over to the following the page. This is the crux of
the problem, if my Lord takes a moment to read that. (Pause
for reading)

THE CHAIR: Yes. You say that it is one thing where there is
whatever guarantee and you look at that.

MR. BARRETT: Absolutely.

THE CHAIR: History tells you that even with some of the most
reputable companies -- I will not name any -- they have
allowed subsidiaries to go into liquidation. Even where they
have a letter of intent saying, "We intend to cover", they
say, "We are not bound by that." Anything short of a
guarantee, you say, a prudent banker probably would not want
to rely on that.

MR. BARRETT: That is the beginning and the end of the point,
my Lord. It is a very simple point. You have seen the
language in 7.2. It is about the financial covenant which you
are receiving. It is about the ability to be paid on a rainy
day.

THE CHAIR: Let me just make some notes. (Pause) On this point,
though, how does that interrelate with the security
collateralisation? On one view, you may say, "This could just

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be treated as, 'You have got the security, you have got a huge margin there, it does not really matter if you look at this other entity or not because you have got a huge amount of, let us say, fat in the security.'" How do you deal with that? I am not saying it is right or wrong. I just want to see how you deal with that.

MR. BARRETT: The short answer is that ----

THE CHAIR: I think that is what he may say, but I want to see.

MR. BARRETT: The short answer is that it does not work. I will show you in due course the communication. The communication, as I tried to explain, has the specific methodology that one needs to follow. It takes account of collateralisation. You absolutely get credit for that. It comes into the mix. It does not provide that you can ignore creditworthiness of the borrower. That simply is not provided for or permitted by the applicable rules. That is the very short answer.

The second answer is that such a thought process was never conducted or even dreamt about. What actually happened is that there was a fundamental error of analysis. Can I ask my Lord to take a step back and think about is going on and why. Why are we seeing these fundamental errors happening? The reason is that because of the unsatisfactory process that has been conducted by the responsible officers, if one applies the rules properly at this stage, they have a big and

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embarrassing problem. They need to go back to the committee afterwards and have a public meeting of all the council members and the Mayor of Manchester and explain that the basis upon which that decision was made and publicly promulgated was completely false.

THE CHAIR: Why do they have to do that?

MR. BARRETT: Because the methodology ----

THE CHAIR: I thought your case was that they never did that.

MR. BARRETT: Sorry, my Lord?

THE CHAIR: I thought your case is that they never did that.

MR. BARRETT: No, they never did that.

THE CHAIR: You said that they never did that.

MR. BARRETT: I am not being clear, my Lord. What I am trying to explain at the moment or submit is that in terms of why we are seeing these very surprising errors being made is that if Mr. Walmsley's own process is applied properly, it produces an answer that is very, very problematic for him from a personal perspective.

THE CHAIR: Okay.

MR. BARRETT: So, my Lord, this is, we say, an absolutely critical point in the case. We say it is plain error. It is hard-edged error to apply the written rules properly, the rules mandated by the relevant EU communication and also the Authority's own internal rules which require this process to

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be applied. On the erroneous basis that Mr. Walmsley conducted the exercise, this stage of the analysis leads to an output, which you can see on page 102, of an interest rate being produced by this stage of the analysis as an minimum interest rate of [REDACTED].

THE CHAIR: Is that not CRO material?

MR. BARRETT: Sorry, I did not think this number was, but I may be told I am wrong about that. (Pause)

THE CHAIR: Anyway, if it is, it can be taken out of the transcript.

MR. BARRETT: If it is, I apologise, my Lord. I was not aware this figure was.

THE CHAIR: I do not know.

MR. BARRETT: My Lord, if the methodology had been correctly applied, it would have required the addition of not 1%, but 4% so it is a 3% difference.

THE CHAIR: Let me get the rate. You are saying the calculation is at 102.

MR. BARRETT: Yes.

THE CHAIR: This is too low by 3%.

MR. BARRETT: 3%. So, if my Lord stands back and thinks about materiality, on any view, I say this is plainly (unclear) of 3% and in the context of a loan of this sort, it is not something that can be said to be insubstantial or immaterial.

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2 We are talking about very consequential ----

3 THE CHAIR: Yes. Have you finished this document?

4 MR. BARRETT: I have got, I think, two more points on this
5 document.

6 THE CHAIR: Make your two points and we will have our break.

7 MR. BARRETT: Thank you. So, my Lord, further, in my submission,
8 as you know, our primary submission is that you do not need to
9 get into any of this. It does not matter. If we do need to
10 get into this further fundamental error of approach that
11 Mr. Walmsley adopts, can I ask you to turn up page 101. If
12 you look at the top of that page, you will see stage 3.

13 THE CHAIR: The pricing decision, yes.

14 MR. BARRETT: The pricing decision. Under the heading, it says,
15 "The final consideration for the interest rate setting process
16 is the pricing and loan structures that are available in the
17 lending market today." If I can ask you to highlight and
18 underline "today".

19 THE CHAIR: Yes.

20 MR. BARRETT: It is a short point, my Lord. I say that is indeed
21 a highly relevant, necessary question that any authority,
22 acting lawfully, would need to ask.

23 THE CHAIR: You are saying that he has asked the right question
24 there.

25 MR. BARRETT: He immediately goes on to go down a blind alley.

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The first heading in the first bullet point is "Customer expectation". Customer expectation is a rather different concept to what products are available in the market to this particular enterprise today.

THE CHAIR: What we do not have is any expert evidence from either side on that, is that right?

MR. BARRETT: That is correct, my Lord.

THE CHAIR: Let me just note this down. (Pause) As you know, I would have allowed either party or both parties to put in expert evidence on this, but no one seemed to be keen.

MR. BARRETT: Yes.

THE CHAIR: You are entitled to take that view. You would probably say, "I do not need to and it was too expensive in any event" and they could, if they had wanted to, have adduced that type of evidence.

MR. BARRETT: Yes.

THE CHAIR: And they did not.

MR. BARRETT: Because they have never lawfully considered that. I say that is the reason.

THE CHAIR: Say that again?

MR. BARRETT: They have never lawfully considered this very important issue. They have never actually applied their minds to it is the simple truth.

THE CHAIR: Yes, but I am noting down that there was no expert

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2 evidence from either party on this.

3 MR. BARRETT: I accept that.

4 THE CHAIR: And the point is that I would have been happy for
5 either party to have done that exercise, but for whatever
6 reason neither side has.

7 MR. BARRETT: Yes.

8 THE CHAIR: I have accepted the reason why your client did not
9 because we argued that out last time. We will have our break
10 now and come back. How are we doing on timing? You will
11 still finish today?

12 MR. BARRETT: I will finish today, but I am behind. I will finish
13 today.

14 THE CHAIR: That is fine. I will have a firm stopping at quarter
15 to five, if that is okay. If you need more time than you
16 thought, just take it, but we need to finish at quarter to
17 five. Then we will just have a couple of minutes of wash-up
18 as to where we are and what needs to be done before Thursday.
19 Thank you very much.

20 (Adjourned for a short time)

21 THE CHAIR: Yes, Mr. Barrett.

22 MR. BARRETT: Thank you, my Lord. My Lord, we had just left
23 Mr. Walmsley's paper. If I could just seek to encapsulate my
24 three main submissions about that document for your note, in
25 the first submission, the strand relying on the 2022

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regulations, flawed, unsustainable in law for the reasons
I have sought to explain. The second submission, the
calculation of the EU margin applicable, flawed, unsustainable
for the reasons I sought to explain. The third strand,
stage 3 of the analysis, analysis of the rates available on
the market today, flawed for the reasons I have sought to
explain. The right question is written on the page ----

THE CHAIR: The correct question is posed, but there is no answer.

MR. BARRETT: There is no answer, no lawful inquiry actually
conducted, a misdirection, and he then answers a different
question. My Lord, that takes us to the developments
regarding liquidation of XQ Developments. Could I ask you to
turn up the phase 2 bundle. It is the first of the two
phase 2 bundles, volume 1.

THE CHAIR: I can put the core bundle away, can I?

MR. BARRETT: For the moment, you can.

THE CHAIR: Which one do you want me to pull out?

MR. BARRETT: Phase 2, the first volume.

THE CHAIR: Phase 2, disclosure bundle volume 1.

MR. BARRETT: Volume 1, and if you can turn up page 634.

THE CHAIR: Okay, so phase 2 disclosure, yes.

MR. BARRETT: It is the email chain of 9th October. This is
Mr. Walmsley first appreciating that XQ Developments is being
liquidated.

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THE CHAIR: Where am I looking at, the top of the page?

MR. BARRETT: Can we look at the middle e-mail? You will see that this actually happened a few weeks earlier, but Mr. Walmsley had not essentially appreciated what was happening.

THE CHAIR: Let me just look. What page are we on?

MR. BARRETT: Unless I have the wrong page, it is 634.

THE CHAIR: (Pause for reading) That shows that Walmsley is aware.

MR. BARRETT: Becomes aware and if my Lord ----

THE CHAIR: XQ Developments is being liquidated.

MR. BARRETT: Yes.

THE CHAIR: Yes.

MR. BARRETT: Importantly, I say, my Lord. If you read the e-mail at the top of the chain, you see Mr. Walmsley stating, "I have not really sought to understand the driver for liquidating XQ Developments." As my Lord put to me earlier in debate, what is the factual position here? What is really going on? My fundamental submission about this is that that very important question was never looked into by the Authority. It absolutely needed to be in the circumstances, but was not.

THE CHAIR: Is there any document or evidence anywhere ----

MR. BARRETT: No.

THE CHAIR: No, listen.

MR. BARRETT: Sorry.

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2 THE CHAIR: That it is not an insolvent liquidation? Is there
3 anything in there in the papers? I thought there was
4 something somewhere.

5 MR. BARRETT: There might be something somewhere indicating that
6 it is not an insolvent liquidation.

7 THE CHAIR: That is what I want to know.

8 MR. BARRETT: That, if it is there, is as far as it goes. What is
9 happening with the money, why the money is needed now,
10 nothing, because it is simply not addressed. It is simply not
11 looked into and it needed to be. I do say that the words are
12 striking. "I have not really sought to understand": those are
13 Mr. Walmsley's own words. Mr. Walmsley, given the analysis
14 that he conducted that we have seen, absolutely needed to
15 understand.

16 THE CHAIR: We have this of 9th October 2024.

17 MR. BARRETT: Yes.

18 THE CHAIR: The final iteration of the interest rates setting
19 proposal or paper, whatever you want to call it, is after this
20 date and it still has the same sort of wording in relation to
21 XQ, has it?

22 MR. BARRETT: With some subtle changes, which I am about to show
23 you, if I may.

24 THE CHAIR: We will have a look at that, yes.

25 MR. BARRETT: My Lord is quite right, if I can make the point in

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two stages. First of all, as at 19th November, three days before signature, Mr. Walmsley's paper is not updated at all to address this. I can just give you the reference for that.

THE CHAIR: Wait; interest not updated.

MR. BARRETT: As at 19th November. The reference for that is core bundle, pages 108, 115 and 118.

THE CHAIR: I do not need to look at that now.

MR. BARRETT: You do not need to look now, but for your note, the point is that as of 19th November, he has not even updated the paper. Then on the 24th or thereabouts -- this is core bundle page 1503 -- he sends that version.

THE CHAIR: What date, sorry?

MR. BARRETT: It is at 1503. Perhaps if you turn that up ----

THE CHAIR: Do I need to look at it?

MR. BARRETT: If you would, please.

THE CHAIR: This bundle? You are saying core bundle.

MR. BARRETT: The core bundle, the second volume.

THE CHAIR: My core bundle, bundle 2. What page did you say?

MR. BARRETT: I said 1503.

THE CHAIR: Mine ends at 1454.

MR. BARRETT: Let me just check. I may be giving you a wrong reference, my apologies.

A SPEAKER: While Mr. Hodge looks at that, at (unclear), it does say that it is in the process of voluntary liquidation, so it

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is not an insolvency ----

THE CHAIR: My hard copy bundle seems to end before that.

MR. BARRETT: We need to remedy that urgently.

THE CHAIR: Okay. Just let me look at it on the screen. (Pause
for reading) Okay, that is dated what, though, 19th November?

MR. BARRETT: That is three days before signature, my Lord.

THE CHAIR: Okay, and that says voluntary liquidation.

MR. BARRETT: Yes.

THE CHAIR: What is this reference to the pari passu structure?

MR. BARRETT: I must say, looking at the documents, I cannot
myself discern what happens with that. I think Mr. Robertson
can help us with that in due course. I am not clear at the
moment what ----

THE CHAIR: Mr. Robertson, if you look at that before Thursday,
I will just put "query pari passu reference".

MR. BARRETT: Mr. Walmsley's colleague draws attention to this
point and we can then see Mr. Walmsley amending his paper. If
I can ask you to turn that up, you will find that in the core
bundle at page 134.

THE CHAIR: That is another version of the ----

MR. BARRETT: It is the updated version that Mr. Walmsley creates
in response to his colleague's e-mail.

THE CHAIR: And the date?

MR. BARRETT: As I understand it, my Lord, the date which you see

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2 at page 141 indicates that this is on 20th November. I can
3 show you the changes.

4 THE CHAIR: Wait a second. (Pause for reading) Okay, where do
5 I look?

6 MR. BARRETT: 134, my Lord. If you have that, you will see the
7 change is the new fourth paragraph on that page in the box,
8 "XQ entered voluntary liquidation".

9 THE CHAIR: Yes, so when you look at the LTVs, what was happening
10 then is that a certain percentage is coming out of the fund,
11 and the balance of the equity was going to come through XQ,
12 but the priority was in favour of the fund and so that is
13 fine. Then here is a reference to the novation and really
14 just taken out the structure. You are just looking at
15 Mr. Whitaker. Yes.

16 MR. BARRETT: The second change, my Lord, is at page 141.
17 My Lord has that. You will see the change in the third
18 paragraph on that page. You will see that there is a sentence
19 added prior to its liquidation. (Pause for reading)

20 THE CHAIR: The earlier reports -- I like to just look at the
21 equivalent wording if you can take me back.

22 MR. BARRETT: Sure.

23 THE CHAIR: Did the earlier one actually say XQ Developments is --
24 we are using that as an appropriate Renaker company to test as
25 a proxy for DW's financial position.

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2 MR. BARRETT: Yes.

3 THE CHAIR: Can I have a look at that?

4 MR. BARRETT: Yes, go back to 95.

5 THE CHAIR: Yes.

6 MR. BARRETT: If my Lord flicks forward to the corresponding
7 wording we have just been looking at, it is page 102. My Lord
8 has that. It is the ----

9 THE CHAIR: You are saying all they have done is put prior to its
10 liquidation.

11 MR. BARRETT: Indeed, precisely so.

12 THE CHAIR: Let us just put that. (Pause) It does not use the
13 words that they are choosing that as the appropriate proxy for
14 DW.

15 MR. BARRETT: Shall I just read the words: "In this respect XQ
16 Developments is considered the appropriate Renaker company to
17 test."

18 THE CHAIR: Exactly, but it is not as a proxy for DW's financial
19 position, is it?

20 MR. BARRETT: It absolutely is, my Lord, because the regulations
21 refer to the creditworthiness of the entity to which the loan
22 has been given. It is truly testing a company other than the
23 company to which the loan has been given.

24 THE CHAIR: No, but the loan has been given to (unclear due to
25 overspeaking) okay. They are using instead of the SPVs, they

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are using XQ as a company, like the operating company within,
it is not a group, but whatever the loose structure is. There
is no reference to DW in there. They are not looking to see
his personal financial position, are they? They do not use
that wording, though, do they?

MR. BARRETT: Mr. Whitaker, my Lord?

THE CHAIR: Yes.

MR. BARRETT: I thought my Lord was putting a different point to
me about XQ. No, they do not refer to Mr. Whitaker, my Lord.

THE CHAIR: That is right.

MR. BARRETT: Yes. Can I make my submissions about this.

THE CHAIR: Yes.

MR. BARRETT: The submissions are four points.

THE CHAIR: Are they in your skeleton?

MR. BARRETT: I do not think they will be captured in this.

THE CHAIR: Then I had better listen, yes.

MR. BARRETT: The first point, my Lord, is that Mr. Walmsley's
analysis had been predicated on reliance upon XQ Developments,
that was the basis of his own analysis. It was insolvent,
therefore his own analysis on any view needed to be revisited
and redone. That was not done. He simply updated the paper
recording the factual development without analysing it. That
is the first submission.

THE CHAIR: He has not analysed the significance of its

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2 liquidation.

3 MR. BARRETT: No, there is nothing at all. No analysis at all
4 unfortunately.

5 The second submission is that if one were to analyse the
6 significance of this development, the required inquiry would
7 be what is the creditworthiness? This is on his analysis.
8 I do not accept this is the right analysis, but on his
9 analysis, what is the creditworthiness of Mr. Daren Whitaker.
10 One would need to inquire into that very important factual
11 question. One would need to understand what liabilities does
12 Mr. Whitaker have, what assets does he have. That was never
13 done.

14 The third submission which is really the outturn,
15 I suppose, of those two fundamental factual points, is that
16 this issue, in my respectful submission, on Mr. Walmsley's
17 view of the world very material development is never put to
18 any relevant decision-making body. It is simply buried or
19 brushed under the carpet.

20 THE CHAIR: In circumstances where there is no guarantee, surely
21 your case is ----

22 MR. BARRETT: Absolutely.

23 THE CHAIR: ---- that they should not be looking at Mr. Whitaker.
24 What I noticed is that, in the final version that you showed
25 me of 20th April, is that he is saying as if in the past they

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2 have used XQ as a proxy for DW.

3 MR. BARRETT: I think it is a proxy for, I think in so far as he
4 says that, my Lord, I think what he is saying is -- this is me
5 trying to reconstruct Mr. Walmsley's thought process.

6 THE CHAIR: It is difficult I know.

7 MR. BARRETT: This is me extrapolating. I think what he said is,
8 as far as I can tell, "XQ was an entity of substance,
9 I regarded it as appropriate to look at XQ as the entity
10 I know about and have some information about" -- he says that
11 in his little paragraph that he has some management accounts,
12 as a point of reference I think may be his language. That is
13 what he does. That entity then disappears. The point I am
14 making, as my Lord put to many, I say this does not arise,
15 I say there is no guarantee, this is all completely
16 misdirected. If one did reach this stage, I say if that
17 entity disappears and you are just relying upon Mr. Whitaker
18 you need to know what assets and what liabilities Mr. Whitaker
19 has, because we just do not know. He may have lots of assets.
20 He may be very robust or he might not be.

21 THE CHAIR: You see when you have a company ordinarily you will
22 have the accounts.

23 MR. BARRETT: Yes.

24 THE CHAIR: And you will have, let us say the assets and the
25 liabilities and all the rest of the stuff.

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2 MR. BARRETT: Yes.

3 THE CHAIR: If what he is saying in the last report that was a
4 proxy for DW, well, I can see why he is saying it because he
5 says everything is novated into DW, but then that does not
6 tell you about what liabilities DW may have.

7 MR. BARRETT: Precisely so, my Lord.

8 THE CHAIR: Which you would otherwise hopefully pick up with the
9 company.

10 MR. BARRETT: Precisely, my Lord. That in my respectful
11 submission is why it is obviously fundamentally important that
12 one would do the due diligence on Mr. Whitaker because, as
13 I say, it may be that he was in a robust position. One cannot
14 assume that. One does not have the first idea absent due
15 diligence.

16 That has really preempted my next point, and it is my
17 final point on the factual narrative, that due diligence never
18 occurs, no due diligence and no further consideration of the
19 pricing of the loans ever occurs. I do not know if my Lord
20 wants me to turn up the documents, there are two relevant
21 documents, one is a briefing that goes to the Credit Committee
22 on 7th November.

23 THE CHAIR: Let us have a look at that.

24 MR. BARRETT: Of course, it is the core bundle.

25 THE CHAIR: 7th November. What is the document, I will just write

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it down first.

MR. BARRETT: It is a report to the Credit Committee, it is
called ----

THE CHAIR: Report to Credit Committee. Date is the 7th.

MR. BARRETT: It is the 7th November.

THE CHAIR: Bundle reference?

MR. BARRETT: Tab 44, page 1242.

THE CHAIR: Tab 44 of what.

MR. BARRETT: The core bundle.

THE CHAIR: And what?

MR. BARRETT: Page 1242. It is referred to as ----

THE CHAIR: My bundle does not have tabs in it.

MR. BARRETT: Nor does mine, my Lord.

THE CHAIR: If you can give in the tabs, they can be updated in
the bundle for you.

MR. BARRETT: Yes, my Lord.

THE CHAIR: 1422. Let me catch up. (Pause) Loan agreement credit
report.

MR. BARRETT: Yes.

THE CHAIR: Who has written this?

MR. BARRETT: I think it is signed by Ms. Blakey at the end,
my Lord.

THE CHAIR: Show me that.

MR. BARRETT: It is 1247, signed on 22nd November.

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2 THE CHAIR: There is a signature of Steve Wilson on the next page,
3 1248.

4 MR. BARRETT: You are right.

5 THE CHAIR: There is Laura Blakey on the previous page.

6 MR. BARRETT: It is dated the 22nd, I think it is described in the
7 index as 7th November which is the date I gave you.

8 THE CHAIR: Let us change the date then, 22nd November, which is
9 the date of the ----

10 MR. BARRETT: Signature.

11 THE CHAIR: The date of the signature, so one would expect that.
12 What do you want me to look at?

13 MR. BARRETT: My Lord, you will have picked up the theme, it is
14 the absence of relevant issues, so the report does not address
15 the pricing at all. It does not address the liquidation of XQ
16 Developments and it does not address any due diligence or the
17 financial position of Daren Whitaker, forming the liquidation
18 of XQ Developments.

19 THE CHAIR: You are asking me to note a negative.

20 MR. BARRETT: Indeed, that is really my point.

21 THE CHAIR: I have to quickly flick through this.

22 MR. BARRETT: Of course.

23 THE CHAIR: (Pause) This is to the Credit Committee because they
24 are seeking approval to enter into the loan agreement.

25 MR. BARRETT: Yes, that is my understanding, my Lord.

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THE CHAIR: They refer to all the due diligence being done.

MR. BARRETT: Yes.

THE CHAIR: (Pause) Have we looked at the minutes of 7th March 2024?

MR. BARRETT: Yes.

THE CHAIR: They are the ones we saw earlier.

MR. BARRETT: Indeed.

THE CHAIR: Yes. (Pause) It says heads of terms, it refers to the CAT and that the loan agreement is consistent with bar points which have been covered in the aforementioned wrap-up report, that is 1244. (Pause) Okay, read it.

MR. BARRETT: Thank you, my Lord. It is the same three points.

THE CHAIR: I have it, yes.

MR. BARRETT: My Lord, I think to complete the set as far as I am concerned, there is then a document dated 19th November. Can I ask you to turn that up. It is in the Phase 2 documents.

THE CHAIR: This is before this one, okay.

MR. BARRETT: Yes, I was confused, my Lord.

THE CHAIR: This is all going to be in the chronology.

MR. BARRETT: Yes, of course it will.

THE CHAIR: What you find in these cases there are a lot of documents here, but very few will be central to the case.

MR. BARRETT: I respectfully agree, my Lord.

THE CHAIR: Which documents?

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MR. BARRETT: The Phase 2 documents, the second volume, page 1399.

THE CHAIR: Yes. It is a wrap-up report which is referred to.

MR. BARRETT: Yes, my Lord, indeed. It is the same point I make,
my Lord, the same three ----

THE CHAIR: I am going to write my note. I see. (Pause) Okay.

MR. BARRETT: My Lord, the loans are then signed on 22nd November.
That concludes from my perspective the analysis of the
contemporaneous documents recording the decision-making
process.

That shows, in my respectful submission, first of all,
that there was never any consideration by a relevant
decision-making body of whether the pricing of the loans was
consistent with the market rate.

Secondly, there was never any consideration by relevant
decision-making body of the significance of XQ Developments'
insolvency.

Thirdly, there was never any consideration or due
diligence regarding the financial position of Daren Whitaker.
We do submit, my Lord, this is the fundamental issue in this
case.

THE CHAIR: You say, it would have been fine for them to ignore
his financial position on the basis he is not a guarantor, but
the fact is that they purported to ----

MR. BARRETT: Precisely so.

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THE CHAIR: ---- as a reason for pricing. You could have said,
look, it would have been totally irrelevant for pricing and in
which case that is fine.

MR. BARRETT: Yes.

THE CHAIR: But then you look at it as a standalone SPV and then
you have quite a number of basis points to add on, on your
basis.

MR. BARRETT: Yes.

THE CHAIR: Will you show us the loan documents.

MR. BARRETT: Of course.

THE CHAIR: Particularly the clauses that deal with security and
interest rate.

MR. BARRETT: I can certainly help on interest rate. Security
I may at a stretch, but certainly interest rate. You will
find that at page 749 of the core bundle, you need to look at
a couple of different provisions.

THE CHAIR: That is okay. Yes.

MR. BARRETT: We start with clause 8.1 which you will find on
page 797.

THE CHAIR: This bundle you are going to put in tabs and
everything. If your solicitor can come round tomorrow morning
and just liaise with the Registry and make sure I have all the
pages of every bundle and the tabs are put in at the right
place. If that can be done by lunchtime tomorrow, that would

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be great. Okay. That is it, the term facilities agreement.
Let us have a look at this.

MR. BARRETT: Interest clause, my Lord.

THE CHAIR: You are going too quick, I have to make a note.

(Pause) Yes.

MR. BARRETT: The interest rate clause, my Lord, is at page 797,
clause 8.

THE CHAIR: I will just quickly flick -- it is a structure I am
pretty familiar with, let me just have a look. (Pause) Okay,
so, 768 margin.

MR. BARRETT: Yes. If my Lord wishes to do it in this way of
course.

THE CHAIR: I will.

MR. BARRETT: There is certainly a different order I was going to
suggest to see how it hangs together. The definitions you
want are "margin" and you also need the definition for "EU
reference rate".

THE CHAIR: Yes.

MR. BARRETT: You find that on page 762. My Lord has that and has
the definition of "margin".

THE CHAIR: Yes.

MR. BARRETT: You then want the operative clause, which is
clause 8, on page 787.

THE CHAIR: Let me just have a look. (Pause) Okay. You can see

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that you have the subordinated creditors, so they are standing behind the Authority. They are one step behind on the security.

MR. BARRETT: Sorry, my Lord, I do not follow that.

THE CHAIR: You have one creditor is going to be the fund, the other creditor, whoever is supplying the gap in the equity, and they are presumably subordinated creditors and that is what you find on page 754.

MR. BARRETT: Yes, I (unclear) my Lord.

THE CHAIR: We need to bear all of this in mind.

MR. BARRETT: Of course.

THE CHAIR: (Pause) What did you want me to look at?

MR. BARRETT: To answer your question about interest rates, the relevant clause is clause 8 at page ----

THE CHAIR: Yes, I have marked that.

MR. BARRETT: We need to work to two things, first 8.1, you see the two ingredients we saw on the definition section, "margin" and you have "EU reference rate".

THE CHAIR: Yes.

MR. BARRETT: You also need to see, my Lord, if you turn forward to page 801, you will see the loan management fee which is 1%.

THE CHAIR: That is the arrangement fee, is it.

MR. BARRETT: I think that is a different thing, my Lord. The arrangement fee is the sums we see catered for in the earlier drafting at 9.1. Loan management fee is part of the margin at

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1%.

THE CHAIR: Okay. Yes.

MR. BARRETT: My Lord, that is the answer to the question you put to me, does one see that the number is the same.

THE CHAIR: They are the same once you take that into account.

MR. BARRETT: Precisely so, my Lord. No change.

THE CHAIR: Where is the arrangement fee, then?

MR. BARRETT: That is 9.1, my Lord.

THE CHAIR: Let us have a look at that.

MR. BARRETT: That begins at 797.

THE CHAIR: It is spread out.

MR. BARRETT: Unless I can help you further with this document.

THE CHAIR: No, that is fine.

MR. BARRETT: I turn to the law, I set out the detail in my skeleton argument.

THE CHAIR: I know you have.

MR. BARRETT: Which I hope is helpful. I do not want to repeat all of that unless it is helpful for me to do so, I would prefer to focus on the what appeared to me to be the points that are or may be in dispute.

THE CHAIR: The problem on the law is you are both looking at different things and not necessarily the same cases. It should be fairly clear when we get Mr. Robertson's document, let us say we call it supplemental skeleton argument, exactly

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where the battle lines lie on each point of law because it may be, as you say, most of them are not going to be contentious. I want it to be cheer as to which paragraphs of your legal analysis are accepted, in which case it is accepted, and which are not accepted, and then we can focus on those.

MR. BARRETT: Yes. I entirely understand that, my Lord. Perhaps that reinforces the benefit of me not repeating everything I have said because it would be a more focused exercise.

THE CHAIR: It will be, I think that is probably right.

MR. BARRETT: On that basis if I am going too fast or stepping over something.

THE CHAIR: I will tell you, do not worry.

MR. BARRETT: Let me know, I will try and deal relatively quickly with the framework.

THE CHAIR: Okay.

MR. BARRETT: As my Lord is well aware, the Subsidy Control Act implements the UK's obligations as a matter of international law under the Trade and Cooperation Agreement with the EU, the ECAA. I do not think a great deal turns on it for this litigation, but the definition of "subsidy" if my Lord wishes to look at that in the TCA.

THE CHAIR: You have that there.

MR. BARRETT: Is at 363 of the TCA. The concept being an advantage, that is the key legislative concept at that level.

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2 THE CHAIR: In your skeleton, if you have the tab number of the
3 authority I can write that in now on my copy.

4 MR. BARRETT: I do not think we have given you the Article, the
5 reference for the TCA is tab 7, but we have not given you that
6 Article, we can add that.

7 THE CHAIR: Just add that, that can be added tomorrow.

8 MR. BARRETT: Of course, the Act itself.

9 THE CHAIR: What tab is that then?

10 MR. BARRETT: This is at tab 1. The Act itself, the core duty for
11 the purposes of this sort of challenge is section 12. Can
12 I ask you to turn that up.

13 THE CHAIR: Unless you have quoted it, anything else you want to
14 rely?

15 MR. BARRETT: I think it is helpful if my Lord turns it up. There
16 is one point I wish to add to my skeleton, page 11, tab 1.
17 My Lord sees that line, "The duty is to consider the subsidy
18 control principles before" -- this is the line which I say is
19 of significance -- "deciding to give." The duty is to assess
20 compliance with the subsidy control principles before making a
21 decision to give a subsidy.

22 THE CHAIR: Their case is, they never decided to give a subsidy.

23 MR. BARRETT: Exactly.

24 THE CHAIR: You say no, they have it wrong, they did give a
25 subsidy.

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MR. BARRETT: I say they are conflating deciding to give a subsidy and giving a subsidy, actually they are separate concepts. The additional point, my Lord, that you get from section 12 in my submission, which I say is assistance on that dispute, that disagreement between us, is subparagraph (3) which deals with the making of a subsidy scheme. You see there "The duty is to consider the subsidy control principles before making a subsidy scheme."

THE CHAIR: They say they have not made a subsidy scheme because there is no question of subsidy, do they not?

MR. BARRETT: They do and they are either right or wrong about that. The point is a slightly different point, it is a time point, if one thinks about a subsidy scheme, a public body makes a decision it is going to establish a subsidy scheme. The scheme then sits there for it may be months or years, it may at some point in the future give subsidies under the scheme, it may not. There is that temporal gap and difference necessarily. You are entitled to challenge, indeed you are required to challenge the scheme as soon as there is a decision about it. You do not have to wait until the subsidy is actually given.

My learned friend's construction on subsidies, not making the scheme but subsidies, is a radically different approach as between schemes on the one hand and subsidies on

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the other. He says when you have a subsidy you cannot go to court until there is a signed contract. I say that is a remarkable proposition and analysis for a few reasons. The first and fundamental point I make is, if one looks at this provision, section 12, and reads it as a whole, it is actually just not consistent with how the draftsman has framed it.

THE CHAIR: Yes.

MR. BARRETT: My Lord, that is all I was going to say for the moment about section 12.

The next important provision I think is section 70. Can I ask you to turn that up, at page 51. This is the crucial provision which founds the tribunal's jurisdiction in these proceedings. The first point I make really the other side of the coin perhaps in the submission I have just made, is that the trigger for a right of action is not the giving of a subsidy, it is not the statutory language, it is the making of a subsidy decision. Again, I say that is in fact inconsistent with my learned friend's case. The draftsman could have said that the trigger is the giving of a subsidy, that is not the drafting, it is a subsidy decision. The scope of the tribunal's jurisdiction is defined by section 70(5), that provides that it is a judicial review jurisdiction that is being exercised. There is no limitation or constraint on that jurisdiction, it is a general true judicial review

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jurisdiction.

A point I should draw attention to is sub (2), it is dealing with the making of schemes, just to make good that point I submitted earlier, you are required to challenge the making of the scheme. You actually cannot wait until a subsidy is given, you have to challenge the scheme.

THE CHAIR: Where are you looking at now?

MR. BARRETT: That is (ii).

THE CHAIR: You say you are an interested party.

MR. BARRETT: Of course. There is no dispute about that, my Lord.

THE CHAIR: No dispute. Good. Yes.

MR. BARRETT: If I can then show you the provision my learned friend places reliance on, it is section 2(5). You will find that at page 5.

THE CHAIR: Yes.

MR. BARRETT: My short point is that this is a clever red herring, in my submission. It is actually just dealing with a different point. It is not dealing with when you do or do not have a subsidy decision at all. It is dealing when, for the purposes of the Act, something is treated as given, the point there being that it is when a subsidy is given that certain procedural consequences follow for the purposes of making notifications and publications on a database and so on and so forth. It is just not dealing with this question about the

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decision at all. It plays a different role in the statutory scheme.

THE CHAIR: Yes, but the financial assistance is given, presumably, at the very latest on 22nd November.

MR. BARRETT: Yes, at the latest indeed.

THE CHAIR: Yes.

MR. BARRETT: Then the next provision I should show you, my Lord, is the very important key provision in the case, section 3(2). I will make some submissions about this, if I may.

THE CHAIR: You just have to look at the wording. It is fairly clear to me, but you never know with clever lawyers. They may come up with something.

MR. BARRETT: I doubt it, my Lord.

THE CHAIR: I would be inclined to just focus on the wording.

MR. BARRETT: Yes. My Lord, in my respectful submission, in some respects, the legislative formulation is, in my view, somewhat tortured, a double sort of negative. Financial assistance is not to be treated as an advantage unless the benefit is in terms that are more favourable than might have reasonably been expected.

I submit that the correct construction of the provision is a relatively straightforward commonsense matter. The relevant legislative question, in my submission, can be stated as follows. Financial assistance will not confer an economic

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2 advantage if it was reasonably considered to have been given
3 on the same terms as could have been obtained by the
4 enterprise on the market. That is my respectful submission as
5 to the correct construction or meaning of 3(2).

6 THE CHAIR: Where do you deal with that in your skeleton? You do
7 deal with it, do you not? (Pause)

8 MR. BARRETT: I do not think I have articulated that submission in
9 the way I just have, my Lord.

10 THE CHAIR: No.

11 MR. BARRETT: That is the substance of my submission.

12 THE CHAIR: It raises questions as to who has got the burden of
13 proof and all that sort of stuff and of what.

14 MR. BARRETT: Yes, let me deal with that head on. I say that it
15 is the usual burden of proof in a judicial review. A
16 claimant obviously bears the initial burden, but in the end,
17 the tribunal is reviewing a decision and it is reviewing a
18 decision applying the usual legal principles and applying that
19 review jurisdiction in reaching its decision. So, in my
20 respectful submission, my Lord, it follows from that that the
21 relevant question ----

22 THE CHAIR: Well, one second. Mr. Robertson, can you, in your
23 note, just deal with the burden of proof on that for me?

24 MR. ROBERTSON: I think this is all being advanced for the first
25 time.

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2 THE CHAIR: I know, but I do want to get it right, so when you
3 look at it ----

4 MR. ROBERTSON: I was going to address it in my supplemental
5 skeleton.

6 THE CHAIR: That is all I want, yes, as long as it is covered.

7 MR. ROBERTSON: I am going to cover that and I am going to cover
8 definition of "subsidy" because my learned friend is also
9 advancing, for the first time, a submission based upon the
10 definition of "subsidy scheme".

11 THE CHAIR: The whole idea is that you can put whatever you want
12 in these submissions. It is really helpful, the way that
13 Mr. Barrett is dealing with these things, because we know what
14 it is and you have that one-day gap so it actually works out
15 fine. There is no ambush in any of this.

16 MR. ROBERTSON: I have plenty of time to address it so I will
17 address it there.

18 THE CHAIR: That is absolutely fine.

19 MR. BARRETT: The relevant legal question that the Authority must
20 ask itself, my Lord, in my submission, is what terms would be
21 available to this enterprise on the market in respect of this
22 financial assistance? That is the relevant question, if I
23 just try and distill it. That is the question that has to be
24 answered. That requires lawful consideration, in my
25 submission, of the market. That requires lawful consideration

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of the position of the particular enterprise. Now, the
primary decision maker on these issues is obviously ----

THE CHAIR: Can we just go back one space. What troubles me --
and it is not a big trouble, but I want to get to the bottom
of it, and both of you need to address it -- is that if, when
we look at this, having regard to all the evidence we have
seen and our experience of these things, we take the view that
these terms are more favourable than would be available on the
market, what do we do even if we accept your proposition that
they have not done that assessment themselves? I have not
come to a view either way. I need to go through this in more
detail. I do not know where we are going to come out on this.
We may have a much better view by Thursday.

There are two broad ways we can come on this under the
fundamental question. First, we have looked at it and we
think that actually these terms are unduly favourable, they
are not justifiable, they are significantly below what are
market terms, hence giving Renaker, let us say what you would
say, an unfair advantage over your client's business. We
could take that view.

The other view we could take is that we have looked at
this. We think that these rates are perfectly normal. We
have looked at the security and the risks involved. Having
done a proper review of all the evidence, we take the view

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that it is okay.

Another theoretical possibility is that we just do not have the information to get to that, in which case your fundamental point must be right, which is that if we are not in a position to decide on the basis of all the material we have got, and a proper procedure has not been followed, it cannot be the case that we should just allow something to go forward which we feel may well infringe subsidy principles, even if we do not know for sure. I am just thinking aloud as to ----

MR. BARRETT: I entirely understand.

THE CHAIR: ---- what the theoretical possibilities are.

MR. BARRETT: Can I try and help with that?

THE CHAIR: Of course you can. As much help as you can give us is appreciated.

MR. BARRETT: The analysis you have just articulated, in my submission, is the correct legal analysis. This is a judicial review jurisdiction. If there is a material legal error in the decision-making process, then the decision is quashed and sent back unless the defendant can establish, to a very high level of certainty on the evidence, that the legal errors could not, in any world, have made a difference to the outcome.

The tribunal, in my respectful submission, should be

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2 extremely cautious about entering that territory. The cases
3 describe that often as "the forbidden territory". It is
4 essentially the tribunal stepping in as the primary
5 decision-maker rather than the reviewing judicial review
6 court. It is something that the court is not supposed to do
7 absent a very exceptional case. There is lots of authority
8 about that. If it is helpful, I can provide it.

9 At the moment, on my learned friend's skeleton, I do not
10 know whether he will seek to possibly develop his position,
11 but at the moment, I do not apprehend there to be a difference
12 of principle on this issue between the parties. My learned
13 friend's skeleton on the law essentially says that you are
14 reviewing the decision. He says that when you are reviewing,
15 you should give a very wide margin of appreciation. You
16 should be very hands off and you should be deferring to what
17 the Authority has done.

18 I disagree about that. I will try and explain why I
19 disagree about that. I do not understand him to be suggesting
20 that the tribunal can or should be making its own mind up
21 about whether these are market rates. Indeed, he positively
22 submits that this is not an appeal. It is not one of those
23 cases where the tribunal is entitled to or should be
24 conducting that exercise.

25 THE CHAIR: Where does it come in that we are a specialist

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tribunal? On this particular panel, the panel has been chosen because we do have two very experienced bankers who know this area pretty well and at the Bar, as you know, I specialise in banking and financial services and stuff. To what extent is that a relevant factor? If we were just three laymen not having a clue, I can see why you would not want to touch anything. You would want to defer to everyone. What do you do when you have a specialist tribunal like the CAT, which is specifically convened for this, particularly in a case where neither party has adduced any expert evidence? How does that all fit in?

MR. BARRETT: On the authorities -- if it is helpful, I can try and help with this -- where the expertise in the tribunal fits, it is actually at an earlier stage. It is this point which Mr. Robertson and I disagree about regarding the intensity of review. Mr. Robertson points to authorities and says that these authorities support a very wide margin, hands off, do not second-guess, do not scrutinise these decisions. I say that one of the important reasons that these cases were sent to the CAT was because you do have potential access to that expertise. Where there is that expertise, I am not of course saying that there is not a margin. There is a margin in matters of reasonableness. It is a reason why the tribunal can and in appropriate cases should more closely scrutinise

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some of those reasons or decision-making processes.

THE CHAIR: If you look at what happened on Cerelia, for example, we did look at everything in a lot of detail, but we did not want to write War and Peace and put all the stuff in one report. The Court of Appeal said that we should feel, let us say, more willing to scrutinise the decision of the CMA, which I agree with. It is not a problem. I do not know if Cerelia is in the bundle, but perhaps we should turn up that paragraph that deals which deals with that and see whether that is relevant or not for this exercise.

MR. BARRETT: We do have that, I believe, in the bundle.

THE CHAIR: If you look at it, we can see what the Court of Appeal said and see if that is relevant for the exercise that we have.

MR. BARRETT: Of course, I respectfully submit ----

THE CHAIR: What paragraph is it? Paragraph 40: "It also follows that in a given case, 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

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2 that sort of exercise.

3 "41. It is, though, important not to let semantics
4 obscure the nature of the exercise. If, following a detailed
5 review, the CAT concludes that the decision-maker erred
6 because, for example, it misconstrued the evidence or data or
7 failed properly to enquire into the evidence, then it is a
8 matter of words only to say that the decision is an error
9 because it was not supported by the evidence or,
10 alternatively, the decision was irrational.

11 "Finally, none of this involves the CAT substituting its
12 own view for that of the decision-maker. It is simply holding
13 the CMA to a proper standard."

14 I thought that resonated to this case when I looked at
15 it. Unless someone persuades me that that is wrong, that is
16 what we were going to do.

17 MR. BARRETT: Yes. My Lord, in my submission, that absolutely
18 goes to stage 1 of your review of the decision: has there
19 been an error of law? That is what I sought to submit a
20 moment ago. There is, in my submission, an absolutely
21 fundamental difference between what you do if you find there
22 has been an error of law and the question is what would have
23 happened or what should have happened in the counterfactual
24 world? That is for reasons not just of expertise, but it is
25 also a constitutional responsibility. It is simply not the

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constitutional responsibility or even the right, the authorities tell us, of the courts to step in and, as it were, make decisions for, or instead of, public bodies. If there has been a legal error, the constitutional function of the court is to identify that and send the matter back.

As I say, if there is a dispute between us about that, we will obviously make submissions to you and you can consider the cases for yourself.

THE CHAIR: So, are you saying that one option would be for us to send the matter back for them to do the analysis that you say they should have done?

MR. BARRETT: I would say not for you to do that analysis, my Lord. I would say that the simple position is if there has been a material error of law -- and I need to try and persuade you of that -- the decision is quashed. It is then a matter for the Authority as to what it does. I do not go so far in my case -- I cannot as a matter of this jurisdiction -- to say that there is no possible world in which the Authority might take a lawful decision to make these loans. I cannot submit that to you. It is not part of your jurisdiction.

THE CHAIR: It is not your case, but one scenario would be that we quash it.

MR. BARRETT: Yes.

THE CHAIR: And it is down to them to do what they want to do.

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MR. BARRETT: Yes.

THE CHAIR: And there are a number of ways that it can go.

MR. BARRETT: Exactly.

THE CHAIR: They can make a lawful decision, get all the relevant evidence in, maybe change the rates a bit, or they can say, "Let us draw stumps on this and Renaker will self-finance or go to the market or whatever to pick up the gap between the equity that they were going to provide and 100%."

MR. BARRETT: That is all I was trying to say, my Lord. If I am correct that there has been an error of law and breach of legal duty in the process, it is back to the Authority. The point I was trying to express is that they might do a number of things. They might look at this again and say, "Actually, we think we can conduct a lawful process and support loans at this rate." That is one possibility, I do not know. They might say that in the light of what has now been heard in evidence, there needs to be an increase in the rate of X%. That fundamentally is for them, in my respectful submission. It is not for the tribunal in this jurisdiction to remake or make its decision as to what the market rate is. For reasons I have sought to explain, that is something that crosses a line in the Authority's general position.

THE CHAIR: I do not know. On one view, you are playing with possibly 300 basis points and if we take the view that you are

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right, we can quite easily say that the rates here do not fall within section 3(2) because the gap between what would be the market rate and the rate they have done is 300 basis points.

MR. BARRETT: I would obviously wish to have my cake and eat it, my Lord. I would obviously wish to submit that to you and say that this is a highly material gap and it just cannot be lawful. As I say, inevitably as an advocate, I would wish to have my cake and eat it, but the point I am trying to make, giving you the right answer, is if we are in a world where there has been an unlawful decision, the court, in my respectful submission, should be very cautious in getting into this counterfactual world.

THE CHAIR: I am not sure if that is right. I do not know. The point I am making is if we look at it and we take the view that the reason why it does not comply with section 3(2) is that it is outside the range of the market rate, and the bottom of the market range would have given, let us say, 300 points above what this is, that would be the reason why it gets quashed in the first place.

MR. BARRETT: Yes.

THE CHAIR: And if we are able to quantify it, we are able to quantify it. If we are not able to quantify it, we are not able to quantify it. Sometimes you just say, "This is way too low." We are not going to say what we think it would be ----

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2 MR. BARRETT: I accept that.

3 THE CHAIR: There is a number of permutations. We may be in a
4 better position on Thursday to talk about some of the more
5 detailed points on this as to where we are coming out. At the
6 moment, no one should think that we have made any decision
7 about anything. Everything is up for grabs, but what I can
8 say is that your submissions are fully understood and
9 appreciated, and we can see where you are coming from.

10 MR. BARRETT: Thank you, my Lord. My Lord, that is all I was
11 going to say for the moment on the legal framework.

12 THE CHAIR: Let me have a quick look.

13 MR. BARRETT: Of course. (Pause)

14 THE CHAIR: Okay, we are going to look at your paragraph 43 now,
15 are we?

16 MR. BARRETT: Bear with me a moment my Lord. (Pause) Yes.

17 THE CHAIR: And is that binding on the Authority?

18 MR. BARRETT: In my submission, it certainly is, my Lord.

19 THE CHAIR: Let me just get my note right. Do this one point and
20 we will have our break.

21 MR. BARRETT: I showed you the investment policy updated in 2019,
22 paragraph 7.2, that is the Authority's internal rule which
23 requires it to comply with this document.

24 THE CHAIR: Sorry, the Authority's internal rule.

25 MR. BARRETT: Requiring it to comply with this.

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THE CHAIR: Paragraph 7.2. What is the bundle reference for that?

MR. BARRETT: Bear with me. (Pause) I will find it.

THE CHAIR: We have looked at it.

MR. BARRETT: We have looked at it, indeed, at the beginning of the morning. (Pause) It is at main bundle page 281, paragraph 7.2.

THE CHAIR: Okay, that is fine. Then we now look at the reference rate communication. Where is that in the bundle?

MR. BARRETT: That is the document I handed up this morning, my Lord, you inserted that at tab 4.

THE CHAIR: Tab 4, let us have a look at that, then. (Pause) Yes.

MR. BARRETT: It is relatively straightforward stuff. We have an explanation if it is helpful, introduced in 2008 by the European Commission, you see under the heading "Reference and discount rates" you see a description of its purpose. You then see two sections which unless my Lord wants to look at, I do not think you will get much from, background to the reform and study, explaining the history.

THE CHAIR: Yes.

MR. BARRETT: That is weaknesses as well and looking at what we used to do and why we have the new methodologies. This is page 2 of the new methodology. You see there (unclear) and just explaining the particular approach and the logic of the approach that now has been required. It is all about having

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something that is easy to apply, ensures equal treatment across Member States, minimum deviations in current practice, and it is a simple approach is the long and short of it. Our final point, it makes it possible to avoid adding uncertainty and complexity to calculation methods.

Then you have the notice itself, that sets out the methodology we looked at earlier, two parts to the calculation. It explains here, first of all, the base rate, the LIBOR number 5.65. Then margin, that is the table. You have the two ingredients, you have the rating category of the borrower and the collateralisation, the X axis and Y axis, and you look at the two to identify the number of basis points which are required to added.

Collateralisation, not in dispute for present purposes, that is characterised as high. What matters is the creditworthiness of the borrower. Relying on XQ Developments. Mr. Walmsley wants to see 100 SPV. Over the page, you see the 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 increase by at least 400 basis points.

THE CHAIR: And the margin can never be lower.

MR. BARRETT: Yes. Even if you have great collateral, for example, my Lord, even if you have parent company guarantee.

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THE CHAIR: Well, I do not know, is says that the base rate should be increased by at least 400 basis points depending on the available collaterals, and the margin can never be lower than the one which would be applicable to the parent company.
Okay.

MR. BARRETT: My Lord, that then takes me to my short submissions.
I think that is if it is convenient for you.

THE CHAIR: We will have a break now.

(A short break)

THE CHAIR: Mr. Robertson, Mr. Barrett, when you look at this commission document, I want to know whether or not this is an absolute bar point. The first point, is this binding on the Authority, and if it is, can you fall within section 3(2) and have a rate which was below what comes out of this; i.e., do you have to hit the rate under this to comply with section 3(2)? Also, when you look at the wording of the last page, is it saying that when you have an SPV you are bound to increase the rate by 400 basis points or is it that prima facie you should increase it by at least 400 basis points, but you can have a lower rate depending on the collateral and the LTB and the margin -- although the margin can never be lower than the one which would be applicable to the parent company -- it does not mean that you still have to have about

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400 basis points increase. I do not know, I just think I need more help on this particular thing. You can cover it in your written submissions tomorrow.

MR. ROBERTSON: It would help me if my learned friend could explain why he submits this is legally binding on the Authority.

THE CHAIR: We need to get to the bottom of that.

MR. ROBERTSON: I am slightly unclear as to that.

THE CHAIR: When I look at this, this is not necessarily a simple exercise, because when you look at the past, let us say, performance of the Renaker-related entities for similar structures, you look at the relatively low LTB, you look at the quality of the security, you look at the fact that you have already got the on sales, and so you could take the view -- I am not saying it is right or wrong -- that this is not high risk lending even if you are using an SPV structure, and that whilst there is no parent company or personal guarantee from DW, you do have cross-collateralisation to a certain extent. You have cross-collateralisation between the two borrowers, but you have additional security falling outside the two projects.

I am not saying that is the answer, but I really need to know what is the significance of that document in assessing what complies and what does not comply. I think that Mr. Barrett has heard what you have said about how does this

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bind the Authority. I presume he is saying if you look at the Authority's own internal rules, paragraph 7.2, it refers to this. Those internal rules would have obviously been created some time ago at a time when, presumably pre-Brexit, but I am not quite sure whether this is to be regarded as a sort of handcuff and whether the actual provision about 400 basis points is one that, even on the wording of this document, is let us say an absolute requirement with no flexible at all. Whether you can go below 400 or whether 100 is acceptable or maybe there will be cases where you will say, actually, because of the structure, the high LTV, et cetera, you will say actually you want more than 400 basis points.

These are all issues up for grabs and we will sort this out by Thursday.

MR. ROBERTSON: Yes, just to put my submission very, very briefly.

THE CHAIR: Yes, I am sure, yes, carry on.

MR. ROBERTSON: It is a commission notice so it does not have any binding legal effect, even where the UK is still a member of the EU, which it is not. The state aid rules still apply to goods in Northern Ireland, to that extent it is binding. That is not relevant here. So, it does not have any legal effect as a matter of EU law. It does not have any legal effect as a matter of domestic law. How then is this said to be legally binding on the Authority simply because the reference to the

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2 2019, paragraph 7.2 that my learned friend took you to?

3 THE CHAIR: I think that Mr. Barrett would say you look at it on
4 three levels: one, irrespective of the Authority's own
5 policies, it is a pretty helpful benchmark to work by. Two,
6 when you look at paragraphs 7.2, it is something that the
7 Authority says it will take account of and do that exercise.
8 Three, he will say they did do the exercise and that was
9 followed through in this interest rate setting proposal paper,
10 whatever you want to call them, and hence it fits in that way.

11 This is not an issue where we do not need any help on,
12 it is an issue where we do need help on. One of good things
13 about having this hearing is it identifies things which are
14 really important and things which are not important, and this
15 is one of the things that is important and we need to get to
16 the bottom of, and we will get to the bottom of. We will
17 figure it out. Both sides will have the opportunity, because
18 by Thursday in the morning we will have your supplemental
19 skeleton and then Mr. Barrett will be able to reply on the
20 day. If I feel that we still need more help on anything,
21 I will give the parties the opportunity to put in further
22 submissions on specific areas where, let us say, I am not 100%
23 sure but I do want to make sure that whatever decision I make
24 with my colleagues here that we have as much help from you two
25 as possible.

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MR. ROBERTSON: I understand my learned friend to be nailing his colour to the mast of paragraph 7.2. If there are other grounds on which he says it is binding, I will need to know that in advance of putting in my supplemental skeleton.

THE CHAIR: I think what it is, he has 7.2, he will say irrespective of 7.2 it is a useful benchmark for the Authority and the tribunal to consider, and it was the benchmark that was considered by Mr. Walmsley in those papers. It is not as if this is something we are going to completely ignore, we are going to look into this and try and get to the bottom of this issue by close of business on Thursday.

MR. ROBERTSON: Understood.

THE CHAIR: Thank you very much.

MR. BARRETT: If I can help with that, the three points my Lord has articulated are the three things which I would say. The fundamental point I make is that as a matter of public law, if public authority adopts a particular decision-making process, then it is required to comply with that decision-making process. That is Mandalia in the Supreme Court, that is not a controversial proposition as far as I understand it. That is my central submission.

THE CHAIR: Is that in your skeleton?

MR. BARRETT: It is not. I may be wrong about this, but I have not regarded this as a potential controversial ----

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2 THE CHAIR: This document and its importance and where it fits in
3 is controversial. When it comes to Thursday, if you think it
4 will help us ----

5 MR. BARRETT: I will provide it.

6 THE CHAIR: ---- you put something in writing. I do not know
7 whether you would want to see what Mr. Robertson says first.

8 MR. BARRETT: I will see what my learned friend has to say, if
9 that is okay, and I will come back. There is one point
10 I would add to the three, which is a development of those
11 points. As my Lord will recall, the whole underpinning here
12 is that these funds are funds from central government. The
13 Authority is required to use this methodology as part of those
14 arrangements. That is one of the reasons why I am surprised
15 that this is said to be controversial. I will see what my
16 learned friend has to say about it.

17 THE CHAIR: What you did not show me, and I think I saw it last
18 time, is you have the sort of global government pot, and there
19 is an agreement with the GMCA to give them funds out of that
20 big pot and that has various conditions.

21 MR. BARRETT: Yes.

22 THE CHAIR: Can you check when you have time whether or not this
23 particular thing is referred to in those conditions?

24 MR. BARRETT: It is, and if I may I will find that at the end if
25 that is okay.

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2 THE CHAIR: Yes, as long as we get it. I want to see where it
3 fits in.

4 MR. BARRETT: It is referred to. My Lord, the reason I have shown
5 you the 2019 document is that the 2019 document is the update
6 effectively of what you are looking at there, that was as at
7 2015 and 2019 is the later and more current statement of
8 principle about applying this communication.

9 THE CHAIR: (Pause) We have the investment strategy document
10 here, from 2019.

11 MR. BARRETT: Yes.

12 THE CHAIR: What I wanted to look at was the document under which
13 the central government gives these funds for the purposes of
14 on-lending by the local authority. I remember I looked at it
15 for the last hearing, it would be nice if we can look at it
16 now because it all fits in.

17 MR. BARRETT: Can you bear with me a moment, my Lord.

18 THE CHAIR: Yes. (Pause)

19 MR. ROBERTSON: Tab 7.

20 THE CHAIR: Which bundle is it?

21 MR. ROBERTSON: I believe it is in Mr. Rose's exhibit bundle,
22 tab 7, it commences at page 72, and you will see there the
23 title page, and then the reference to state aid is to be found
24 on page 102.

25 THE CHAIR: Let me just make my note. What paragraph now?

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2 MR. ROBERTSON: It is paragraph 7 on page 102, "Investment
3 pricing".

4 MR. BARRETT: You actually get it there as well, my Lord.

5 THE CHAIR: Tab 7. Page?

6 MR. ROBERTSON: 102.

7 THE CHAIR: Yes.

8 MR. BARRETT: And it is paragraph 7, headed "Investment pricing".

9 THE CHAIR: Okay, so it refers to this document, 2008/C.

10 MR. ROBERTSON: Yes.

11 THE CHAIR: Does that not imply that it should be followed then?

12 MR. ROBERTSON: That is what it says in order to ensure that
13 lender complies with EU State aid regulations.

14 THE CHAIR: You say we are not ----

15 MR. ROBERTSON: And those regulations no longer apply. Therefore,
16 it does not apply. This of course was a 2015 document.

17 THE CHAIR: Okay. I think you would have to put this in more
18 detail in your written submission.

19 MR. ROBERTSON: I am going to come to cover it.

20 THE CHAIR: We want to have a proper debate on this and Thursday
21 is probably the best time.

22 MR. ROBERTSON: The second point is that in any event as a matter
23 of EU law, the communication is only seen as a starting point
24 to conducting the EU equivalent of the CMO principal
25 assessment and may be departed upon upwards or downwards.

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2 THE CHAIR: Okay. Yes, Mr. Barrett, we will come back to this.

3 MR. BARRETT: Can I focus submissions and actually I have made
4 most of my points in the course of the analysis already today,
5 I will just try and encapsulate my points and there are one or
6 two points that are discrete. The starting point whose
7 decision are you reviewing and where do you see ----

8 THE CHAIR: Are we in your skeleton?

9 MR. BARRETT: We are, my Lord.

10 THE CHAIR: Can I just put the stuff away.

11 MR. BARRETT: Of course.

12 THE CHAIR: So I do not have too much in front of me. (Pause)

13 Where are we in your skeleton?

14 MR. BARRETT: Page 22, paragraph 48, the subsidy decision that you
15 are reviewing and analysing that, hopefully it is helpful to
16 then identify two pertinent questions for the tribunal. First
17 of all, who is the decision-maker whose decision you are
18 reviewing? Secondly, where do you see the reasons of that
19 decision-maker that you are reviewing? You have my
20 submission, my Lord, that the responsible decision-maker was
21 and is the GMCA committee. That is as a matter of law, it is
22 the responsible decision-maker for approving the loans and the
23 pricing of the loans. You saw in the relevant reports that
24 these were very important strategic decisions.

25 THE CHAIR: You have the year wrong again.

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2 MR. BARRETT: Sorry, it is 2024.

3 THE CHAIR: Let us change that.

4 MR. BARRETT: Correct decade, wrong year!

5 THE CHAIR: That is the problem with not having a junior!

6 MR. BARRETT: I have many problems not having a junior.

7 My Lord, a matter of substance it is the legally
8 responsible body. The decision of the committee was made on
9 22nd March, I took some time showing you the reports because
10 it is important in my submission to clearly understand the
11 legal nature of that decision. It was a decision to approve
12 the loans and delegate authority to sign the loans to the two
13 relevant officers. There was no delegation of any wider
14 decision-making authority. That remained at all relevant
15 times with the GMCA committee.

16 My essential submission is that when a public body makes
17 a decision to approve a loan or a grant, it could be one of a
18 number of different types of measures, subject to confirmatory
19 due diligence (what occurred here), that is a decision which
20 is capable of being challenged under the Subsidy Control Act,
21 it is a subsidy decision. On the facts here as you are aware
22 I have shown you, there was no later or subsequent decision of
23 the committee. The target, the relevant point of reference is
24 that decision of 22nd March.

25 There is simply no evidence that has been put before the

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court as to the reasons of the committee for approving the loan. A case of this sort, typically there would be a detailed witness statement from a senior officer explaining to the court what the discussion was, what reasons were considered important or not important by the cabinet, there is simply no evidence.

THE CHAIR: Just going back, after 22nd March has this loan ever gone back before the GMCA committee for any purpose?

MR. BARRETT: No.

THE CHAIR: Is that right, Mr. Robertson?

MR. ROBERTSON: Yes, that is correct.

THE CHAIR: Okay, that is fine. I can note that down. (Pause)
Carry on, sorry.

MR. BARRETT: Sorry, my Lord. I was dealing with the absence of any witness evidence as to the reasons of the GMCA committee, not canvassed in any of the five witness statements which have been served by Ms. Blakey. I do say in the circumstances it does follow that the decision should be quashed. There is simply no evidence before the tribunal capable in my submission of supporting a finding that there was any lawful decision in this case for the purposes of the Act.

I want to deal head on with the suggestion it is not possible to bring a challenge until there is an enforceable private law obligation. That suggestion would be out of

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2 kilter, it would be contrary to every other forum of judicial
3 review. My Lord will be very familiar, there are an infinite
4 number of challenges to contract award decisions, decisions to
5 make grants to different recipients. There are many, many
6 cases in the authorities of those decisions being challenged
7 as soon as there is a cabinet level decision. It has never
8 been suggested and there is no authority I am aware of that
9 supports a proposition that such a challenge cannot be brought
10 until a contract is actually signed.

11 The opposite is the case, my Lord. If my Lord thinks
12 about the case where we see most challenges, the award of
13 public contracts, a challenge can be brought and must be
14 brought as soon as there is a decision to award a public
15 contract. If one waits until a contract is signed, typically
16 that will prevent the court granting relief which sets the
17 contract aside, it would be too late because a private law
18 enforceable contract has been created. The suggestion that in
19 the specific context of a subsidy control challenge one is
20 required to wait until a contract has been signed is a wholly
21 remarkable suggestion.

22 THE CHAIR: But on this, though, I understand what the debate is
23 and the dividing lines, but what is the significance on the
24 facts of the present case? I know that what you are trying to
25 say is that what it means is the relevant date and the time

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2 for assessment is 22nd March 2024, but then I would say there
3 is another view about that, which is when you have got a
4 decision to grant a loan like this, there is no binding loan
5 agreement until it has actually been signed, and that it is
6 quite common that you will have a committee which approves a
7 loan or whatever within a bank and that the terms will change
8 from the date of the formal approval because of developments
9 that have occurred.

10 MR. BARRETT: Yes, that is why I have tried to explain as clearly
11 as I can, my Lord, this point about, first of all, what the
12 nature of the delegation that was effected here is, and
13 secondly, what actually has happened. For example, my Lord,
14 trying to explain it in this way, if Mr. Walmsley had written
15 a report to the GMCA Committee and that had gone before the
16 GMCA Committee before signature, about XQ Developments
17 becoming insolvent, I would potentially be accepting that the
18 later decision by the committee would be a relevant decision
19 for this purpose.

20 On the facts here, what has happened is that the
21 decision to approve the loans was made on 22nd March by the
22 Committee (the duly authorised body), there was a very limited
23 delegation for the purposes of signature, and then there has
24 been no further decision. On the facts here, the only
25 candidate decision, if I can put it in those terms, for the

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tribunal's review is the decision of 22nd March.

THE CHAIR: Okay, but I am unclear in my own mind, and it is probably my fault, the extent to which the Authority itself relies on the interest rate setting paper. I am unclear. It will be clear on Thursday. I am not worried that it will not be clear because, on one view, their case may be that it never went before the Committee, it was not relied upon by the relevant decision-maker, and it is irrelevant.

MR. BARRETT: It certainly was not said that it is irrelevant.

THE CHAIR: No, I am saying that is one view that can be taken.

MR. BARRETT: Yes.

THE CHAIR: Another view can be taken that if it is relevant, it shows a flawed process that does not follow the notice from whenever it was, 2008, which ties in with the rules at paragraph 7.2, which ties in with the Main Facility Agreement with Central Government, which refers to the 2008 Commission Notice. We will see by the end of Thursday where each side has a final landing on those issues.

There are a number of ways of analysing this, but I just want to make sure that everyone has a fair opportunity of saying where they are on this. We are all lawyers. We know that lawyers often take inconsistent provisions, saying, "It is this, but if it is not this, it is something else, and if it is something else, it does not really matter." There is no

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2 problem with that in my own mind.

3 MR. BARRETT: Can I try and deal with that, my Lord, the way it is
4 put at the moment in the defendant's witness evidence. What
5 is said is that this was never put before a decision-maker;
6 that is not its purpose. What is said is, "This is a record
7 of the things that we thought about at the time." I say that
8 amounts to an entirely impermissible attempt to attribute to
9 the decision-maker documents and reasoning processes that the
10 decision-maker never undertook.

11 You will see it most clearly in Ms. Blakey's fifth
12 witness statement. There is quite a remarkable passage where
13 she looks at the interest rate setting paper and she
14 effectively says -- it is submission and not factual evidence
15 -- "You should read the Gateway paper. If you look at the
16 Gateway paper, you can just about find a fact or a reference
17 which you can link to the various reasoning of Mr. Walmsley in
18 the IRSP. You should therefore read or find or assume that
19 the Gateway Committee engaged in the thought process one sees
20 in Mr. Walmsley's paper." That is the way that Ms. Blakey
21 puts it in her fifth witness statement.

22 I am going to show you some authority where I submit
23 that is an entirely impermissible approach. The Court of
24 Appeal authority is absolutely axiomatic that you cannot treat
25 a document after a relevant decision-making body has sat and

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2 try and rely on that later document that they never saw as
3 representing their reasoning.

4 THE CHAIR: Okay, let us look at it this way. Let us say that we
5 have this position. It may be that Mr. Robertson will say
6 that that is what we have. You have got someone within the
7 Authority whose job is to the frontline guy. He specifically
8 considers what are the commercial terms? He believes that
9 there are all sorts of reasons why they are commercial terms.
10 It goes before the committee and the committee have something
11 before them which says, "These are commercial terms which
12 would be otherwise available on the market to this particular
13 borrower", hence it somehow tracks or falls within section
14 3(2).

15 It is not necessary for the GMCA to see the underlying
16 evidence because if it does, their task is totally
17 unmanageable. At these meetings, they have a vast number of
18 things to go through. Quite often, they will have a paper
19 before them, it will say X, Y and Z, and they will rely on
20 that paper as being accurate and having done the necessary
21 underlying work. They will not necessarily have to have all
22 the underlying work for that.

23 We are going have to look quite carefully -- and I am
24 sure Mr. Robertson is going to do it -- at what material was
25 put before the Committee because what you have shown us so far

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2 does not, on your view, even do that. What I do not want to
3 do, on things like this, is to expect or foresee a committee
4 that has a huge agenda, a lot of very important items, to have
5 an expectation that the committee itself has to review all the
6 underlying paperwork as long as the basic information, the
7 basic boxes, are ticked. You say, as I understand it, that
8 they have not even done the basic box exercise. They did it
9 on an ex post facto basis and even on an ex post facto basis,
10 they got it wrong. That is how I understand your case.

11 MR. BARRETT: That is my case, my Lord. If I can tackle that head
12 on, there are two fundamental points. First of all, my Lord
13 is absolutely right that as a matter of law, it is a certain
14 level of information that must be provided to, and considered
15 by, the relevant decision-making body. I will show you the
16 authorities about where that level is pitched.

17 The second point I would make is that on any view, this
18 cannot be a case, in my respectful submission, where there is
19 an argument that, if you like, one is in danger on that basis.
20 Mr. Walmsley's paper, taking it at its high-water mark, is a
21 12-page paper. We are talking about loans with a value of
22 £120 million. Cabinet committees very frequently, in all
23 areas of public law, need to deal with detailed reports,
24 sometimes running to many tens or hundreds of pages. That is
25 the reality of local government decision-making. A 12-page

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briefing or a ten-page briefing or a six-page briefing, in my respectful submission, if my learned friend was to say that that is too much to expect, too much to require, that would, in my submission, not be a compelling ----

THE CHAIR: I do not know, but I think what we need to see is to what extent the basic information is provided for this particular issue.

MR. BARRETT: Yes.

THE CHAIR: Okay. How are we doing for timing?

MR. BARRETT: I need to get my skates on.

THE CHAIR: Okay, carry on.

MR. BARRETT: Can I just give you two final points on this issue about the decision and how this works. I have shown you the point about making subsidy schemes. I say again that is a very important point because the consistent interpretation and application of the rules in relation to schemes, on the one hand, and individual decisions on the other, strongly supports my case.

I have given you the point about all sorts of other grounds of judicial review. They can all certainly be brought to decisions to enter into contracts in future after a contract is finalised or after due diligence is conducted. There is no explanation or reason of principle as to why it should be different in relation to subsidies.

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The third point, which I say is a very important, practical one -- there are two parts to it -- is this. First of all, we are told by authorities (see the Bulb Energy case in the Court of Appeal) that there is a really powerful public interest. If a subsidy is going to be given, the challenge can be brought on and heard really quickly because it is in the public interest for the dispute to be resolved so that matters can then move forward.

The suggestion that in this sort of case, one needs to sit and wait and you cannot challenge and cannot go to court until and unless there is a contract actually signed would cut directly against that. Related to that, if one has to wait until a contract is signed, that means that there is no scope for a challenger to go to court and get interim relief before a contract is signed. If a contract is signed, that has profound implications for the availability of relief, quashing orders and so on. One would need, in my respectful submission, a very compelling explanation as to why that is said to be the position here that the Act brings about. In my respectful submission, there is no such explanation.

THE CHAIR: Here, the contract was signed now in November, was it not?

MR. BARRETT: Yes. That raises issues for relief. If we get to that stage, we will need to deal with it. I can show you

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2 authorities if it is helpful. There are lot of authorities
3 that tell us that when contracts are signed, the court has to
4 look extra hard about quashing a private law enforceable
5 contract because it engages third party interests.

6 THE CHAIR: We are there now, are we not?

7 MR. BARRETT: In this case, we are. We are. That is not a point
8 against the submission I am making, my Lord. That is just the
9 reality of the position.

10 THE CHAIR: But is Mr. Robertson going to rely on that on
11 Thursday? We will see.

12 MR. BARRETT: It is not in his skeleton argument, but he is going
13 to write a new skeleton argument. Those are my submissions
14 about the decision.

15 THE CHAIR: We are up to paragraph 56, are we?

16 MR. BARRETT: Yes. I will need to accelerate.

17 THE CHAIR: We are now moving on to the approach to the evidence,
18 yes.

19 MR. BARRETT: My Lord, bear with me for a moment. (Pause) I think
20 before I get to the approach to the evidence, I need to say
21 something briefly about the applicable principles of judicial
22 review. I have set those out in my skeleton.

23 THE CHAIR: I have got those. We will see to what extent they are
24 contentious when we see Mr. Robertson's supplemental skeleton.

25 MR. BARRETT: Thank you very much. There is one authority that

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I should show you which is dealing with this really central issue in the case that my Lord has just been putting to me about what documents do you look at, what reasons matter? It is the Kenyon authority.

THE CHAIR: Have you not set out the three relevant paragraphs?

MR. BARRETT: I have.

THE CHAIR: As long as you give me the authority bundle number. What tab is it?

MR. BARRETT: It is in the authorities. It is page 876.

THE CHAIR: Has it got a tab number or not?

MR. BARRETT: Sorry. (Pause) It is at tab 20.

THE CHAIR: It would be helpful, then, that we get all the tab numbers for all the authorities in the skeleton.

MR. BARRETT: I will give you that to my Lord, of course.

THE CHAIR: I do not want a new skeleton. I will just note them up when they are ready, so when your chap comes tomorrow, if I have a piece of paper with the paragraph numbers where any authority is referred to and where the tab is, then it can be noted on my skeleton.

MR. BARRETT: Yes. I need to distill then those passages that I have quoted.

THE CHAIR: I have read those. That is fine.

MR. BARRETT: Those are the principles, that you cannot do it.

The witness evidence has really been dealt with in the course

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2 of my factual submissions ----

3 THE CHAIR: You made your points there. Let me see if there is
4 anything there.

5 MR. BARRETT: ---- in significant part. What I say, my Lord, is
6 that the consequence of those points is that I do see that
7 this is a case where the courts will be primarily assisted by
8 looking at the contemporaneous documents. I do say that is
9 clearly the best evidence and the most reliable evidence in
10 this case.

11 THE CHAIR: Yes. I will be quite clear, I have written on this in
12 Phips on, on Chapter 45, and I do not think that Gestmin is
13 this type of case. This is a case where everything is
14 relatively recent and that tends to look at some historical
15 cases where there is plenty of contemporaneous evidence and
16 really disputed issues of fact. He thinks that the witnesses
17 reconstruct things when you are looking so far back.

18 I do not think that is this type of case. What is more
19 helpful is that if you say any particular passage is
20 unreliable, we look at them in particular. Of course, we will
21 be looking at a mixture of the underlying documents.
22 Obviously, that is important because you say that is the audit
23 trail and we should focus on that. In so far as there is
24 witness evidence that supplements it, there is no
25 cross-examination being asked for here. It is not normal in

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judicial review. However, if there are points of fact that you dispute in the witness statements of Blakey -- I think it is only Blakey and we are really focusing on Blakey 1 and 5 -- statements of fact that you dispute, you should identify them so we know where the areas of dispute are and you have to say why you dispute them.

I am not expecting you to do that exercise now, but if by Thursday, you are in a position to say, "I do not accept the following paragraphs of Blakey", give me the paragraph numbers and the references and you just list why you do not accept it.

MR. BARRETT: I will do that, my Lord, thank you. So turning then to the substance of my submission, it is set out in my skeleton argument.

THE CHAIR: Where are we now; what paragraph?

MR. BARRETT: We are now within my skeleton at paragraph 59.

THE CHAIR: What is the authority tab number for that?

MR. BARRETT: It is tab 2. I am not going to take you through all of the references.

THE CHAIR: No, you do not need to.

MR. BARRETT: My Lord, the essential submission is this. We have very detailed statutory guidance which is guidance to which public bodies are required to have regard under the Act, which delineates in quite a lot of detail the steps the public

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2 authority should take, or needs to take, unless it has
3 demonstrated good reason not to, in order to assess and
4 document whether there has been compliance with the CMO
5 principle.

6 What the guidance does is to establish or set out that
7 there must be a detailed process of analysis. There must be
8 detailed evidence gathered and retained to support the
9 analysis. It sets out three methodologies, which are the
10 approved methodologies to establish that you have in fact
11 complied with the CMO principle. The first one is *pari passu*
12 investment with a private investor. That obviously does not
13 arise here. The second and third are benchmarking analysis,
14 that is gathering evidence about what loans that are proper
15 comparator loans are available in today's market. The third
16 possibility is comparative profitability analysis, looking at
17 how profitable you think the investment is going to be for
18 you, looking at what level of profitability is required for
19 properly comparable investments by private parties, and
20 ensuring that you match or you are within a reasonable range.

21 The essential submission is that these are
22 straightforward methods which are applied every day by local
23 authorities and public bodies, large and small, across the
24 country as a matter of course. They are not difficult. They
25 are not onerous. They are readily completed and complied

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with.

I say, my Lord, that that is the fundamental framework through which the tribunal should be assessing the reasonableness of the process that has been adopted in this case. It is very surprising that we are dealing here with substantial loans, £120 million, and none of these absolute basic steps have been taken. They could have been and should have been. That is what the statutory guidance requires unless you have good reason to depart, but they were not.

Where the Authority has elected not to take any of those steps, I do say that in a case of this sort, the tribunal should be inferring or finding that compliance has not been demonstrated.

THE CHAIR: Yes.

MR. BARRETT: My Lord, my next submission really turns on this point about the required statutory question and what I submit is the Authority's failure to ask that question or conduct a lawful inquiry to answer that question. That is, are these loans consistent with market rates available today?

THE CHAIR: Where are we now?

MR. BARRETT: In my skeleton, we are at paragraph 66.

THE CHAIR: Yes.

MR. BARRETT: There is simply no analysis, my Lord, of that question by the GMCA Committee.

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2 THE CHAIR: I have got that.

3 MR. BARRETT: If one is looking at Mr. Walmsley, we saw that the
4 question at one stage is posed, but then not addressed. He
5 immediately switches tack to what would the customer expect?
6 We say that is a core failure to ask or answer the correct
7 legal question.

8 My Lord, turning then to the reliance by the Authority
9 in its pre-action correspondence and Mr. Walmsley's paper on
10 the 2022 regulations, I have given you my submissions about
11 those. There are three fundamental problems with the
12 approach. First of all, the regulations are not enacted for
13 the purpose of establishing compliance with the CMO principle.
14 Rather, the purpose is confined to quantifying advantage where
15 there is an admitted accepted subsidy. They are simply not
16 available for this purpose. It is not how they work.

17 The second point is that he applied the regulations to
18 the wrong legal entity, to XQ Developments and not the
19 borrower, Trinity and Jackson. The third point is, as
20 I sought to explain, that that exercise produced an interest
21 rate of 5.3%, south even of the base rate, still less a
22 commercial rate, and it was obvious as a matter of
23 reasonableness and rationality that that was not a market rate
24 in the context of these loans.

25 THE CHAIR: So you have actually said a bit more than you said in

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this section in your skeleton.

MR. BARRETT: Yes, I may have developed that somewhat, my Lord,
but it is those three points, which I hope are clear.

My Lord, then turning to the Authority's reliance or a
purported reliance on the fund methodology, that is
Mr. Walmsley's analysis. Again, I have given you my three
essential submissions about that. The first point is that he
analyses the wrong legal entity, XQ Developments, rather than
the borrowers. The second point is even if he was entitled to
analyse XQ Developments, that company then became insolvent
and therefore there could not be lawful reliance on that
company at that stage. The third point is that at that point,
at that stage, what would have been required if he was to
continue down that path, that course he had adopted, was to
analyse the position of Mr. Whitaker. That was never done.

As you know, my Lord, we say that the difference this
makes is very material. It is a difference of 3%. So if
there is a legal error at this stage of the analysis, we do
say that must be one that vitiates any decision.

THE CHAIR: Okay.

MR. BARRETT: My Lord, turning then to my two discrete points, the
first point is in relation to the previous viability
assessments that have been conducted in respect of these
schemes.

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2 THE CHAIR: Where is that in your skeleton?

3 MR. BARRETT: This is at paragraph 80.

4 THE CHAIR: I just wanted to raise one point.

5 MR. BARRETT: Yes.

6 THE CHAIR: Given that what we are looking at is pricing, which we
7 will take into account, the actual interest plus the other
8 charges, such as arrangement fees and management fees, the
9 concentration of risk, one would normally say, will go into
10 what the rate should be because you may say because of the
11 concentration of risk, you want some points above. You can
12 have a situation whereby you say, "Because of the
13 concentration of risk, we are just not going to lend any more
14 money to you." Is it your case that we should find that the
15 Authority should not have made these loans at all, irrespective
16 of the rate, because of the concentration of risk? Is that a
17 freestanding point that we need to consider?

18 MR. BARRETT: Yes.

19 THE CHAIR: Or are you really relying on the concentration of risk
20 in relation to pricing?

21 MR. BARRETT: My primary submission is in relation to the pricing,
22 my Lord.

23 THE CHAIR: That makes sense, yes.

24 MR. BARRETT: So, my Lord, just to make it as direct as I can, we
25 say that it is remarkable and very surprising that the

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2 Authority is lending 66% of the loan book to a single
3 counterparty. We say that is remarkable. We do say that is
4 something that is not justified on the evidence as being in
5 compliance with the CMO principle, but I think I realistically
6 have to accept the evidence on that issue.

7 THE CHAIR: I know, yes. So you just focus on pricing and
8 that ----

9 MR. BARRETT: Yes, I say.

10 THE CHAIR: You get to the same result.

11 MR. BARRETT: On any view, I say it must or should be, or would be
12 for a private lender, a relevant consideration for the
13 purposes of setting the rates. I appreciate, obviously, that
14 there are different types of investment funds with different
15 appetites for risk. Objectively, in my submission, on any
16 view, 66% of the book is very high indeed. I submit that the
17 CMO or the private lender would require to be somewhat
18 compensated for such a high concentration risk.

19 THE CHAIR: When you say 66% of the book, obviously you have a
20 rolling book. Are you saying that at the time we reach 22nd
21 November 2024, £120 million represented 66% of the lending
22 outstanding at that stage?

23 MR. BARRETT: Under the fund, yes.

24 THE CHAIR: Not 66% -- okay, so you are saying it is 66% ----

25 MR. BARRETT: Of the capacity.

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2 THE CHAIR: Of the book.

3 MR. BARRETT: Of the capacity, if I can put it in those terms.

4 THE CHAIR: No, that is different.

5 MR. BARRETT: Sorry.

6 THE CHAIR: It is fine. The 66% relates to the 120 figure.

7 MR. BARRETT: Yes.

8 THE CHAIR: Okay, so as at 22nd November 2024, how much was the

9 book, i.e. how much had been lent out? So, is 120 million

10 ----

11 MR. BARRETT: I understand.

12 THE CHAIR: ---- 66% of the book as at that stage?

13 MR. BARRETT: Yes. So, I do not think I can answer that. All I

14 know is that the total capacity of the fund ----

15 THE CHAIR: That is different, yes.

16 MR. BARRETT: ---- as at that date is 180. What has actually gone

17 out, I do not know if my learned friend can help you with

18 that.

19 THE CHAIR: We will see. You are saying 66% of the book of 180

20 and you say that is quite a concentration of risk.

21 MR. BARRETT: Yes.

22 THE CHAIR: But where it leads us is that if you are going to have

23 a high concentration of risk, if it was not going to put you

24 off lending at all, or at that level, it is something that you

25 would say a rational banker or lender would take into account

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because if it is something they may or may not take into account, I am not sure if it takes you very far. If it is what you say a rational lender would take into account in pricing, then of course I can see how that fits in.

MR. BARRETT: That is the submission. I am sorry if I have not been clear. The submission is that it is a required or mandatory level consideration and any rational CMO would do that. If you are looking at the rest of the magnitude of the risk you are assuming, I would say that is preeminently relevant to the price you are going to charge.

THE CHAIR: Okay, fair enough. Let us move on. Paragraph 80.

MR. BARRETT: Yes. I am trying to deal with this, it is one of my two discrete points, it is a submission relating to the viability assessments.

THE CHAIR: This is the section 106 viable assessment.

MR. BARRETT: Exactly. In the end it is a short point. The fundamental position is that Mr. Whitaker had previously submitted viability appraisals in relation to these properties for the purpose of seeking exemption from affordable housing requirements. I have the reference for that and I am not going to turn it up, if that is okay, core bundle, page 596, and also 604 for the two submissions. The essential point, my Lord, is those representations from Mr. Whitaker positively represented that the developments would have very low profit

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margins, in the region of around 10%, and as a result they were commercially unviable and therefore no affordable housing obligations should be applied, there should be an exemption. I should say to cut to the chase and narrow the dispute between us. I accept of course that those appraisals were prepared a few years ago.

THE CHAIR: Three years before.

MR. BARRETT: I accept that. I also accept that those appraisals are appraisals where the appraiser is not just looking at these individual towers, there is more than one development within the appraisal. I entirely accept, but the fundamental point is this, my Lord, notwithstanding those two concessions, these were Mr. Whitaker's own financial analyses of how profitable, how viable and therefore how risky these developments were. As I have indicated, the analysis was a profitability of around 10%. Viability, to be viable one is looking around 20% profitability. As explained in my skeleton and in the evidence, we then have helpful further evidence ----

THE CHAIR: We have Mr. Lloyd, I have looked at that.

MR. BARRETT: It is Mr. Lloyd explaining it in detail.

THE CHAIR: I have read that.

MR. BARRETT: Further helpful evidence from Mr. Lloyd, he clearly explains that Mr. Whitaker has then submitted much more

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2 recently, 23 and 24, viability appraisals for other
3 developments, closely related developments in the same
4 development area as these projects and he has strongly
5 contended in those submissions that the financial position has
6 materially ----

7 THE CHAIR: Deteriorated, I know I have seen it. This is not
8 necessarily that concrete all of this for the reasons, I think
9 to a certain extent we looked at this last time and they can
10 take you so far. At the end of the day when the Authority was
11 looking at the lending decisions, they were not working from
12 these figures, they were working from other figures. Unless
13 you can say the figures they were working from, let us say,
14 were materially misleading, it is difficult to do this.
15 Because this is relatively contentious, and this is not the
16 material that was the material that was being relied upon at
17 the time. You may in a different world, if this is like a
18 full trial and all that, have been able to say and
19 cross-examined a witness on this.

20 MR. BARRETT: I cannot do that, no.

21 THE CHAIR: It is very difficult, I am not saying that it is
22 unarguable but you certainly have more fundamental points you
23 have been raising today.

24 MR. BARRETT: Yes. Can I try and distill the bottom line
25 submission, my Lord. I understand that. The bottom line

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2 submission is, I take my Lord's point that there is then a
3 process of commissioning and looking at further figures and
4 I accept, in my submission, that is the defence that the
5 Authority have on this issue. The problem I do see, my Lord,
6 that persists is this. This was Mr. Whitaker's own analysis
7 when he was seeking exemption from affordable housing. He
8 then says in his further submissions that the position has got
9 much worse, not things have moved on and things are now
10 better, things have got much worse. He then produces, and
11 this is the basis of the approval decision, revised analyses
12 for this project which show a very material improvement. It
13 jumps, I am not going to read out the figure, because I think
14 it is said to be confidential, but broadly almost doubles
15 thereabouts the ----

16 THE CHAIR: You say there is more than one, let you say,
17 conclusion one can draw from that. It may be that it is quite
18 common in these projects where people do not want to, let us
19 say, build 20% affordable housing that they look pretty glum
20 and depressing and say "Can you exempt us from this, because
21 it is not going to work otherwise", and then they later make a
22 bigger profit than they would otherwise have done. I do not
23 know whether it is one or the other. I do not think it is the
24 sort of evidence, certainly for my point of view, that I have
25 a great deal of confidence in relying on in, let us say, an

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adverse sense against the GMCA. We may come to a different view when we discuss this amongst ourselves.

MR. BARRETT: I understand those observations, my Lord. The essential submission is this is a point that should have been looked at. There is then a further process of commissioning third parties to look at the valuation and look at the costs, and I accept that is against me, that is evidence against me in the basis of a submission against me. I do say that in circumstances where there had been this very material improvement and the evidence suggested, if anything, there should have been a material improvement, there should have been a worsening, I do say that is a specific point that those third parties should have been asked to look at and scrutinise. They should have been looking at the evidence that was then being provided in light of those earlier, I say, not consistent materials. That is as far as I can take that submission.

THE CHAIR: Yes. When you look at the correspondence, and some of the things said in the witness statements, there is a view that you are looking at something that they have done a very, very important job and all of that. We do not need to go down that route and I do not think you are encouraging us to say there was any sort of deliberate playing around.

MR. BARRETT: I do not think that, my Lord.

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2 THE CHAIR: We have to look at this as a judicial review, look at
3 the things on the face, we have no cross-examination. You say
4 just looking at what we have before us, and accepting that
5 efforts were made, it still does not add up.

6 MR. BARRETT: It does not add up and therefore calls for inquiry,
7 further specific inquiry. What is the reason, what is the
8 justification for the discrepancy? That is the extent of the
9 submission.

10 A final discrete point which is a very short point, it
11 is this issue regarding the decision-maker having regard to
12 non-commercial, non-financial considerations. I think when
13 I was making submissions about ----

14 THE CHAIR: Where is that in your skeleton?

15 MR. BARRETT: This is at paragraph ----

16 THE CHAIR: Do you mean paragraph 84?

17 MR. BARRETT: I think that is right. Yes, thank you. It is
18 paragraph 84.

19 THE CHAIR: You say there are non-commercial factors as
20 justifications for the lending process.

21 MR. BARRETT: That is the Part A report. This dispute turns on
22 essentially a factual question, which is what was the
23 decision-making basis, what were the reasons of the committee?
24 I anticipate my learned friend will want to say there were two
25 entirely discrete matters here: on the one hand, they were

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making a decision, he would wish to say, on the basis of the CMO principle. At the same time, but separately, they were thinking about the non-commercial benefits that this stuff would give rise to, but the latter was not contaminating the former.

THE CHAIR: He is bound to say that.

MR. BARRETT: I say on the evidence that is not a submission he can make good, because the evidence is that the GMCA committee gets the Part A and Part B report. These considerations are identified, as my Lord picked up this morning, as key considerations for decision-makers in deciding whether or not to approve the loans. As I sought to indicate in my submissions earlier, there has been no evidence filed by the Authority explaining or justifying the committee's decision-making process. There is no witness evidence demonstrating that the Authority did silo matters in the way that my learned friend would wish to submit.

Where that leaves us is, we have two reports, there is no indication that what were identified as key considerations in the Part A report were not part of the overall decision-making process to approve the loans. In those circumstances, I do say on this evidence that is a decision that has been made with regard to the relevant considerations.

THE CHAIR: Okay. You are in good time.

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SUBMISSIONS - BARRETT

MR. BARRETT: Just!

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DISCUSSION

THE CHAIR: Okay. Mr. Robertson, is it clear what is required?

MR. ROBERTSON: Yes.

THE CHAIR: Good.

MR. ROBERTSON: First of all, this evening I will send my learned friend a draft chronology.

THE CHAIR: Brilliant.

MR. ROBERTSON: Hopefully we can agree that and you want that by one o'clock tomorrow.

THE CHAIR: I do, yes.

MR. ROBERTSON: Secondly, you want a supplemental skeleton to deal with the additional points that have been raised.

THE CHAIR: Any points, that come up today.

MR. ROBERTSON: When would you like that?

THE CHAIR: As long as I have it by early Thursday morning.

MR. ROBERTSON: Right. It will be late Wednesday evening then.

THE CHAIR: That is fine because I get up early. You do not need to worry, as long as it is there at five o'clock in the morning, then it will be read and analysed before you start.

MR. BARRETT: Can I make a request as to that, I would ideally like some time to consider the new skeleton argument.

THE CHAIR: If he says he is going to do it by Wednesday night that is enough, because there are plenty of hours between that and 10.30 in the morning. That is fine.

MR. ROBERTSON: Thirdly, I am quite happy to start on Thursday

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DISCUSSION

morning, rather than taking the last five minutes, not least because those sitting behind me have trains to catch to Manchester this evening.

THE CHAIR: We will come back at 10.30 on Thursday. You will have until presumably some time after three. I would have thought that as long as you finish at 3.45, that will give Mr. Barrett enough time. I do not like long replies, it does not normally assist anything. If he runs out of time, I am always going to say he can put something in writing, but we will want to finish at a normal time on Thursday. Ideally we do not want to come back on Friday, because I know how expensive it is with you two here to have an extra day and I want to save the parties the cost of that.

MR. ROBERTSON: Unless something goes disastrously wrong.

THE CHAIR: I do not think it will, no. It has all been very helpful today, and I appreciate that everyone is working really hard to try and get everything put together. I can see there has been a lot of work since the last CMC, by the parties which has made it possible for us to come to a hearing like today and be effective and everyone has a fair crack at the whip. Ironically we are lucky we could not sit tomorrow because it gives us the chance to fill in any gaps on both sides.

Mr. Barrett, anything else from your side.

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DISCUSSION

MR. BARRETT: No.

THE CHAIR: We will rise. Thank you very much.

(Adjourned till Thursday at 10.30 a.m.)