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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.

Thursday, 29th 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,  
6-9 Quality Court, Chancery Lane, London, WC2A 1HP.  
Telephone No: 020 7067 2900. DX 410 LDE.  
Email: info@martenwalshcherer.com. www.martenwalshcherer.com)

- - - - -  
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 2)  
(TRANSCRIPT PREPARED WITHOUT ACCESS TO HEARING BUNDLES)  
- - - - -

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2 THE CHAIR: This is Day 2 of the hearing of Weis v GMCA. Some of  
3 you are joining us live stream on our website so I must start  
4 therefore with the customary warning. An official recording  
5 is being made and an authorised transcript will be produced,  
6 but it is strictly prohibited for anyone to make an  
7 unauthorised recording, whether audio or visual of the  
8 proceedings, and breach of that provision is punishable by  
9 contempt of court. Mr. Robertson.

10 MR. ROBERTSON: Sir, members of the tribunal, I am going to divide  
11 my submissions into four parts.

12 THE CHAIR: Before you do that, can we just do the housekeeping,  
13 just to make sure I have all the relevant pieces of paper.

14 MR. ROBERTSON: That was part 1. Part 1 is housekeeping and  
15 introductory. Just to give you the other headings, 2 is  
16 submissions on the law, and that is covered by this  
17 supplemental skeleton served yesterday event. Part 3 is facts  
18 and that is essentially based on the chronology as  
19 supplemented by annex 1 of the supplement skeleton served  
20 yesterday. In part 4, I will conclude with some brief  
21 observations on relief. To start with.

22 THE CHAIR: Yes, let us see what we have had overnight. Just  
23 tell me what I should have.

24 MR. ROBERTSON: You should have a supplemental skeleton argument  
25 divided into two parts, submissions on the law and then

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HOUSEKEEPING

Annex 1 which deals with factual ----

THE CHAIR: I have got that, that is good.

MR. ROBERTSON: That has been updated this morning. I am going to  
check that ----

THE CHAIR: It has been updated, okay. What is the difference  
between that and -- can you think of any differences so I can  
make sure I have got the right one?

MR. ROBERTSON: The one difference is paragraph 22 of Annex 1,  
where my eagle-eyed learned friend spotted that we had put the  
wrong figures into paragraph 22.

THE CHAIR: Okay. I am just looking at that. So, which figures  
changed and then I can just check it against both versions  
I have got?

MR. ROBERTSON: So, nothing changed in paragraph 22.1. In 22.2,  
the figure in the second last line, the total rate should be  
[Redacted].

THE CHAIR: That is subject to confidentiality and I have got  
that. So, I have got the right version. Okay, so I do not  
need to look at this, do I? I will put that one away, the one  
you handed up. It is the same one as the one I printed out.  
Okay, that is what I have got from you. There is a  
chronology, is there not.

MR. ROBERTSON: Yes.

THE CHAIR: Is that now agreed or not agreed? Mr. Barrett, have

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you agreed the chronology?

MR. BARRETT: We have sent you, my Lord, a version which has the points which we do not agree. There are a relatively small number of points. It is fair to say they are relatively limited points.

THE CHAIR: Have we got those?

MR. ROBERTSON: It has just arrived in the inbox of my solicitors.

THE CHAIR: Try and sort it out so that at two o'clock, we have an agreed chronology. You two can talk if there is any differences and make sure you agree.

MR. ROBERTSON: I think I can anticipate that we will object to his additions on the basis that they are submissions, not details of the chronology.

THE CHAIR: All I am interested in the chronology is what I said last time. You have got a date, you have got the document, and then where it is in the pleading and where it is in the witness statements, with the page in the bundle where it is. If it is anything outside that, it is not really going to help me, all right? That is the broad spectrum.

MR. ROBERTSON: The chronology ----

THE CHAIR: If there is a date which is unclear, for example, the date of a meeting in, whenever it was, February 2024, you can put "date unclear", but I just want something pretty basic.

MR. ROBERTSON: That is what you have got.

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THE CHAIR: Okay. Tell me at two o'clock whether you have something that is agreed and if not, we will thrash it out then. I do not want to have competing chronologies in a case like this.

MR. ROBERTSON: I do not think you will have competing dates. What you will have is my learned friend making submissions on the chronology. I think what is appropriately done by way of reply, not by attempting to amend the chronology.

THE CHAIR: Okay. He has submitted an additional document on the Blakey witness statement saying where we should not accept and should accept or whatever. I had asked for that and obviously that is helpful to have that one. I agree that it is additional submissions, but at least you are on notice as to which paragraphs he does not accept and for what reason.

MR. ROBERTSON: On that basis, we only saw that yesterday when we were in the process of drafting the chronology and the supplemental skeleton. I have not had time to take any detailed instructions on that. We would wish permission to put in a written response because they are serious allegations.

THE CHAIR: Of course you can. At the end of the day -- you know me well enough -- all I want is to get the right answer at the end of the day, and as much help as I can get from you two is all appreciated. We just need to avoid a free for all. I had

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asked Mr. Barrett to do this and he has done it and he has done it in a form which I find useful, so I am happy with what he has done, but that does not mean you should not have the right to reply to it. You can have until next Tuesday to come back with something in reply to that schedule.

MR. ROBERTSON: By 5 p.m. next Tuesday.

THE CHAIR: 5 p.m. next Tuesday is fine. I will want to get a ruling out sooner rather than later, but it will not be before Tuesday, so as long as I have it at five o'clock on Tuesday, it will be taken into account. Is there anything else I need to look at? Mr. Barrett sent another version of his skeleton. Mr. Barrett, is the only change putting in the references? Okay, so I can keep my old version and just add in the references in manuscript where I need to. That is perfect.

MR. ROBERTSON: There are two other matters of housekeeping both to do with the bundles. We have put in additional documents to the main bundle, new tabs 30-34.

THE CHAIR: Are these documents that Mr. Barrett has seen?

MR. BARRETT: I have not.

THE CHAIR: Can you look at them and see if there is any objection? We can deal with it at two.

MR. ROBERTSON: They are on the table in front of my learned friend. The documents are the transcript of the first case management conference.

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THE CHAIR: That is fine, yes.

MR. ROBERTSON: The notice of appointment of liquidator and notice of statutory declaration of solvency for XQDL.

THE CHAIR: That is absolutely fine because I can see that on the internet.

MR. BARRETT: I do not seem to have that.

THE CHAIR: We discussed this yesterday.

MR. BARRETT: I would like to see the document.

THE CHAIR: Of course you should look at it, but if it is telling us what type of insolvency ----

MR. BARRETT: My Lord, I would just like a copy.

THE CHAIR: Of course you should have it, but in principle, that is within something that is really in the public domain. I can find it myself.

MR. ROBERTSON: The final item that has gone into the bundle is missing pages from an exhibit to Ms. Blakey's fifth witness statement, an e-mail from Daren Whitaker to Ms. Blakey.

THE CHAIR: As long as Mr. Barrett has the opportunity to see all of it, that is fine. You always get uneasy when you hear there are additions to the bundles that you have not seen. Everyone is going to have the opportunity to look at everything.

MR. ROBERTSON: The final piece of housekeeping is that you also have a bundle of supplemental authorities as referred to in

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our supplemental skeleton. That are four authorities, one of which is the one you provided, Cerelia, but we have given you the reported version.

THE CHAIR: You can be sure I am pretty familiar with 1-3.

MR. ROBERTSON: The other two authorities ----

THE CHAIR: I would have to look at that.

MR. ROBERTSON: ---- are the authorities which you summarised in your judgment in Tobii v CMA, just so you have the full versions. Finally, we have referred to a paragraph from the new President's textbook, Bacon on State Aid, in our skeleton argument. That is the relevant paragraph there. So, it is not a welter of a supplemental authorities; it is just filling in some gaps.

THE CHAIR: That is fine.



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2 MR. ROBERTSON: The only words I wanted to say by way of  
3 introduction, given that my learned friend introduced his case  
4 -- sorry, there is one point that I do want to raise that  
5 arose out of observations that you made on Day 1 about putting  
6 in expert evidence. This is just to draw to the tribunal's  
7 attention that this was canvassed in full at the first case  
8 management conference with the then acting President.  
9 Mr. Barrett sought permission to put in expert evidence. We  
10 did not object, subject to us having the right to put in a  
11 responsive expert report, if so advised, to deal with any  
12 additional points that had been raised in their expert  
13 evidence. There was a discussion in front of the acting  
14 President about that.

15 We thought they were going down the expert evidence  
16 route because they appointed Grant Thornton. In the end, as  
17 you know from the second case management conference, nothing  
18 came of that, but it is just to show that the possibility of  
19 expert evidence was fully canvassed, was explored, and then  
20 abandoned by the applicant. So, you have the full picture.  
21 The transcript that has gone in as the additional document at  
22 tab 30 of the main bundle, pages 2102-2108, has that  
23 discussion.

24 THE CHAIR: I have read it twice now, that first transcript.

25 I had to read it as part of the general background reading and

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2 also had to read it for the purpose of the ruling I gave.

3 MR. ROBERTSON: Yes. On expert evidence, I would simply observe  
4 following on from your observation about the composition of  
5 the tribunal, you are sitting here with Sir Iain and  
6 Mr. Sawyer both with extensive banking expertise and you have  
7 a depth of experience in that area from your professional  
8 practice, I have to say I have rarely encountered a tribunal  
9 less in need of expert assistance than this one. That is  
10 relevant to the issue of intensity and standard of review,  
11 which I will come on to.

12 THE CHAIR: When you look at it, what we are interested in is  
13 looking at the terms of the loan, looking at the security,  
14 looking at the basic things like LTV, looking at the  
15 cross-collateralisation, whether or not the security is pari  
16 passu or not, all of that goes to how risky this loan is and  
17 it will build up a picture. Your skeleton, annex or whatever,  
18 is helpful on that. Because I think at the end of the day  
19 although we are not going to substitute our decision for  
20 anyone else's decision, a lot is going to come on our  
21 assessment as to whether or not the Authority got it right as to  
22 how, let us say how risky and where the interest rate should  
23 have fallen on this case, appreciating that it is not just a  
24 question of the actual interest rate, you look at arrangement  
25 fees and all those other things. The reality for any lender

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2 is what is the return we are going to get for the level of  
3 risk that we have. Then when you look at the forward sale  
4 point and the requirement as to the other equity coming in as  
5 a condition of drawdown, you can see it builds up a picture of  
6 how risky it is.

7 The other thing, certainly from our point of view, we do  
8 not find it particularly unusual for a borrower to have, let  
9 us say, discussions with a loan officer about rates before you  
10 have a formal loan agreement. Any normal human being knows  
11 from their own experience when they take a mortgage, you can  
12 ring round and speak to one bank, another bank, the building  
13 society, and they will all give you indicative rates and that  
14 sort of stuff. Then in the commercial field it is a bit more  
15 sophisticated than that. Everyone understands that until the  
16 loan agreement has been signed, nothing is finally agreed. It  
17 is a pretty basic thing that borrowers like to know is what is  
18 the ballpark. If you are going to say you are going to charge  
19 me 15%, it is just a waste of my time going down this route.  
20 If you are going to charge me a rate which is equivalent to  
21 what I could do getting out on the market, then I am more  
22 interested in going down that route.

23 I do not see anything wrong with that. The concept of  
24 there is something sort of sinister in having that type of  
25 discussion seems to us at this stage rather unreal. That does

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2 not mean you are going to win because there are a number of  
3 issues we need to go through and have to look at the whole  
4 thing in context. I think we do understand how these types of  
5 loans work and how committees work. When you are looking at a  
6 body like the GMCA, they do not need to see all the underlying  
7 workings of the, let us say, the lending officer. If you are  
8 having to do that as a general principle, it is going to be  
9 very difficult to get a loan from any bank, let alone from a  
10 local authority or a fund. What really matters is what work  
11 has actually been done, is this, let us say, a normal  
12 commercial term; or is this sort of a far too favourable loan  
13 which the fund should not be granting because it amounts to a  
14 subsidy and does not fall within section 3(2).

15 I want to make it clear, everything is up for grabs. We  
16 have certainly not formed any conclusive view on the key  
17 points of where the differences lie between you on the facts  
18 of this case. In a way it would more helpful for us if there  
19 were experts who had analysed everything and gone out to the  
20 market, had reviewed what were the rates available to Renaker,  
21 what was out there, what other lending was there, that all  
22 would have helped in a perfect world. We do not live in a  
23 perfect world, we live in what we have and we will work from  
24 what we have here. There is a number of scenarios: we could  
25 come to the view that these are normal commercial rates that

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2 fall within section 3(2) and there is no problem.

3 We could take a view that, no, these rates are unduly  
4 favourable looking at the risks, these are just SPVs, and take  
5 into account the 2008 notice, although it is obviously not  
6 conclusive that it is just a factor that you may or may not  
7 want to look into, that we think it is unduly favourable.

8 There is another third scenario, which is we have looked  
9 at everything and we just do not know. We just do not have  
10 enough information and nor do the local authority, the GMCA  
11 have enough information to make that assessment as to whether  
12 or not these loans are, let us say, unduly favourable.

13 Those are the sort of three main scenarios that we can  
14 foresee in the outcome of this case. The help you can give us  
15 on looking at the terms of the loans, the security and all of  
16 that, and why you say these are low risk loans is actually  
17 going to be quite helpful. I know you have done it to a  
18 certain degree in Annex 1.

19 MR. ROBERTSON: I think it is also the tribunal putting itself in  
20 the position of the Authority, because they are the  
21 decision-making body. They are not coming to this,  
22 Mr. Whitaker is not walking off the street as a newcomer.  
23 They have been operating the fund since 2015. It is in fact  
24 closed as of March this year for new lending, and it is in its  
25 three-year run-off period. So far it has successfully

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2 delivered its target of 10,000 new homes in the Greater  
3 Manchester area while delivering significant financial returns  
4 from its commercial funding of loans, both to large developers  
5 such as Renaker, but also to a variety of small and medium  
6 sized developers.

7 THE CHAIR: One of the things that ----

8 MR. ROBERTSON: It has great experience in operating this fund.

9 THE CHAIR: One of the things that struck me was that compared to  
10 other funds, similar funds, the lack of let us say loss-making  
11 loans is pretty impressive, because there are quite a lot of  
12 loans going out there and it seems as though you have not had  
13 any sort of major defaults and people have been paying. That  
14 is a pretty good track record, because sometimes when you have  
15 these funds they grant loans to, let us say, developments that  
16 do not go as well as everyone planned for one reason or  
17 another. The track record, I think, speaks for itself.

18 MR. ROBERTSON: It may also be a degree of luck in that there has  
19 not been a property crash since 2015. Those sort of shocks  
20 that can hit a market outside anyone's control.

21 THE CHAIR: There could be all sorts of things that, let us say,  
22 fundamentally change the dial on a specific project, such as  
23 delays, you could have a bombing, or something like that.  
24 There are all sorts of things that could happen that could  
25 mean one of these projects becomes loss-making. For some

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2 reason, and you say it is because the lending has been  
3 prudent, that has not happened here.

4 MR. ROBERTSON: Your reference to bombing is timely, it is the  
5 30th anniversary this year of the bombing of the Manchester  
6 City Centre by the IRA.

7 THE CHAIR: I am very conscious that these things happen in the  
8 UK.

9 MR. ROBERTSON: That is all I wanted to cover by way of  
10 introduction.

11 Secondly, law, if I can ask you to turn to our  
12 supplemental skeleton argument, and what I have sought to do  
13 in this part of our skeleton argument is identify where  
14 I think we are agreed and those areas where we appear still to  
15 disagree and which the tribunal therefore have to enquire  
16 into. On paragraph 4, I make that point about we do not  
17 materially disagree, this is a statutory judicial review, not  
18 an appeal on the merits. I think there is some disagreement  
19 as to the appropriate standard and intensity of judicial  
20 review but I think frankly we have just covered that and other  
21 than drawing on the authorities, you drew the leading  
22 authority to our attention, I have reminded you of your  
23 summary in Tobii, which is at paragraph 8. All I would say  
24 about the Cerelia case is that I do not think it is calling  
25 into question the correctness, nor could it, of the previous

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Court of Appeal judgments in IBA and BSkyB.

THE CHAIR: I think what the Court of Appeal was saying we can  
scrutinise it for a deeper level using our expertise.

MR. ROBERTSON: Because of your own expertise.

THE CHAIR: We should not necessarily accept all the facts set out  
in the merger report and if there is something there is not  
enough evidence to support it, we can say that.

MR. ROBERTSON: If you recall in Tobii v CMA you set aside, my one  
limited success in that case was setting aside one finding of  
the CMA because there was not evidence to support it.

THE CHAIR: I have no hesitation, where there is a gap to point it  
out, to set it aside in terms of doing it, I think that is  
what we did in Tobii v CMA.

MR. ROBERTSON: It is indeed. I remember that small success well.

THE CHAIR: I do not remember you in that case, but I have done so  
many things, they all merge and advocates seem to think I will  
remember something I did years ago. Please do not assume  
I remember anything.

MR. ROBERTSON: You will remember in Tobii v CMA my client  
demonstrating eye-tracking technology on his laptop standing  
there controlling a laptop by looking at it.

THE CHAIR: I remember.

MR. ROBERTSON: It is that case. The burden of proof, we have  
addressed that at paragraphs 10 and 11. I suspect there is



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2 not that much difference between us, when this is normally  
3 done under judicial review the question is really that  
4 identified at paragraph 11, was a transaction one which a  
5 rational private market operator might have entered into in  
6 the same circumstances is a question for the court to consider  
7 objectively -- it is not a subjective view, it is  
8 objective -- and to decide on the basis of the information  
9 available at the time of the decision and the developments  
10 then foreseeable, to the extent you are prognosticating for  
11 the future, that is how you go about establishing proof. In  
12 doing that, you afford the Authority a wide margin of judgment  
13 or appreciation. That is set out by Hickinbottom J in R (Sky  
14 Blue Sports) v Coventry City Council (No. 1), and then  
15 approved on appeal by the Court of Appeal in that case.

16 THE CHAIR: The question posed in paragraph 11 is not the exact  
17 question that is posed by section 3(2). What happens if we  
18 say, the Authority believed that these terms were, let us say,  
19 proper commercial terms which were no better than Renaker  
20 could have got elsewhere, if they believed that, what happens  
21 if we say they may have believed that but looking at it  
22 objectively using our experience and looking at the whole  
23 structure and the security and the rates, we do not think that  
24 is right. That actually these terms are unduly favourable,  
25 even though at the time they may have had a genuine belief

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2 they were not. What do we do then?

3 MR. ROBERTSON: You have to afford the Authority a wide margin of  
4 appreciation in forming its judgment. It is not a question of  
5 substituting your judgment on the basis of your personal  
6 expertise or experience. It is seeing whether the Authority  
7 has acted unreasonably in coming to that judgment. This is  
8 the case law that has been adopted under the EU, state aid,  
9 market economy investor or market economy operator principle.

10 THE CHAIR: It is a question of degree. You may have a case where  
11 there is room for debate and that sort of stuff, on those ones  
12 the test you are describing is absolutely fine. If you have  
13 one where we look at it and say, these clearly are not market  
14 terms, these are far too favourable to the borrower. Looking  
15 at what was available at the market, the rates and the risks  
16 and the security, surely we can take that view, can we not?

17 MR. ROBERTSON: If you come to the conclusion that the Authority  
18 has acted irrationally in forming a view, yes. That is  
19 standard.

20 THE CHAIR: I agree, but it is difficult, though, to see whether  
21 the line is drawn. It depends on how clear our view is. If  
22 we look at it and we say we have never seen an elephant but  
23 this is an elephant from the description you have had in the  
24 books that you read, then that is an elephant. I do not want  
25 to say anything about how clear this is, because we are going

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2 to have to discuss that amongst ourselves, it may be we will  
3 form a view that is pretty clear one way or the other and that  
4 may drive our final assessment.

5 MR. ROBERTSON: But you still have to ask yourself ----

6 THE CHAIR: We will ask the right question, yes.

7 MR. ROBERTSON: ---- the question could any reasonable Authority  
8 have done this? What I am drawing to your attention is that  
9 there is Court of Appeal authority in R (Sky Blue Sports) v  
10 Coventry City Council (No. 1) under the EU market economy  
11 operator principle, which is effectively the same as the  
12 commercial market operator principle under the Act.

13 THE CHAIR: Not exactly the same.

14 MR. ROBERTSON: The Act sets it out in the wording of  
15 section 3(2), that is the statutory wording.

16 THE CHAIR: That is the wording we follow.

17 MR. ROBERTSON: To be applied without any glosses on it, my  
18 learned friend attempted to say it has a double negative and  
19 that is all very difficult and then reformulated it in his  
20 submissions.

21 THE CHAIR: It is easier just to apply the wording.

22 MR. ROBERTSON: Just apply the wording, it is English, just apply  
23 it. Bear in mind what the Court of Appeal said in R (Sky Blue  
24 Sports) v Coventry City Council (No. 1), that carried on, that  
25 is not just an approach adopted under EU law, it has since

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2 been carried on under the interim regime prior to the entry  
3 into force of the 2022 Act. There was a period from 11 p.m.  
4 on 31st December 2020 when EU law ceased to apply in the UK,  
5 and we were then subject to the Trade and Cooperation Act as  
6 given effect by the European Union Future Relations Act. That  
7 allowed subsidy challenges to be brought by way of judicial  
8 review before the Administrative Court, until the entry into  
9 force of the Subsidy Control Act on 4th January 2023. There  
10 were two such challenges, one was a case called British Sugar  
11 in which the Secretary of State for International Trade  
12 successfully defended a challenge. The second one far more  
13 pertinent for our purposes is British Gas Trading v  
14 Secretary of State for Energy Security and Net Zero, the  
15 reference is at the top of page 5 of my skeleton at the end of  
16 paragraph 14, and that is a case that went on appeal to the  
17 Court of Appeal. We have given you the reference there, where  
18 the Court of Appeal continued to apply the commercial market  
19 operator principle that is inherent in the concept of a  
20 subsidy under the Trade and Cooperation Agreement; because the  
21 Trade and Cooperation Agreement requires the parties  
22 essentially ----

23 THE CHAIR: I have not looked at that case. I may want to just  
24 look at that passage, yes, that you rely on.

25 MR. ROBERTSON: We have put it in the supplemental authorities, it

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is not reported in any of the law reports, there is not a headnote I can take you to.

THE CHAIR: I do not need a headnote.

MR. ROBERTSON: It is paragraph 97 if you want to quickly turn that up -- sorry, it is in the authorities bundle.

THE CHAIR: The main bundle. Yes.

MR. ROBERTSON: It is at tab 25, and the relevant page is 1068, paragraph 97, towards the bottom of the page. You will see there reference to the market economy operator test: "While the test is an objective one, the law recognises there is a wide spectrum ...(reads to the words)... would not have been entered into on the terms the state in fact entered into it by any rational market operator", citing R (Sky Blue Sports) v Coventry City Council (No. 1) in the Court of Appeal approving Hickinbottom J (as he then was). It concludes: "The question is one which is open to more than one conclusion on which different decision-makers might rationally disagree, so it is only if the decision is irrational it would be set aside."

THE CHAIR: Thank you.

MR. ROBERTSON: We submit that is the same approach which should be adopted when considering the application of section 3(2).

THE CHAIR: Thank you.

MR. ROBERTSON: The second point where there is a difference between us, though, I am not really sure how much difference

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2 it actually makes in practice is on when a subsidy decision is  
3 adopted for the purpose of a challenge under section 70(1) of  
4 the Act. My learned friend sought to persuade you that in  
5 fact the concept of a subsidy decision is wide enough to  
6 include a decision such as that taken on 22nd March.

7 THE CHAIR: What they are saying is, surely, that you must have  
8 the power. If you say a decision has been made that we are  
9 going to grant someone a loan, and that loan is going to be a  
10 subsidy, they say they should have the ability (as in this  
11 case) to go to the tribunal and say this decision has been  
12 made and if this decision is implemented by entering into a  
13 loan agreement, and you have a drawdown, then the decision is  
14 going to be unlawful. That does not mean that when we look at  
15 this case overall, we ignore what has happened. Because at  
16 the end of the day you have a decision in principle, then you  
17 have the delegation of authority to the treasurer in the  
18 normal way, you have the due diligence, the parties will be  
19 negotiating the terms of the loan, no one is bound until that  
20 loan agreement has been signed. You get the red book  
21 valuation and the security in place and you make a final  
22 decision when you decide to execute the loan agreements. That  
23 is done by the treasurer using the delegated authority given  
24 by the GMCA at the decision on 22nd March 2024. Of course, if  
25 during that due diligence process and the negotiating process

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2 something new comes up which actually changes the  
3 fundamentals, such as the rate of interest, I would expect and  
4 I think the tribunal would expect the matter to go back before  
5 the Credit Committee, for example, for them to consider the  
6 adverse results of the due diligence situation. That is why,  
7 as you say in the annex, you have plenty of decisions saying  
8 in principle you could enter into loan agreements and they do  
9 not actually lead to a loan agreement. Just as when you go to  
10 a bank, you quite often will be getting quotes from your bank  
11 and they are saying they are willing in principle subject to  
12 contract to enter into a loan on these terms, but when it  
13 comes to the crunch the borrower may take the view "This is  
14 too expensive I can get it cheaper elsewhere", so they  
15 disappear. You decide, as the banker, that the risks are just  
16 too great or the market has moved too much "I am not really  
17 interested in lending on this, because whilst it looked good  
18 at the time, things have changed", and let us say things have  
19 come out of the woodwork that mean it is not the proposition  
20 you thought it was going to be.

21 MR. ROBERTSON: If the challenge has already been launched, then  
22 you have aborted proceedings in this tribunal, tying up the  
23 tribunal's time and resources. The problem with that  
24 interpretation is it is contrary to the wording of the Act.  
25 Section 70(1) this is set out in our defence, the wording is

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2 set out in the main bundle, tab 2, page 31: "An interested  
3 party has agreed by the making ...(reads to the words)...  
4 review of the decision."

5 Subsection (7) of 70 provides that a subsidy decision  
6 means a decision to give a subsidy. Then section 2(1) defines  
7 "subsidy" as financial assistance. Subsection (2): "For the  
8 purposes of this Act, the means by which financial assistance  
9 may be given ...(reads to the words)... has an enforceable  
10 right to the financial assistance."

11 No enforceable right to the financial assistance means  
12 no subsidy and no subsidy decision. That is why their  
13 application was premature in advance of ----

14 THE CHAIR: You argued that before, did you not?

15 MR. ROBERTSON: Yes.

16 THE CHAIR: You did not take it to the line, because I think you  
17 took a pragmatic view at the first CMC.

18 MR. ROBERTSON: Yes. What is the point of applying to strike out  
19 at that point, when it looked like it was going to be entered  
20 into and it was entered into. That is why you cannot have a  
21 challenge in advance of an enterprise being given an  
22 enforceable right or entering into an enforcement right to  
23 financial assistance. It is a matter of construction of the  
24 Act and in our submission the Act has been deliberately worded  
25 in that way so that only those challenges may be brought. It



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2 is a simple matter of interpretation of the Act in our  
3 submission.

4 My learned friend suggested that somehow this was  
5 inconsistent with the concept of a subsidy scheme under the  
6 Act. We have set out our response to that in the supplemental  
7 skeleton at paragraphs 26-28. Essentially, a subsidy scheme  
8 is different from a subsidy decision. A subsidy scheme is  
9 where an authority sets out a scheme under which it will be  
10 granting financial assistance in the future provided certain  
11 terms are met. It is a subsidy scheme that can be challenged  
12 under the Act. You do not read into the concept of a subsidy  
13 scheme the concept of a subsidy decision. They are two  
14 different things. That was emphasised by the tribunal in the  
15 The Durham Company v Durham County Council referred to at  
16 paragraph 27, in which I appeared for the council, where it  
17 was obiter but we argued that what we had set up was a subsidy  
18 scheme and the tribunal, chaired by the then president, Sir  
19 Marcus Smith, concluded it was not and setting the rates for  
20 commercial waste collection every year at a certain level was  
21 a separate subsidy decision, even though it was done in  
22 accordance with the policy adopted prior to the entry into  
23 force of the Act. We were arguing that subsidy scheme  
24 pre-dated the Act and therefore was not challengeable. We did  
25 not get anywhere on that.

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That is all I wanted to say about this particular point, but the bottom line is that the Act tells you when a challenge can be brought under section 70(1) and it is not before an enforceable right to the financial assistance has been entered into. The third point of law is one that we have already canvassed, the effect of the reference rate communication.

THE CHAIR: Let us feed through what how it works. You have the facility agreement with central government. That has a provision that refers to it, but you say that relates to state aid and things have moved on since then. Then you have the rules for the fund itself at paragraph 7.2. Then, the question is, did the Authority officer in fact purport to apply the 2008 notice -- I will need some help on that -- and if he did, did he interpret it wrongly? If you have the interest rate setting paper, in that paper -- we will need to look at it in a minute -- does he, in that paper, look at the 2008 notice and purport to apply it or does he not look at that at all? I cannot remember now.

MR. ROBERTSON: I am going to come back to the interest rate setting paper later on, but I will make the point here that the interest rate setting paper is not part of the decision-making process.

THE CHAIR: You put that in your annex and it is in Blakey 5. It does not go to the committee, but it sets out the workings and

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2 the thoughts of the relevant officer who did the initial --  
3 the team, let us say, as I am sure it is not just one person  
4 who is doing it -- the team, as to what their view was about  
5 the loan, its structure, why you have done it in those terms,  
6 what the security is and all that sort of stuff.

7 MR. ROBERTSON: The point I am making by way of submission on the  
8 law is that it is in no sense legally binding on the  
9 Authority.

10 THE CHAIR: Mr. Barrett's point may be a different point. He is  
11 saying that when you look at that document, the analysis  
12 itself is fundamentally flawed. He has it both ways,  
13 actually. He says if this is the basis on which the decision  
14 was made to agree the rates, then it is a flawed basis so you  
15 cannot have any confidence in the figures being within  
16 section 3(2). He also says that actually, this is an  
17 ex post facto rationalisation by the officer trying to fill in  
18 a gap after he has agreed a rate and does not actually reflect  
19 his thinking at the time. He is just trying to cover his  
20 tracks. He wants it both ways, but if he is right on the  
21 first way and that it does not, let us say, justify the rates  
22 because it is fundamentally flawed in the way he says it is,  
23 then it is something that we might be entitled to look at for  
24 that purpose.

25 MR. ROBERTSON: The key point, for our purposes, is that it is not

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2 binding on the Authority. The reference rate communication

3 ----

4 THE CHAIR: I know, but let us just go back a stage. In that  
5 document, was he purporting to follow the 2008 notice?

6 MR. ROBERTSON: They are seeking to apply the guidance set out in  
7 that communication.

8 THE CHAIR: What Mr. Barrett says is that when you look at the  
9 paper, it has failed to apply it properly because he says that  
10 if you have got an SPV with no guarantee coming into it, you  
11 simply look at the SPV and what is around that SPV in the  
12 project and you do not look at the picture of the group or  
13 anything else outside that, and that you automatically get  
14 into an uplift of 400 points basically ----

15 MR. ROBERTSON: At which point Mr. Whitaker would have run for the  
16 hills.

17 THE CHAIR: He is saying if you have got that, then the rate  
18 should have been at least, let us say, 300 above what was  
19 agreed at that meeting. His case is that if Mr. Walmsley was  
20 applying that and had applied it -- and he does not  
21 necessarily accept he did -- at the time when he agreed  
22 indicative rates, then he has done it wrongly. So, when he  
23 has tried to assess whether or not these terms are available  
24 on the market, and henceforward in section 3(2), he has got it  
25 wrong. Mr. Barrett, have I misquoted you?

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MR. BARRETT: No, my Lord.

THE CHAIR: I have not. It is really important that you engage with that point because it is not enough for you to say, "Well, you can ignore that paper because it never went before the Credit Committee." I understand why it would not have done and I have got no problem with that, but if that is what was in the mind of the officer who effectively did the negotiation with the rate, and that is the rate that has ultimately followed through, then you have got a problem on justifying the rate, unless you take the view that the 2008 notice in itself, even if you apply it, is not a tram line. It has got a degree of flexibility because when I look at it, purely looking at from my own point of view, to have an automatic 400 basis points as an inflexible starting point -- if you have got an SPV, there is no guarantee and you are automatically adding on an extra 4% -- you may say that in itself is not necessarily the best way to look at these things.

MR. ROBERTSON: We would say that is not what was done, that you would not apply the notice as tramlines. Our submissions on why it does not apply as tramlines is, first of all, it is a communication from the Commission explaining what they do. Secondly, it is adopted under the EU State Aid Rules and therefore is no longer applicable after the end of 2020, even

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to the extent it was applicable before that as a matter of law.

Thirdly, what you are doing in this exercise is assessing whether this loan is a commercial proposition. That is the key issue for the purpose of section 3(2). Nothing in the subsidy control guidance tells you that you must apply the reference rate communication. Then when you turn to see how the reference rate communication is treated, even as a matter of EU law, you turn to the leading textbook, Bacon on State Aid ----

THE CHAIR: I have read that now.

MR. ROBERTSON: Yes, and you will see there that she explains that on the jurisprudence of the European Court, it is only treated as a starting point and can be departed from either up or down. So, it does not have the effect for which my learned friend contends.

Now, did it form part of the decision-making process? No, it did not. We know from Sky Blue Sports and the passage to which I referred you on burden of proof that you have to look at this objectively as a matter of the materials that were before the decision-maker. I am going to take you through those in the chronology.

THE CHAIR: I am not sure if it is as simple as that because if you simply say that the decision, the beginning and the end,

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2 is what happened on 22nd March, you can easily say that it  
3 does not form part of the decision-making process. The  
4 problem you have, though, is that this is a rate of interest  
5 that has been put to the Committee and has been approved, and  
6 it has been reviewed in the light of the due diligence, and  
7 that is a figure that is in 22nd November 2024 loan  
8 agreements. That is a figure that has been used.

9 However, the workings of, let us say, the man on the  
10 front line, or the team on the frontline, is, "We have come  
11 to the view, which we were quite happy to put to the relevant  
12 decision-making bodies as commercial rates, by applying the  
13 2008 notice." You can say that they were applying the 2008  
14 notice because it can be used as a factor, like a benchmark,  
15 but it is not a tramline. That is something that the facility  
16 agreement with central government says we should be looking at  
17 and I have your point about times have moved on since then.  
18 You have paragraph 7(2), the basic terms of reference for the  
19 actual fund which also refers to it, and then you have got the  
20 interest rate setting paper which itself seems to be looking  
21 at that as a sort of reference point. So, to me, a lot may  
22 depend on how you interpret that decision in the real world  
23 and the significance of that into your decision-making ----

24 MR. ROBERTSON: Sir, simply latching on to, this is an SPV and  
25 therefore you will automatically stick a 400 basis point

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2 uplift on to the loan rate, would be a complete departure from  
3 the real world when you look at the proposition that Renaker  
4 had put to the Authority.

5 THE CHAIR: Yes, I am sorry to intervene, but when you look at it,  
6 you are competing against all sorts of lenders when you fund a  
7 developer out of a fund like yours. What really matters is  
8 are these, let us say, commercial terms, which are unduly  
9 favouring a borrower in contrast to what that borrower could  
10 get from the market? If you are looking at the banks and the  
11 banks themselves are not saying, "We are going to have 4%  
12 every time we are dealing with an SPV with no guarantee from  
13 another body", you may find that that would not be something  
14 that you would find is the norm in the market. The banks will  
15 be looking into things, certainly in these big loans, on a lot  
16 more sophisticated basis than simply saying, "If you look at  
17 this SPV, you had an extra 4%." If every bank did that, they  
18 are not going have a huge amount of business because basically  
19 you add 4% any time you have got an SPV without a guarantee,  
20 which is unreal.

21 MR. ROBERTSON: It would not make any commercial sense when you  
22 are looking at the performance of Renaker-related entities for  
23 similar projects, you are looking at the relatively low loan  
24 to value, you are looking at the quality of security, you look  
25 at where they have got to already on sales, and you would take



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2 the view that this is not high-risk lending even if it was a  
3 SPV structure.

4 THE CHAIR: Do you have, for example, and did you have at the  
5 time, any evidence as to how the remainder of the equity was  
6 being funded? If it is self-funding within the group, it is  
7 pretty neutral and it does not help you. If, for example,  
8 they have got funding for their equity, which is a requirement  
9 under the loan agreement, and that equity is basically being  
10 funded from, let us say, the market, at a rate which is  
11 substantially higher than the ones here, then you can perhaps  
12 see that as a relevant factor. Do we know what the situation  
13 is? Did we know at the time?

14 MR. ROBERTSON: I am told it was self-funded group cash flow.

15 THE CHAIR: That is fine. You are not going to learn anything  
16 from that.

17 MR. ROBERTSON: No. I think we have probably done the reference  
18 rate communication to death. You have got my submissions on  
19 it as to why it is not a tramline. It was not a tramline  
20 under EU law. It is certainly not under the ----

21 THE CHAIR: Can we have a look at it together?

22 MR. ROBERTSON: Sure. It is to be found in authorities bundle 1,  
23 tab 4, and it is a page which you have marked as 348F. It  
24 commences on the first page with an explanation of the  
25 communication, so under "Reference and discount rates",

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"Within the framework of the Community control of state aid, the Commission makes use of reference and discount rates", so it is the Commission making use of these rates.

THE CHAIR: Okay.

MR. ROBERTSON: This is not a regulation or a Directive which would have legal effect throughout the EU. This is a communication for the Commissioners as to how they deal with things. The reason why it is relevant is that under the EU State Aid Rules, the Commission has got exclusive jurisdiction to approve aid. If something is aid, it can only be approved by the Commission. Most aid is dealt with under bloc exemptions issued by the Commission.

It says, "Reference to discount rates applied as a proxy for the market rate." So what you are trying to do is work out what is the market rate. It then says "Background to the reform. The main reason for examining the methodology for setting reference and discount rates is that the required financial parameters are not always available in all Member States, especially the new ones."

That is the difficulty facing the Commission in considering aid. At that time, in 2008, we had just had Romania and Bulgaria join the EU. There had been an expansion about three or four years previously as well. It had undergone a big expansion. I do not think Croatia had joined

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2 at that point so it was 27.

3 "This communication presents a revised method for  
4 setting reference and discount rates." It then refers to a  
5 study from Deloitte and Touche, a standard approach and an  
6 events approach. Then turning the page, they set out what the  
7 standard approach is and what the advanced approach is. Then  
8 they set out various weaknesses. Then they go to their new  
9 methodology: "To avoid these difficulties, the Commission  
10 proposes a method that is easy to apply." It ensures equal  
11 treatment. It uses simplified criteria, taking into account  
12 creditworthiness instead of the mere size of undertakings,  
13 which seems too simplistic a criterion. You looking at  
14 creditworthiness. That is what it is aimed at. That is the  
15 purpose of this.

16 The notice itself starts on the third page. It explains  
17 why it is changing the methodology. It sets out its  
18 methodology and, at the bottom of the page, "Normally, 100  
19 base points... (reads to the words)... and normal collateral."  
20 So when you have got a group like Renaker where you have got a  
21 history of lending to them, they have not lost a penny, in  
22 fact the loans have performed well in accordance with their  
23 terms, that is the environment you are in.

24 The passage that my learned friend has seized on is on  
25 the following page: "For borrowers that do not have a credit

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2 history or a rating based on a balance sheet approach, such as  
3 certain SPVs or start-up companies, the base rate should be  
4 increased by at least 400 basis points." They say, "Aha, they  
5 have set up an SPV for this development. That automatically  
6 triggers the 400." We say, "What is the purpose in that when  
7 you have got a good credit history for the Renaker Group and  
8 this is a low-risk investment?" You will see, when we go  
9 shortly through the history of borrowing, how they have  
10 assessed that. This is not an automatic trigger that says the  
11 Commission automatically, with an SPV, sticks on another 400  
12 basis points. It is doing it for borrowers that do not have a  
13 credit history or rating based on its balance sheet approach.

14 THE CHAIR: One of the things I find is that when you look at what  
15 the test is under section 3(2), you are looking at what else  
16 would be potentially available to the borrower and what terms  
17 they are. If you look at the market, it is not simply  
18 government entities who are in the position to provide  
19 financing. It is the rest of the market like banks and other  
20 types of fund. They would not necessarily have such a, let us  
21 say, simplistic approach as here. When you look at how banks  
22 price major loans of this size, it is actually a very  
23 sophisticated thing. There is a lot more that goes on on the  
24 back, i.e. what they can get back-to-back from whatever  
25 lending they have got, if it is going to be that type of book,

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2 than just simply looking at the people in front of you.

3 I can understand why, if you are simply looking at  
4 trying to get a rule for Member States and stuff, you can have  
5 something that is fairly simplistic like this, but if what you  
6 are trying to look at is, are you unduly favouring one  
7 borrower by giving uncommercial rates, you are not simply just  
8 looking at this. You are looking at what do you think they  
9 could get from the market? So if you think they can get from  
10 the market from this structure, without too much difficulty,  
11 the sort of rates that you have given, then you will not  
12 necessarily have the same concerns than if you feel actually  
13 everyone out there, as the potential lenders, will be  
14 following this as a tramline and everyone would be adding on  
15 4% for the SPV factor.

16 For my part, I am not persuaded at the moment that  
17 banks, when they will be lending, will be applying this type  
18 of thinking on a tramline basis. Of course they can take into  
19 account if it is just an SPV, and they look at that, and they  
20 may treat it differently to where you have a parent company  
21 guarantee, but it is not that unusual, in projects like this,  
22 not to get the parent company guarantee. They will say, "We  
23 have come to you as a potential lender, this project stands or  
24 falls on what we have, we can provide collateral and  
25 everything like that, but we are not prepared, for one reason

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2 or another, to give parent guarantees."

3 Quite often, they will not want to because they may have  
4 other facilities and if they give a parent guarantee that has  
5 an impact on their whole book of facilities, then they would  
6 have to go back to their other lenders and say, "We have to  
7 get your permission for us to give a parent guarantee for this  
8 other loan." Then the bank starts saying, "We want some money  
9 for that" and before you know it, it is going to cost you a  
10 lot of money because although the banks may not object at the  
11 end of the day, they will ask for repricing of their loans.  
12 All I am saying is that this looks quite simplistic to me if  
13 you being looking at it from the point of the view of the rest  
14 of the market.

15 MR. ROBERTSON: I can see why the Commission adopt it as their  
16 starting point. They explain why in the communication. Their  
17 purposes it does not have wider application, even for the  
18 Commission's purposes. As Bacon J explains in her textbook,  
19 it is just a starting point and the authorities to which she  
20 refers, which I have not burdened the court with, say that it  
21 can be departed from. Her summary in the textbook is correct.  
22 So I think that is all I have to say on the cases.

23 THE CHAIR: Can you add to the bundle at least one of those  
24 authorities? Do not do it now, but just add it to the bundle  
25 and I will look at it when we come to it next week.

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MR. ROBERTSON: Yes, I will make a note of that. The final issue of law before we turn to the decision-making process is the effect of the 2022 subsidy control gross cash amount and equivalent regulations. I do not understand my learned friend to be placing any reliance on the 2022 Regulations as affecting the way in which the Authority exercised its judgment. I merely refer to the regulations because they are referred to as a cross-check, but essentially they do not apply to the exercise under section 3(2), they say on the face of them in regulation 3 what the scope of the regulations is, what exercises they apply to. I do not really want to add anything to what I have said in writing about them.

THE CHAIR: Are they referred to at all in any of the underlying papers of the Authority?

MR. ROBERTSON: They are.

THE CHAIR: In the context of this lending. I may want to see. Are they in the interest rate setting paper?

MR. ROBERTSON: It is the IRSP, yes.

THE CHAIR: I would like at some stage in your submissions to look at that paper.

MR. ROBERTSON: Yes.

THE CHAIR: Because Mr. Barrett went through it very helpfully in his submissions in some detail.

MR. ROBERTSON: We will be looking at it.

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2 THE CHAIR: You only have to do it once but I will benefit from  
3 you taking me through it.

4 MR. ROBERTSON: Yes. I will certainly take you to it, but it is  
5 not part of the decision-making process.

6 THE CHAIR: We will look at it, you keep saying that but I still  
7 would like to look at it, because for the reasons that  
8 Mr. Barrett said it is something that the person who  
9 negotiated the rates, it is something that he has prepared and  
10 you can say well that forms part of the thinking as to why he  
11 took the view, at the time he negotiated possibly, but  
12 Mr. Barrett said this came later, but certainly by the time  
13 you get to the loan agreement you have a more developed  
14 version and that is his effectively working notes as to why  
15 the rates that he has he considered to be commercial rates  
16 both at the time that he initially agreed it, commercial  
17 rates. Once you have gone through the whole due diligence  
18 process and looked at all the security and everything and you  
19 have the Red Book valuation. Yes.

20 MR. ROBERTSON: I am going to come to the decision-making process.  
21 Before I turn to the chronology itself that was handed in  
22 yesterday, just by way of background, we have already seen the  
23 original agreement with central government. If you recall  
24 that was in the Ben Rose exhibit bundle, at tab 7, we went to  
25 section 7 of that with the reference to state aid.



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2 THE CHAIR: We have looked at that, yes.

3 MR. ROBERTSON: As regards governance of the fund.

4 THE CHAIR: Can we just have a quick look at that. Benjamin Rose.

5 MR. ROBERTSON: Tab 7.

6 THE CHAIR: It is that bit that we looked at last time. Yes.

7 MR. ROBERTSON: It begins on page 72, section 7 is on page 102.

8 THE CHAIR: When you say 102, which version of the numbering is  
9 it, the big version or the little numbers?

10 MR. ROBERTSON: The big pagination.

11 THE CHAIR: Investment pricing.

12 MR. ROBERTSON: Investment pricing. The reference rate  
13 communication. Then, paragraph 2 is the split of receipt of  
14 funding between the Authority and its sponsoring department,  
15 the fund sponsoring department which is now the Minister for  
16 Housing Communities and Local Government.

17 THE CHAIR: The EU State Aid Regulations, when did they cease  
18 applying?

19 MR. ROBERTSON: They ceased applying on 31st December 2020 at  
20 11 p.m.

21 THE CHAIR: Do you not have the transitional provisions.

22 MR. ROBERTSON: That is when they came to an end. That is when  
23 the UK ceased to be bound by EU law. The UK had left the EU  
24 at the end of January 2020. I remember it well because I was  
25 if the European Court on 27th January doing a state aid case

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2 for the UK -- not the only reason I remember it well I should  
3 add.

4 THE CHAIR: The methodology at Annex 2, where is Annex 2?

5 MR. ROBERTSON: There is not an Annex 2 in my version, I am afraid  
6 I cannot assist you with that.

7 THE CHAIR: Okay. (Pause)

8 MR. ROBERTSON: I am being pointed to Schedule 5 at page 110.

9 THE CHAIR: Yes, okay.

10 MR. ROBERTSON: State aid interest calculation.

11 THE CHAIR: If I just say page 110, yes. Okay.

12 MR. ROBERTSON: Then, as to governance of the fund, that is now  
13 set out in the revised investment strategy, which is to be  
14 found in the main bundle.

15 THE CHAIR: Which number?

16 MR. ROBERTSON: It is tab 14, which starts on page 280.

17 THE CHAIR: I have not got the tabs put in yet. That was going to  
18 be done yesterday. It is double-sided copy, so it is a bit  
19 difficult. Do not bother with the tabs then. That is fine.

20 MR. ROBERTSON: Okay. The document itself begins at page 277.  
21 You will see there what the purpose of the report is and  
22 recommendations, GMCA's requested to approve the revised  
23 investment strategy of the fund. The passage I want to show  
24 you is on page 280, governance, paragraphs 5.1-5.3: "The core  
25 investment team is responsible for managing the fund, both the

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Gateway Panel and Credit Committee have been set up and have been operating over the four years of fund operation to review proposals and provide the necessary approvals before recommending the projects for approval by the GMCA. As part of good governance the Gateway Panel membership was rotated and two new members were appointed at the start of 2019. The role of the independent Gateway Panel is critical to ensuring external scrutiny of projects being approved. The panel is considered to include all the necessary expertise to provide the appropriate level of scrutiny to projects. Projects are fully developed before being presented at the Gateway Panel such that they review all the detailed information prior to approving projects. This results in two separate committees reviewing the detailed proposals for investment of more than £2 million before approval is recommended to the GMCA."

That is the governance for the fund.

THE CHAIR: I looked at 6.1 and 6.2 which I thought was relevant.

MR. ROBERTSON: Yes. You asked for names of the individuals from the treasurer downwards, you asked for the names of the treasurer and the monitoring officer when we looked at that document. I thought I would give you the chain of command so you have it. You have the GMCA treasurer, that is Steve Wilson.

THE CHAIR: Yes.

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MR. ROBERTSON: Then the chief monitoring officer, Gillian Duckworth. There are two deputy monitoring officers, one of whom is Sarah Bennett, who is sitting behind me. Both of the deputy monitoring officers are solicitors, incidentally. You have encountered Mr. Bill Enevoldson, who was chief investment officer until his departure last year. The role of chief investment officer has not been filled since then. Then you have Laura Blakey, who is the director of Strategic Finance and Investment, whose witness statements you have. Then below that are transaction managers, one of whom is Michael Walmsley.

THE CHAIR: Transaction what?

MR. ROBERTSON: Managers. Overall, the team is about 25 strong. They are not exclusively devoted to the fund, but they work on other funds as well.

Sir, the next thing I was going to do was turn to the chronology document.

THE CHAIR: We will do that after the break, then.

MR. ROBERTSON: That is what I thought.

THE CHAIR: We will come back at 12.

(A short break)

MR. ROBERTSON: Sir, I said I was going to take the tribunal through the chronology. If we may sensibly have the

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chronology document submitted yesterday in front of you.

THE CHAIR: Is there more than one version of this floating around?

MR. ROBERTSON: Not from me there is not.

THE CHAIR: There is a version I have seen with some green on it.

MR. ROBERTSON: Mine is black and red.

THE CHAIR: Okay. Go through this and then you will sort it out at lunchtime with Mr. Barrett.

MR. ROBERTSON: Yes. I should just explain one thing about the bundle references, I have referenced volumes of the core bundle so the first document we are going to look at is in my core bundle 3, but I realise that everyone is operating on hard copy bundles, some are double-sided, some are not, mine is not.

THE CHAIR: The main thing is whether it is core bundle or main bundle. Those are the two important ones.

MR. ROBERTSON: If you can take core bundle, tab 41, page 1233.

THE CHAIR: What we will want from you today is you to take us through all the factors and the relevant material as to why you say the rate that was in this is within, let us say, the reasonable range of rates. That requires an understanding how the security worked, the valuations and all of that. You have done most of that in your annex and that is very helpful.

MR. ROBERTSON: When we go through it you will see those points

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2 emerging as this goes first of all here to ----

3 THE CHAIR: Give me the page number again.

4 MR. ROBERTSON: Sorry, it is page 1233 and this is a paper to the

5 Gateway Panel, as you can see at the top, 11th December 2023.

6 This is the initial overview of the proposed funding. You see  
7 the introduction.

8 THE CHAIR: Let me just see where it is on your chronology, then

9 I can tick it off.

10 MR. ROBERTSON: It is item 1 on my chronology.

11 THE CHAIR: Yes.

12 MR. ROBERTSON: You will see it sets out in the introduction

13 proposals being brought forward in light of the sales position

14 on the two Renaker schemes to which GMCA's current lending

15 already being sufficient, and are expected to represent the

16 final commitment to Renaker schemes from the housing

17 investment fund in its current form. This is not Mr. Whitaker

18 or Renaker walking in off the street. The fund has a depth of

19 experience in funding developments with Renaker. Therefore,

20 it already has a knowledge as to the terms on which funding

21 has been made. It is not starting from scratch.

22 THE CHAIR: The point may be made against you, which is that, yes,

23 but that only takes you so far because if he has been given

24 unduly favourable rates up until now, the fact that what has

25 happened in the past does not help people. What really helps

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2 us is to look at what the terms are, what the risks are, so we  
3 can assess whether generally this is within the realms of  
4 section 3(2), is it not?

5 As I see Mr. Weis's second witness statement, he says  
6 you do not actually start just looking at these loans, there  
7 is a whole history here, and when you look at the whole  
8 history he has these concerns, which whether they are good or  
9 not I do not know. What we would probably need to focus on  
10 is, I do understand that you understand business, you know how  
11 it works, you should know what the risks are and all that sort  
12 of stuff. It is us seeing what the risks are, us seeing the  
13 assessment of the risks, us seeing how you mitigate those  
14 risks and how you reach whatever rates you have.

15 MR. ROBERTSON: Yes, it is subject to independent scrutiny from  
16 the Gateway Panel and it is also subject to scrutiny from the  
17 Credit Committee which has external representation on it, as  
18 I shall show you in due course. Here is the initial proposal.  
19 It sets out, under recent GMCA lending to Renaker, the schemes  
20 which GMCA have supported other the course of the past three  
21 years.

22 THE CHAIR: You say it has a good track record.

23 MR. ROBERTSON: Yes. It is not just GMCA being referred to here  
24 because under the first indent it refers to the club loan with  
25 GM Pension Fund. They are an independent fund run on a

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2 commercial basis, they are a commercial lender. We are not  
3 represented on that fund. Therefore, we have been involved in  
4 funding together with that fund for the Blade, which is very  
5 recently at the time of this been repaid. The next indent, a  
6 further club loan, again with the GM Pension Fund, for  
7 Colliers Yard, repaid in the previous year.

8 THE CHAIR: Are those loans on an SPV basis without let us say  
9 guarantees?

10 MR. ROBERTSON: I am told yes.

11 THE CHAIR: As regards those loans, do we know what the let us say  
12 the margin was?

13 MR. ROBERTSON: (Pause) I am told the figures are available in the  
14 interest rate setting paper.

15 THE CHAIR: I would like to see what they are, particularly the GM  
16 Pension Fund in respect of the Blade and see what the margin  
17 over is. It is not just a question of the interest rate, it  
18 is the other ones with the arrangement fees and that sort of  
19 stuff and see how comparable they are. I can see what you are  
20 saying when you have a club loan and a commercial lender, that  
21 is an indication of what ----

22 MR. ROBERTSON: If I can jump way ahead at this point to the  
23 interest rate setting paper.

24 THE CHAIR: That is fine.

25 MR. ROBERTSON: Which is to be found at ----



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2 THE CHAIR: What you are saying is, when you look at the pension  
3 fund they have no interest at all in let us say the wider  
4 objectives. They are interested in just getting a commercial  
5 rate of return for the people, the pension holders.

6 MR. ROBERTSON: That is to be found in core bundle, in my case,  
7 volume 1, tab 14, page 152.

8 THE CHAIR: Yes. Bear in mind I do not have tabs.

9 MR. ROBERTSON: Yes.

10 THE CHAIR: Just the page number.

11 MR. ROBERTSON: My learned friend remarked upon it being headed  
12 "Customer expectation", but the figures are there for the  
13 Blade and Colliers Yard margin, LMF, loan management fee.

14 THE CHAIR: Yes.

15 MR. ROBERTSON: Then for comparison, the table below shows key  
16 metrics for the Colliers Yard scheme against two new  
17 facilities covered in this paper, so there is the direct  
18 comparison.

19 THE CHAIR: What about the blade. Do we have that, or is it just  
20 colliers?

21 MR. ROBERTSON: We do not have the equivalent figures; we only  
22 have the margin.

23 THE CHAIR: Yes, but you can see, for example, that LTB is not  
24 hugely different than Colliers Yard.

25 MR. ROBERTSON: Yes. You will see that the Colliers Yard has

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significantly less equity invested ahead of debt.

THE CHAIR: That is what I am looking at, yes.

MR. ROBERTSON: Sort of broadly equivalent loans which you get  
from the senior facility at the top of that table. (Pause)

THE CHAIR: Okay. So.

MR. ROBERTSON: Over the page ----

THE CHAIR: Is it Blade and Colliers Yard? Are they the only club  
loans out of the four?

MR. ROBERTSON: For Renaker, yes.

THE CHAIR: So these are the club loans.

MR. ROBERTSON: Yes. You see them described again on ----

THE CHAIR: With the pension fund, yes.

MR. ROBERTSON: Yes. You will see that over the page on page 153.

THE CHAIR: Do I have to split between what this fund is doing,  
relative to how much is the split on the club, what is the  
participation of each one?

MR. ROBERTSON: I am not sure I can put my finger on those precise  
figures at this stage.

THE CHAIR: No, it will be somewhere in here.

MR. ROBERTSON: If I can just take you over the page to page 153  
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THE CHAIR: Yes, I am looking at that.

MR. ROBERTSON: It is also noted that in the case of the Blade and  
Colliers Yard, GMCA lending of 70 million formed part of the

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2 club loan with ----

3 THE CHAIR: Yes, that is fine. That is fine.

4 MR. ROBERTSON: The pricing of those facilities was subject to  
5 independent analysis on the part of Averson Young, which at  
6 the time acted as development adviser to the pension fund's  
7 property venture fund, and found to be in line with the  
8 lending market.

9 THE CHAIR: Okay. We do not actually have the analysis, do we, in  
10 the bundle?

11 MR. ROBERTSON: No, I do not believe we do.

12 THE CHAIR: The fact is whoever wrote this was aware of that and  
13 would have been involved in that. Yes, okay.

14 MR. ROBERTSON: So that is what I say. When this initial proposal  
15 for these two towers comes to the fund, they have already got  
16 a good deal knowledge about the state of the lending market  
17 from their very recent involvement in club loans.

18 THE CHAIR: What you say is that this is under customer  
19 expectation. Obviously, Renaker will be fully aware of that  
20 and that when you have your negotiation, they are going to  
21 bear in mind what was available on the other loans, including  
22 a club loan with someone who has gone out and done an  
23 independent analysis.

24 MR. ROBERTSON: Yes.

25 THE CHAIR: Yes. Okay.

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2 MR. ROBERTSON: The transaction manager, I am instructed, for  
3 Blade and Colliers Yard is the same transaction manager as for  
4 Contour and D1 and that is Michael Walmsley. It is direct  
5 personal knowledge within the team reporting to the chain of  
6 command that I took you to before the break.

7 Back on the initial proposal on 1233, it refers at the  
8 third, fourth and fifth indents, under "Recent GMCA lending to  
9 Renaker", to other loan facilities to Renaker, namely, the  
10 Circle, Bank Side, and Tower D2, which was one of the four  
11 towers on Trinity Island. It then sets out development  
12 appraisals.

13 THE CHAIR: Yes, got those.

14 MR. ROBERTSON: And over the page, on page 1234, there is lending  
15 structure and security. "In both cases, the proposals are  
16 based", and it then sets out what the basis is. Then it  
17 explains why that is considered acceptable. It shows the flow  
18 of current Renaker commitments overlaid with the proposed new  
19 lending. Then, "The fund's requirements around over cost  
20 overruns is normally based... (reads to the words)... Red  
21 book valuations obtained by the fund in April 2023 give a  
22 combined value for the sites" and then compares that to  
23 Bankside and Trinity.

24 There are some more details around drawdown and then, in  
25 the paragraph beginning, "Instead", it is noting that the loan

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2 to value provides significant headroom to sustain additional  
3 costs. It suggests what Renaker might be asked to put up.

4 "The analysis above is based on ...(reads to the words)...

5 These will be detailed in further proposals and brought back  
6 to the panel."

7 THE CHAIR: When you look at the sales strategy and exit, the  
8 risk, the last paragraph of that, what would be helpful is at  
9 some stage if you take us through the final loan agreement.  
10 Then we can look at the clauses that deal with things like  
11 this. Of course we can read it ourselves, but I think, tying  
12 all these threads together, you can see that they refer to the  
13 consideration as something that is quite material, which  
14 reduces the level of risk and shows an appreciation of, you  
15 know, if you are looking at the scale of the lending, possibly  
16 concentration of risk, and you are saying that is all  
17 mitigated by ensuring that by the time of drawdown, there have  
18 been sufficient exchanges to cover the full repayment of the  
19 facility, then we want to see what the covenants say about  
20 what happens to the proceeds to see whether or not the  
21 proceeds will be an account that can be, let us say, a  
22 resource for repayment if something happens.

23 MR. ROBERTSON: Yes. That is the culmination of the chronology  
24 when we get to that.

25 THE CHAIR: We will get to it. Yes, that is fine.

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2 MR. ROBERTSON: Then the next item is a document that you have  
3 already seen which is the Gateway Panel meeting on 22nd  
4 February. That is to be found in core bundle, in my case,  
5 volume 2, tab 24, page 743.

6 THE CHAIR: Yes. I will just make some notes.

7 MR. ROBERTSON: This is the Gateway Panel meeting minutes, 22nd  
8 February 2024, and we see at the top there the attendees.  
9 Now, you have encountered Mr. Enevoldson and Laura Blakey from  
10 the Housing Fund, but on the Gateway Panel, the individuals  
11 there are described in Ms. Blakey's fifth witness statement,  
12 which is in the main bundle, in my case behind tab 24,  
13 page 1193.

14 THE CHAIR: What paragraph number?

15 MR. ROBERTSON: 26.

16 THE CHAIR: Yes.

17 MR. ROBERTSON: You will see there the three individuals,  
18 Mr. Fitzsimmons, Mr. Chiltern and Ms. Hurst. They are  
19 described at subparagraphs 26.1, 2 and 3. Mr. Fitzsimmons is  
20 a former Chief Executive of Redrow, one of the UK's major new  
21 house builders, a wide variety of housing and non-executive  
22 appointments.

23 Ms. Hurst is Managing Director Of Maple Grove  
24 Developments, a division of Eric White, with many years of  
25 property development experience from both the public and

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2 private sectors, formerly a development director at Salford  
3 City Council.

4 Mr. Chiltern is Managing Director of Rowlandson, an  
5 experienced contractor and developer, with again several  
6 decades of experience and also experience in the public sector  
7 with Homes England. So these are the independent members of  
8 the panel scrutinising this proposal.

9 In our submission, they are there to provide independent  
10 scrutiny, as we have seen, from the governance. They are not  
11 there to just rubber-stamp a cosy relationship, as my learned  
12 friend suggests, between Renaker and the Authority. They are  
13 there to provide independent scrutiny and that is what they  
14 do.

15 The panel receives a presentation from Renaker. That  
16 presentation is available in the phase 1 bundle at page 210.

17 THE CHAIR: Mr. Barrett says that when you look at the minutes, it  
18 does not reveal any discussion about the pricing of these  
19 proposed facilities. It talks about other things, but not  
20 that, so he is saying, "Where is the evidence that they  
21 considered that?" Then the argument would be that if they  
22 were concerned about the rates, there would be an issue and  
23 that would come up in the minutes. The points that they  
24 wanted to be done is on the last page, and that will include  
25 things which are highly relevant on pricing if it does not

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come out in a satisfactory way.

MR. ROBERTSON: Yes. You do not minute absolutely everything that is discussed. You minute the points that need to be minuted. They have had the benefit of a presentation from Renaker. That is minuted. The presentation itself is in the phase 1 bundle.

THE CHAIR: So there is a presentation by Renaker.

MR. ROBERTSON: Yes.

THE CHAIR: And that is referred to at the beginning of the minutes.

MR. ROBERTSON: It is in the phase 1 bundle at page 210.

THE CHAIR: Yes. Can I put this file away or do I need to keep it nearby?

MR. ROBERTSON: Can you just keep that nearby, just for the time being, please.

THE CHAIR: The phase 1 bundle.

MR. ROBERTSON: Yes.

THE CHAIR: Yes. Page number?

MR. ROBERTSON: 210. If you are lucky enough to have a tab number like me, it is tab 12.

THE CHAIR: No.

MR. ROBERTSON: I just invite you to flick through it because you will see that it summarises essentially what the proposal is. There is some background to Renaker's developments. Then



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2 starting at page 218, there is then the proposal for Contour,  
3 a description of what is proposed, delivery team consultants  
4 at 227, the programme at 230, then the key risks and  
5 submissions at 231, costs certainty at 232, then the total  
6 development costs at 235, development appraisal at 236, sales  
7 progress, and then the same thing is done for Tower D1  
8 starting on page 239.

9 THE CHAIR: Yes.

10 MR. ROBERTSON: It is the same matters. Funding is at 257, 258,  
11 closing summary. So, you will see that they are not just  
12 proceeding on the basis of a two to three-page initial  
13 appraisal. There has been a detailed presentation to them.  
14 They had before them an investment proposal.

15 THE CHAIR: At this meeting?

16 MR. ROBERTSON: Yes, and that is at core bundle 1, tab 3, page 22.  
17 I should say that this investment proposal also went to the  
18 Credit Committee who sat on the 7th March. I am going to come  
19 to that in a minute. Just to be ahead, you have the reference  
20 to both points and it is not just duplication. The same paper  
21 went to the Gateway Panel as went then to the Credit  
22 Committee. You will see the outline, in particular at bullet  
23 point 4, the loan to cost for each scheme with the structure  
24 for each facility and then the equity investment proposal.  
25 "In view of the conservative loan to value for D1 ...(reads to

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2 the words)... for the Bankside and Trinity loan", so the  
3 Bankside and Trinity loan is coming to an end. That is  
4 Trinity D2. You then keep the charge running, but use it for  
5 the purposes of an overrun guarantee here.

6 There is a source and application, a fund summary,  
7 financial covenants, over the page, security description,  
8 pricing, EU reference rate, EU State Aid margin, fund risk  
9 premium and total rate proposed. For each facility, 1% of the  
10 fund risk premium is to be charged as a loan monitoring fee.  
11 This is all before getting independent scrutiny by the Gateway  
12 Panel.

13 So, the fact that there may not be specific reference in  
14 the minutes does not mean that the panel ignored the issue.  
15 They were specifically briefed on it. Then there is more  
16 detail. They are being asked to approve total funding of  
17 140 million. In the end, as we know, it was not 140 but 120.  
18 That was under consideration. There is an explanation in the  
19 third bullet point under "Executive summary" as to the  
20 thinking behind that. It refers to the siteings papers, the  
21 initial proposal that I took you to first in this chronology.

22 Then it sets out the background, the group structure,  
23 the borrower, business strategy, and identifies key personnel  
24 within Renaker, including someone who previously had been a  
25 finance director for the footballer, Gary Neville, who has a

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2 big property development company in North West. Then there  
3 are track record and experience summaries, the fund's previous  
4 and current lendings of the Renaker schemes, including  
5 Colliers Yard and Blade that we have looked at. It sets out  
6 the position with the live facilities. Then at the bottom, it  
7 refers to the cap.

8 At the top of page 25, there is the Renaker lending  
9 chart. At 2.4, "No overall Renaker ...(reads to the words)...  
10 applying for this project." There is access to funds and then  
11 here we see the reference to XQDL, the holding company for  
12 Crown Street Phase 1 and the Dean Square schemes, looking at  
13 its profits and net assets. It then looks at the contracts of  
14 Renaker Build and refers to a group cash flow forecast.

15 Finally there, "Visibility of the group cashflow will be  
16 maintained throughout delivery of the schemes." Then there is  
17 source of equity injection, additional costs available, with  
18 an explanation of that.

19 We then get the description of the towers and it  
20 continues on 26. Reference has been made to section 106 in  
21 relation to Contour for the fifth bullet points, so Renaker  
22 does have a section 106 agreement. It is required to make a  
23 financial contribution to offsite education provision being  
24 used by Manchester City Council and being used to fund the new  
25 Great Jackson Street Primary School, which opened last year.

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2 It is called Crown Street Primary School now, the first new  
3 primary school in inner Manchester in nearly 20 years,  
4 according to news reports.

5 Over the page on 27, there is the funding proposal,  
6 development proposals, figures given there for each of D1 and  
7 Contour, the assumptions. At the bottom under 3.3, there is  
8 market due diligence. Ahead of commissioning red book  
9 valuations, the most up-to-date data on comparable currently  
10 available is the form of sales at Bankside and D2.

11 Turning the page to 28, this is looking at whether their  
12 proposals are overoptimistic or not and if they seem in line  
13 with the market. Then over the page on 29, 3.4, pricing, and  
14 then that sets out the pricing. So, again, for the  
15 independent panel members, when they are looking at this, it  
16 has been explained to them. If they think, "Hang on, this is  
17 way below market rates", you could expect them to have said  
18 so. Their role is to provide independent scrutiny, to say to  
19 the Authority, "Hang on, you are not getting value for money  
20 here, you should be charging more for these loans." We do not  
21 see that in the minutes and it is not what happened.

22 It then goes on to cash flow, repayment, over the  
23 page on 30, security, and just a bit more detail on what has  
24 been trailed in the introduction. Then covenants.

25 THE CHAIR: There is going to be a blocked account, it is a charge

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over a blocked account, so the sales deposits are there and available. (Pause) Yes.

MR. ROBERTSON: Yes. Covenants and in particular a covenant in relation to sales. The bottom page, key risk and mitigants. Construction risk, it has a track record, not straightforward development but that is considered. Lending significantly below the LTB threshold, the fund will normally consider for city centre schemes. Then you will see there the sales covenant. Then the equity risk, how that is addressed. Then proposed conditions of sanction.

Then over the page, we can actually see what we are talking about. Contour is the right-hand tower, which I think I am right in saying the concrete element of it has now been completed. The concrete frame is now completed, in fact, so a striking addition to the skyline of Manchester City Centre. That is the investment proposal.

THE CHAIR: Yes.

MR. ROBERTSON: I should say we describe the Gateway Panel meeting, in our skeleton argument supplemental, Annex 1, at paragraphs 10.1-10.4, I do not need to take you to it but that is for your note.

That is the Gateway Panel. Then the document we have just been looking at also went to the Credit Committee meeting. That took place on 7th March, so this is item 3 on

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2 my chronology. For that we are back in the core bundle, page  
3 746, my tab 25, for its minutes. This Credit Committee  
4 meeting you will see the attendees.

5 THE CHAIR: What is the page reference again?

6 MR. ROBERTSON: This is 7th March 2024.

7 THE CHAIR: Yes.

8 MR. ROBERTSON: It is item 3 on the chronology.

9 THE CHAIR: 746. Okay. Thank you.

10 MR. ROBERTSON: Page 746, my core bundle 2, tab 25, and the  
11 attendees.

12 THE CHAIR: It is not helpful, my core bundle 2 is headed  
13 bundle 1.

14 MR. ROBERTSON: Sorry, I had mine printed out single sided.

15 THE CHAIR: Okay.

16 MR. ROBERTSON: The individuals attending this are GMCA team  
17 members along with Tony Goldrick, and his short biography is  
18 given by Ms. Blakey in her fifth witness statement, in the  
19 main bundle page 1194. You will see Mr. Goldrick worked at  
20 the Royal Bank of Scotland for 30 years, much of his time in  
21 the real estate sector. He was head of corporate real estate  
22 team covering the north of England. He is a director and  
23 shareholder and chief risk officer at the peer-to-peer real  
24 estate funding platform, CapitalStackers. He funds real  
25 estate for a commercial business which he is a director and

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2 shareholder of. It offers mezzanine finance provided for  
3 private investors, along with senior bank funding to  
4 commercial businesses, generally small and medium-sized house  
5 builders. Again, relevant private sector expertise,  
6 experience.

7 THE CHAIR: Where it says presented the paper, what is the page  
8 reference for that?

9 MR. ROBERTSON: That is the one we have just been looking at,  
10 which is at core bundle pages 22-33.

11 THE CHAIR: Okay.

12 MR. ROBERTSON: It was the same paper went to both.

13 THE CHAIR: I just want to put the reference in there. That is  
14 fine.

15 MR. ROBERTSON: You see there Mr. Walmsley presenting that paper  
16 and giving them an update on Contour. There is a point about  
17 Renaker and security, and the actions recommendations in  
18 relation to that on the right-hand side.

19 My learned friend took you to this paper, he said there  
20 is nothing in there about pricing. There was, in the paper  
21 that went to them; we have just been looking at it.

22 Again, in our submission, if the independent Credit  
23 Committee member had thought this was on unduly favourable  
24 terms and that the Authority was effectively having the wool  
25 pulled over their eyes by Renaker, its function is to call

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2 that out. We know that from the governance.

3 There is a credit paper that went to this committee that  
4 is in the core bundle, pages 1238-1239, a credit comments  
5 paper. I do not think we need to go through that in any  
6 detail but it is worth looking at.

7 THE CHAIR: I may want to, but it has the investment proposal  
8 which we have looked at before.

9 MR. ROBERTSON: Yes.

10 THE CHAIR: You are saying it had a credit paper.

11 MR. ROBERTSON: It has this paper as well, core bundle page  
12 1238-1239.

13 THE CHAIR: Where is the reference to the credit paper in the  
14 minutes?

15 MR. ROBERTSON: There is the reference at 746, matters discussed  
16 Mr. Walmsley presented the paper.

17 THE CHAIR: I thought you told me that was the investment  
18 proposal.

19 MR. ROBERTSON: I am instructed ----

20 MR. BARRETT: I wonder if I might rise and clarify something.

21 THE CHAIR: Yes. When he is listening.

22 MR. ROBERTSON: I have taken instructions on this, both papers  
23 went before the Credit Committee. This one, the two-page one  
24 that I just showed you, was prepared by Ms. Edwards who is one  
25 of the attendees.



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2 THE CHAIR: Mr. Barrett, do you want to say something now before  
3 I read it?

4 MR. BARRETT: It is precisely this point, if I may, I may be  
5 misunderstanding but my reading of Ms. Blakey's witness  
6 statement was not for this investment proposal had been  
7 provided to these two meetings. The document you have been  
8 shown is actually dated March, so on the face of it I cannot  
9 understand how it was shown to the February meeting. In  
10 relation to the second meeting, the Credit Committee meeting  
11 in March, my understanding I think as my Lord had shared, it  
12 was not the paper being referred to, it was the credit  
13 briefing the short two-page paper.

14 THE CHAIR: Because it is dated 4th March.

15 MR. BARRETT: Indeed. Speaking for myself, I had understood  
16 Ms. Blakey's evidence to be that the investment proposal was  
17 not before these committees. There may be a dispute about  
18 that, if it is the case that there is evidence there was,  
19 perhaps that could be provided.

20 THE CHAIR: I think so, what we will want is a letter from your  
21 instructing solicitors on this point, saying that having  
22 verified this with the Authority they can confirm or not, that  
23 at the meeting of the Credit Committee on 7th March 2024 there  
24 were the following documents.

25 MR. ROBERTSON: Yes.

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2 THE CHAIR: I think that is what we will want to have. Someone  
3 really has to check it, as Mr. Barrett said, you have a duty  
4 of candour, you have to check it, and I want the solicitors to  
5 be personally satisfied of the veracity of the answer. They  
6 are going to have to see the evidence to support that.  
7 Because, as I said, there is only reference to one paper,  
8 Mr. Barrett says he thinks it is the credit paper, and that is  
9 logical. If there were two papers, then there were two  
10 papers.

11 MR. ROBERTSON: I have taken specific instructions on this,  
12 because the same reference appeared against both ----

13 THE CHAIR: I have done this in other cases. I want to have the  
14 solicitors themselves to verify, having taken reasonable  
15 enquiries with the client, and if there is any evidence, then  
16 produce the evidence as well.

17 MR. ROBERTSON: I think there are e-mails circulating.

18 THE CHAIR: That is fine. Mr. Barrett is not saying you cannot  
19 make the point, he is saying please satisfy the tribunal that  
20 both were before the committee. Can I just look at the credit  
21 paper now. (Pause) When it says bullet point 3 under  
22 "Contour" that the funding agreement will require a sales  
23 company will be incorporated in the funding agreement  
24 requiring 100% of the Contour facility top be covered by  
25 exchange sales at the point of drawdown. I want to

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2 understand, what does that mean in money terms is actually  
3 going to be effectively secured? Is it just the deposits  
4 which have been paid on those sales or is it the full sales?  
5 I just want to know what figure will be in a secured account  
6 at the time of drawdown. It will be clear from the loan  
7 agreement.

8 MR. ROBERTSON: It is deposits on exchange sales.

9 THE CHAIR: Exactly.

10 MR. ROBERTSON: To the value of the loan.

11 THE CHAIR: Yes. Let us get it right. There are two figures.

12 MR. ROBERTSON: Excuse me. (Pause for instructions)

13 I misrepresented that.

14 THE CHAIR: Exactly. There will be two figures: there will be  
15 the value of the exchange sales, but that does not necessarily  
16 mean all that is due at the date of that period. There will  
17 be deposits, okay. If, for example, there is 100 million of  
18 exchange sales and the deposit is 20%, then you will have that  
19 20%. Will that 20% then be blocked in an account?

20 MR. ROBERTSON: Yes.

21 THE CHAIR: That is what I had understood. It is not that you  
22 have 100% of the drawdown amount that is secured. You will  
23 have sales to the value of the drawdown amount, of which you  
24 will have the deposits in respect of that. That is how  
25 I understood it.

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2 MR. ROBERTSON: Yes.

3 THE CHAIR: That is fine.

4 MR. ROBERTSON: Again, I am in the hands of the tribunal's  
5 expertise.

6 THE CHAIR: No, it clearly mitigates the risk but it is not a  
7 complete answer. This is not a situation where you have, for  
8 example, a back-to-back loan where you know it is 100% cash  
9 there secured and you have no worry. Here you will have  
10 whatever the deposit figure is, which is probably 20% or so,  
11 you will have that in a blocked account which will be  
12 available but if there is a meltdown you are going to at least  
13 get that. Okay. In the end there was a forward sale  
14 agreement in respect of the whole tower; is that right?

15 MR. ROBERTSON: (Pause) For tower D1, yes.

16 THE CHAIR: Okay, we will look at it later.

17 MR. ROBERTSON: We will come on to that when we get to the final

18 ----

19 THE CHAIR: Let me just look at it. (Pause) Then you have the  
20 recommendation at the end. Then you will say they have been  
21 looking at all the relevant considerations, and they are very  
22 much aware of what the risks are and what the risks are not  
23 and what the mitigation you can deal with by the structure and  
24 the security.

25 MR. ROBERTSON: And like the tribunal, they are property experts,

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independent property experts.

THE CHAIR: Yes. We will have our lunch break now, unless there is something you want to show me on this document over and above what I have just seen.

MR. ROBERTSON: Subject to the tribunal's questions, I am aiming to finish about 3.30.

THE CHAIR: That is fine. We can go on until about 5. I just want to make sure that we get enough help from both of you before we leave.

MR. ROBERTSON: I just thought it would be helpful for Mr. Barrett to know.

THE CHAIR: At the end we will have a discussion about what both of you would like to submit in writing by Tuesday, if there is it anything more, so we all know what is going to come in. I do want everything to stop at five o'clock on Tuesday, so we can start pulling all this together. Okay. Thank you very much. We will rise until two.

(Adjourned for a short time)

THE CHAIR: Yes, Mr. Robertson.

MR. ROBERTSON: Sir, on the chronology we are now at the GMCA public meeting, which is item 4. The documents, the recording of that you have already been taken to. I would like to briefly turn them up again, at core bundle, page 5.

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2 THE CHAIR: I am just making a note. (Pause)

3 MR. ROBERTSON: Core bundle, page 5, as a reminder, this is the  
4 Part A and the Part B reports, the Part A being the public  
5 report. The only point I want to draw your attention to is  
6 page 16, at 5.3: "Delegation. Any recommendations approved  
7 under the delegations will be subject to the usual due  
8 diligence processes and reported at the next available meeting  
9 of the GMCA."

10 THE CHAIR: What do you say about the point Mr. Barrett made,  
11 which is that the delegation is limited to 5.2 and 5.1?

12 MR. ROBERTSON: If you look at the terms note it says, the  
13 delegation is for 5.1.

14 THE CHAIR: Yes.

15 MR. ROBERTSON: The approval of the loan itself, you see the  
16 approval on page 14. The Part B report gives a more detail on  
17 the lending to Renaker, starting at page 18. My learned  
18 friend has taken to that. Summarises on page 19 the programme  
19 and exit strategy, construction having been commenced for both  
20 of the schemes. At the bottom of page 19 the condition of  
21 drawdown or (unclear) sales in place at the level needed to  
22 repay the loan. That is the point we covered before lunch.  
23 Financial information on page 20.

24 I think, as you observed earlier on, you have the  
25 Authority considering this report on the basis of the process

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2 that we have been through so far. That is to be expected, the  
3 way an Authority works. You would not expect them to be  
4 trawling all over the details of loan pricing. That has been  
5 dealt with.

6 THE CHAIR: All the percentages at first blush are different from  
7 before, that is because you have separated out the loan  
8 management fee; is that right?

9 MR. ROBERTSON: Yes.

10 THE CHAIR: But when you add that back in, it is the same figure  
11 as before?

12 MR. ROBERTSON: Yes. There is a margin figure which is margin  
13 plus loan management fee. Of course, there is also the  
14 arrangement fee as well.

15 THE CHAIR: Is that not different?

16 MR. ROBERTSON: Yes, that is separate.

17 THE CHAIR: So you have the -- yes.

18 SIR IAIN McMILLAN: Chairman, could I ask for clarification here  
19 in the rates of interest there. The arrangement fee was in  
20 the paper that went to the two committees. The margins here  
21 are 2% and 2.65. In the papers that went to the committee  
22 they were 3 and 3.65. In this paper, they have lost 1% but  
23 there is a loan management fee of 1%, so the aggregate is the  
24 same. Is that the point you are making?

25 MR. ROBERTSON: Exactly, yes.

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2 SIR IAIN McMILLAN: Thank you very much.

3 THE CHAIR: Just remind me, what is the period of the loans?

4 MR. ROBERTSON: They are to be repaid by 2027, three-year loans.

5 The reason for that is that in any event the fund comes to an  
6 end in March 2028.

7 THE CHAIR: If they are three-year loans and you have an  
8 arrangement for your flat percentage, effectively you are  
9 paying one-third of the interest. If you add that to the  
10 interest, the effective charge is certainly going to be more  
11 than the base plus the margin, it is base plus the margin plus  
12 obviously the loan management fee, plus that at a rate of  
13 one-third of that figure.

14 MR. ROBERTSON: Yes.

15 THE CHAIR: The question is, does that appear to be, let us say, a  
16 rate that is within 3(2) or not?

17 MR. ROBERTSON: I think it is the generous margin of judgment, the  
18 appreciation of the Authority. As I say, it has gone through  
19 a process, it had independent scrutiny, both the Gateway Panel  
20 and the Credit Committee. If somebody had looked at that and  
21 said, "Hang on, this is absurdly generous to Renaker, you the  
22 Authority are not getting good value for money here", and they  
23 would have said so. That is the point of scrutiny.

24 We then go on in the chronology, you will see in the  
25 chronology there are various items in red which I am not going



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2 to address because my learned friend has taken you to those.

3 I just really want to run through the steps that took place

4 between March and execution of the loans documentation on

5 22nd November later that year. We see there is heads of

6 terms, which are in this bundle at page 34.

7 THE CHAIR: I do not think I have looked at that.

8 MR. ROBERTSON: We have not, no. You will see, this really picks

9 up on the point that Sir Iain was just raising there, on page

10 34 about two-thirds of the way down we see the facility term,

11 we see the arrangement fee, we see the interest rate, which is

12 based on the European State Aid base rate, we see the margin,

13 and the provision for reduction in the margin, that is for

14 facility one, that is D1, and then facility 2 there is the

15 margin, to which you then add the loan management fee,

16 statements as to whether that is to be made payable, and so

17 on.

18 THE CHAIR: Is there any significance in the fact that when you

19 look at the European base rate, which is, is it 0.9%,

20 whatever, higher than the UK base rate, you are looking at the

21 higher base rate you would get for Euros. The lending here is

22 in sterling. So, the base rate is 0.9% higher than it would

23 otherwise have been.

24 MR. ROBERTSON: Yes. What matters at the end of the day is the

25 total cost to the developer for entering into the loan.

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2 However you calculate it, it is the overall figure, but I do  
3 not think anything turns on the fact they are using an EU  
4 starting point which, as you say, is predicated on the use of  
5 the Euro, not on the pound.

6 THE CHAIR: The rates had diverged at that stage.

7 MR. ROBERTSON: They had. Remember, this fund started when it was  
8 subject to EU State Aid rules, so it sort of continued on that  
9 basis. That seems to me the reason why it has not been  
10 revisited.

11 That is heads of terms being agreed.

12 THE CHAIR: Heads of terms, who would that have been, who would  
13 that have gone to?

14 MR. ROBERTSON: (Pause) It was agreed between the Authority and  
15 the management of Renaker, their finance team I am told.

16 THE CHAIR: Okay.

17 MR. ROBERTSON: The next stage is the red book valuations, which  
18 are again ----

19 THE CHAIR: When you look at the heads of terms, you have got that  
20 very important reservation at the top.

21 MR. ROBERTSON: Yes, typical heads of terms.

22 THE CHAIR: I know, but it fits in with the point you made  
23 earlier.

24 MR. ROBERTSON: Yes, it does.

25 THE CHAIR: Things only crystallise once you have got the loan

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2 agreements signed and everyone understands these things.

3 MR. ROBERTSON: Nothing is agreed ----

4 THE CHAIR: Nothing is agreed until you sign the final piece of  
5 paper.

6 MR. ROBERTSON: Nothing is agreed until everything is agreed.

7 THE CHAIR: Yes, we know that.

8 MR. ROBERTSON: If some intervening event happens like a property  
9 crash, Lehmans going under ----

10 THE CHAIR: The rate can change depending on the red book  
11 valuation, all sorts of stuff.

12 MR. ROBERTSON: Yes, you can have a change of Prime Minister. Liz  
13 Truss can become Prime Minister.

14 THE CHAIR: That is a political point. I will not agree with  
15 that.

16 MR. ROBERTSON: Interest rates can change is the only point I am  
17 making. Just so that you have seen them but I am not going to  
18 take you into them, there are red book valuation reports which  
19 are in the core bundle at pages 158, which is for Contour,  
20 carried out by Knight Frank.

21 THE CHAIR: I am just going to make a note. (Pause)

22 MR. ROBERTSON: We summarise what they do in the supplemental  
23 skeleton, Annex 1 at paragraph 11: "Third party valuation  
24 reports which review the property ...(reads to the words)...  
25 as well as performing a property risk analysis", so carried

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2 out by an IRCS surveyor. D1 is at page 353.

3 THE CHAIR: These are fairly detailed, are they not?

4 MR. ROBERTSON: Yes.

5 THE CHAIR: You can see the track record of the other

6 developments. (Pause) I will read this in my own time. Okay,

7 so that is Contour. The other one is Trinity at 353. Okay.

8 MR. ROBERTSON: That is correct.

9 THE CHAIR: Yes.

10 MR. ROBERTSON: The next stage is -- this is item 13 on the

11 chronology -- 15th October, "Credit Committee approval of

12 matters arising from the proposed forward sale of the D1

13 development", and we find that in the Phase 2 bundle at

14 page 799.

15 THE CHAIR: Okay, that is phase 2.

16 MR. ROBERTSON: Bundle page 799. You will see that the attendees

17 include Mr. Goldrick, the external member. I nearly called

18 them "shelf stackers" earlier. They are capital stackers.

19 Anyway, you will see that it has got recommendations for

20 approval and it is about the exit strategy from D1, Renaker

21 indicating that it has got a forward sale agreement in

22 negotiation and the Committee being informed of that.

23 Then on the following page, 800, Ms. Blakey is outlining

24 an alternative option where the deposits are held in a Renaker

25 account which is charged to the GMCA. The Committee is saying

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2 that that is the better way of dealing with things. Then  
3 there is the decision of Ms. Blakey to feed back to Renaker in  
4 line with the above.

5 They also, to be noted, are concerned about the  
6 implications of these proceedings. On page 801, we see that  
7 the action as a result of that was that there should be an  
8 amendment to the arrangements for fee instalments to be  
9 amended as indicated there. So the Committee is active in  
10 taking decisions and approving amendments. As things develop,  
11 changes have to be made and that is what is happening there.

12 We then get item 14 on the chronology, the project cost  
13 reviews. They are in the Phase 2 bundle at page 1275 for  
14 Contour. That is carried out by Dalbergia. Following that in  
15 the bundle at page 1332, there is a project costs review  
16 carried out on D1 by Naismiths. They are monitoring surveyor  
17 reports. They review and give their opinion on the  
18 construction costs, the progress of the programme and other  
19 construction matters. That report includes recommendations  
20 for collateral warranties that the Authority may want to take.  
21 Again, it is all part of the process of due diligence.

22 Dalbergia happens on 24th October. Naismiths comes a  
23 little bit later on 11th November. In between those two  
24 project costs reviews, there is also a report -- this is item  
25 15 on my chronology -- setting out the detailed terms of the

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2 forward sale agreement which are circulated to the Credit  
3 Committee for approval. That is in the core bundle at  
4 page 1240. It is headed "Trinity tower D1 -- note for Credit  
5 Committee" and then it sets out the terms of the forward sale  
6 agreement. They set out under the heading "Financial due  
7 diligence", what is known about the purchase under the forward  
8 sale agreement.

9 Over the page, there is security and inter-creditor  
10 deed, step in, conclusions and recommendations. GMCA's legal  
11 advisers -- I think that is Addleshaw Goddard -- confirm that  
12 as a result of the terms of the inter-creditor agreement,  
13 GMCA's security position is not prejudiced, and then details  
14 are given of that as to why that is the case. Therefore, the  
15 recommendation to the Committee is to approve the proposals.

16 We get the Credit Committee final wrap up on 19th  
17 November and that is found in the Phase 2 bundle at page 1499.  
18 At the top of 1399, there is the Contour Trinity D1 wrap-up  
19 report to the Credit Committee, November 2024. This report  
20 seeks Credit Committee approval to the outcome of negotiations  
21 with Renaker around lending costs, together with various other  
22 points, where the Credit Committee is asked to confirm its  
23 approval to variations from the proposals set out in the  
24 reports, the lending that was originally approved against, or  
25 variations between the heads of terms and the loan agreement.

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2 Then it then sets those out. So, again, it is just making the  
3 point that due diligence and developments do lead to changes  
4 to the terms, as initially agreed in the heads of terms, and  
5 will have to be reflected in the final loan documentation.

6 THE CHAIR: Yes.

7 MR. ROBERTSON: Over the page on 1400, in particular cross  
8 collateralisation, it concludes, "The panel are asked to  
9 confirm that they are satisfied that this provision is  
10 sufficient, noting the position is significantly de-risked  
11 following the agreed forward sale for D1, and agreed sales at  
12 Contour, exceeding the loan account." So that is the Credit  
13 Committee wrap-up.

14 At item 21 of the chronology, it is reports on title,  
15 which are in the core bundle at page 1249, which is the report  
16 on title for Contour. The report on title for D1 is at 1326,  
17 and those being satisfactory ----

18 THE CHAIR: Just give me the page numbers again. Contour is 1249.

19 MR. ROBERTSON: 1249 for Contour, for tower D1 it is 1326.

20 THE CHAIR: We need to change what you put there, do we?

21 MR. ROBERTSON: Yes, I do apologise for getting those references  
22 wrong.

23 THE CHAIR: Okay, the next one.

24 MR. ROBERTSON: Those are the reports on title. The next item is  
25 22, loan agreement credit report, and that is to be found at

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2 the core bundle at 1242.

3 THE CHAIR: Yes.

4 MR. ROBERTSON: This is a report following the red book valuations  
5 to the treasurer and it is intended to summarise the results  
6 of the due diligence process for the treasurer, Steve Wilson,  
7 who, if satisfied with the results of the due diligence, will  
8 use delegated authority to approve the loan terms and  
9 documentation.

10 It also includes, as we have explained in our  
11 supplemental skeleton, Annex 1, paragraph 15, reference to  
12 reports carried out by Addleshaw Goddard, an overview report  
13 and construction report, which have not been disclosed due to  
14 being legally privileged. They also form the basis for this  
15 report. If we look at the report, one will see the  
16 background, halfway down, confirming that it is 120 million.

17 THE CHAIR: What page are you now?

18 MR. ROBERTSON: 1242 of the core bundle.

19 THE CHAIR: That is where I am, yes.

20 MR. ROBERTSON: It sets out what Renaker is investing, and what it  
21 is investing ahead of first drawdown, and then summarises in  
22 the final paragraph on that page the security, referring to  
23 the red book valuations and referring to the  
24 cross-collateralisation.

25 Over the page at 1243, in relation to the Contour



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2 facility, the covenant which has already been met, there is  
3 the request for approval. There, it lists what due diligence  
4 has been carried out. There is the reference to the two  
5 Addleshaw Goddard reports which you do not have.

6 There is a reference to the proposals being approved by  
7 Gateway on 22nd February, the Credit Committee on the 7th  
8 March, the further wrap-up report, and then over the page, at  
9 1244, a summary of the changes that have taken place, which  
10 you have seen in the wrap-up report, and a reference to the  
11 heads of terms.

12 Over the page, at 1245, there is a summary of the red  
13 book valuations and at 1246, a summary of the report on title.  
14 Then the project costs review is carried out by Dalbergia and  
15 Naismiths, noting no adverse findings. Then at 1247, there is  
16 an initial monitoring surveyor report and then security  
17 documents. That sets out what the security documents will  
18 comprise. We have the conditions precedent and then, at the  
19 bottom of 1247, Ms. Blakey's signature as the Director of  
20 Strategic Finance and Investment. Then over the page on 1248,  
21 there is the GMCA treasurer, Steve Wilson's signature.

22 THE CHAIR: Yes.

23 MR. ROBERTSON: On the chronology, you finally get the term  
24 facilities agreement, item 23, dated 22nd November 2024. It  
25 is page 749. As you can see in the right-hand corner, it is

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2 the execution version. That is the 2024 Renaker loans  
3 actually entered into. Now, I am contemplating how best to  
4 provide assistance.

5 THE CHAIR: On this, yes, because you need to pull all the threads  
6 together on why you say that it is all properly secured and  
7 collateralised, everything has been taken into account, why it  
8 is low risk, and in view of the mitigating and protective  
9 measures and all that sort of stuff. That needs to be put  
10 together by cross-referencing to the relevant clauses, so  
11 where there is cross-collateralisation, for example, that all  
12 needs to be put together.

13 MR. ROBERTSON: I have it in a document.

14 THE CHAIR: That is all right.

15 MR. ROBERTSON: Which, rather than read it out, I would like to  
16 put in and provide to my learned friends, obviously, so they  
17 can make their written submissions on it by the 5 p.m. Tuesday  
18 deadline. I think that is a more efficient way.

19 THE CHAIR: The thing is that if he wants to make submissions on  
20 it, he needs to have it well before then so he can make any  
21 comments on it, does he not? If you are both submitting your  
22 documents on 5 p.m. on Tuesday ----

23 MR. ROBERTSON: I am not going to put this in by 3.55 p.m. on  
24 Tuesday. I was proposing to put this in first thing tomorrow  
25 morning.

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2 THE CHAIR: And then he will have the opportunity by 5.00 p.m. on  
3 Tuesday. That is fine. It is not rocket science.

4 MR. ROBERTSON: It is more efficient.

5 THE CHAIR: You can guess what we are really interested in and if  
6 it fulfils the function that I have mentioned today, you may  
7 want to look at it again tonight to make sure that it 100%  
8 covers all the points.

9 MR. ROBERTSON: I think that is the most efficient way of dealing  
10 with it.

11 THE CHAIR: If you have it in by 2 o'clock tomorrow, that is fine  
12 and that is plenty of time for Mr. Barrett to look at it.

13 MR. ROBERTSON: Sir, I think that is all I wanted to say by way of  
14 the chronology. The only other document that I think you  
15 indicated that you wanted to see again was the interest rate  
16 setting paper.

17 THE CHAIR: I did, yes.

18 MR. ROBERTSON: Obviously, we have numerous iterations of it  
19 because it was a working document. I should explain that the  
20 interest rate setting paper is not unique to this transaction  
21 or large transactions. It is used for every loan made under  
22 the fund. It is a standard process that is carried out by the  
23 Authority. It is addressed in the supplemental skeleton at  
24 Annex 1, paragraphs 24-26. I should say that the latest  
25 iteration of it is in the core bundle at page 145. If you

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2 turn that up, you will see that the author is the transaction  
3 manager and then it is reviewed by another member of the  
4 Credit Committee. Indeed, my learned friend took you to an  
5 example of her reviewing his draft.

6 THE CHAIR: So, Catherine Edwards is a member of the Credit  
7 Committee?

8 MR. ROBERTSON: Yes.

9 THE CHAIR: Is Mr. Walmsley a member of the Credit Committee as  
10 well?

11 MR. ROBERTSON: Yes.

12 THE CHAIR: They are both members of the Credit Committee.

13 MR. ROBERTSON: Mr. Walmsley was the transaction manager.

14 Catherine Edwards was appointed as an independent scrutineer  
15 for the purposes of this transaction. You have seen her name  
16 previously as attending the Credit Committee.

17 THE CHAIR: Is she a member of the Credit Committee?

18 MR. ROBERTSON: No, she is not a member of the Credit Committee.

19 She is listed as attending the Credit Committee. That is my  
20 error. I inferred that she was a member of the Credit  
21 Committee from attending it, but she is not.

22 THE CHAIR: What about Walmsley?

23 MR. ROBERTSON: He is the transactions manager.

24 THE CHAIR: I know, but is he a member of the Credit Committee?

25 MR. ROBERTSON: I am told he is not.

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2 THE CHAIR: I doubt that. Yes.

3 MR. ROBERTSON: My learned friend made great play of the timing of  
4 the first iteration of the interest rate setting paper that we  
5 have been able to unearth, being produced the same week that  
6 his then instructing solicitors wrote seeking disclosure of  
7 information.

8 THE CHAIR: Yes.

9 MR. ROBERTSON: The inference was that there is a cause and effect  
10 that this was somehow cobbled together as a result of that.  
11 I am instructed that is not the case. Any timing is entirely  
12 coincidental.

13 THE CHAIR: Let us break it down. You could say that the first  
14 iteration was not on the 19th and there may be an earlier  
15 version. If you are saying that, then we need to see evidence  
16 of that. If you are saying that it was created but not as a  
17 reaction to the pre-action disclosure, you are saying that you  
18 say that on the basis of instructions. When I look at the  
19 timing of everything, was the allegation put prior to  
20 Blakey 5th that this document was a reaction to the pre-action  
21 disclosure or is that something that only appears in the  
22 skeleton argument and at this hearing?

23 What has happened is this. Not a great deal happened on  
24 this case by way of preparation until after they have had the  
25 disclosure. You then had the second CMC, at which point

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2 everyone gets their skates on and tries to get things put  
3 together. I think everyone has done a good job on that.  
4 However, as a matter of fairness, if you are saying to me the  
5 first time it is alleged that there is a cause and effect has  
6 been, in effect, in the run-up to this hearing, and you want  
7 to say that that is not what actually happened, then the  
8 question is how does either side evidence that?

9 What Mr. Barrett is saying is that it is just a question  
10 of timing. You have got a document which looks as though it  
11 has been made on 19th April and you have our request, let us  
12 say, five days before, whatever it was, and so he is saying  
13 there is an inference that there is a cause and effect. You  
14 are saying that that is not the right inference to take,  
15 either because you are saying that the document may have been  
16 created before the 19th, but that should be easy to find out  
17 one way or another, or because in fact that was not a trigger  
18 and it was going to happen whatever happened anyway. You say  
19 this is a document that is created for every transaction under  
20 the fund and because of that, then it is not a cause and  
21 effect because it was always going to be done, because that is  
22 how it works.

23 MR. ROBERTSON: The first allegation of cause and effect was at  
24 this hearing.

25 THE CHAIR: If that is right, then I have got no problem with you

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2 answering that (I am not encouraging you) with a -- probably,  
3 it is better to have it as a witness statement because if that  
4 is what the situation is, a one-page of witness statement  
5 confirming what you have said. I do not want to leave  
6 something like this in an informal way. In fairness to  
7 Mr. Barrett, if you are going to be making submissions in your  
8 way and if he is going to make submissions in his way, it is  
9 better that it is done by way of evidence which is a clear  
10 public record rather than what is being said orally.

11 I am not stupid, I can see where people have changed  
12 their case as they have gone along and where people have added  
13 things. I have not complained of either party doing that  
14 because I appreciate that everyone is doing their best to put  
15 the case together and they have been doing a very good job on  
16 both sides. However, things like this, I would rather have  
17 formally covered.

18 MR. ROBERTSON: We will do that.

19 THE CHAIR: So, Mr. Barrett can look at it.

20 MR. ROBERTSON: Yes.

21 THE CHAIR: If he wants to respond to it, he is fully entitled to  
22 respond to it.

23 MR. BARRETT: May I just say something?

24 THE CHAIR: Of course.

25 MR. BARRETT: I think I do need to record my concern. I am not

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2 keeping a running tag and I understand that instructions do  
3 come through, but there have been a significant number of  
4 occasions today on matters of important fact where my learned  
5 friend is saying, "I have got instructions" and he is then  
6 saying something quite different to the witness statements.

7 That is a concern for myself and my client. If that is  
8 going to be done, I would ask that there is a sworn witness  
9 statement from the relevant witness. I would say that when  
10 this is occurring, this is something I would like to make  
11 submissions on after today's hearing because I do say it goes  
12 to the weight and quality of the evidence and then I can deal  
13 with that.

14 THE CHAIR: That is absolutely fine. Mr. Barrett makes the point.  
15 Normally, I am quite precise about this because I normally  
16 require a letter at the end of it and we do a running total of  
17 what has been said on instructions. As you know from other  
18 hearings, I require some evidence to support anything that has  
19 been said that is not evidence because I am quite strict about  
20 having a proper audit trail of what has been said on  
21 instructions.

22 We all know what it is like at the Bar. Sometimes,  
23 people give you instructions and it is all done on the hoof  
24 and at very short notice and then later on, you look at it and  
25 it is not quite what you intended. I think Mr. Barrett has a



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2 very good point. So, in so far as you have been saying things  
3 today which are on instructions, I think he is entitled to  
4 say, "I would like to see a witness statement that I would  
5 like to have the right to respond to." I think his stance is  
6 perfectly fair.

7 MR. ROBERTSON: We hear what you say.

8 THE CHAIR: Mr. Barrett, have I got that right?

9 MR. BARRETT: Yes.

10 THE CHAIR: I am with you on that. You are perfectly entitled to  
11 say that if Mr. Robertson is going to be relying on stuff on  
12 instructions, let us have it in writing. I normally do it in  
13 one of two ways. I normally say that the underlying client  
14 has to swear an affidavit or a witness statement verified by a  
15 statement of truth, or that the solicitor does it, but the  
16 solicitor has to confirm that they have seen the underlying  
17 material and it is not merely just relaying what they have  
18 been told, but they effectively confirm, "Yes, we are  
19 satisfied with what was said."

20 The firms involved in this case are both regulars and  
21 known to the tribunal and I know that neither will put their  
22 neck on the line for any one client to say something that  
23 could in fact not be 100% accurate. I think Mr. Barrett's  
24 preference is probably in this case to have a witness  
25 statement from someone on the Manchester side. I do not mind

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who it is as long as it is someone who can say what their enquiries have been, who they have spoken to, and puts it together. There is not a huge amount of things. You should be able to get that all done by close of business tomorrow, but you will have to take instructions.

MR. ROBERTSON: Yes.

THE CHAIR: You have said things on instructions, so presumably that material is there already. If you can do that by five o'clock tomorrow and then Mr. Barrett has the right to comment on that in his final response, which we are going to get on Tuesday.

MR. ROBERTSON: Yes.

THE CHAIR: Does that give you enough time or do you think that we should push back a day the timing of this next round of submissions until Wednesday, at five?

MR. BARRETT: My Lord, I would be keen, as I think everyone would, to do it by Tuesday if that is possible.

THE CHAIR: It should be possible, I want to make sure that no one is under too much pressure.

MR. BARRETT: Can I request this: we work for the moment on the basis it will be Tuesday. If it is surprisingly long and large at that stage, we could revisit the question if that is necessary; but for the moment if we try to stick to Tuesday would be my suggestion.

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2 THE CHAIR: That is fine. I am happy. You are the one who has  
3 the burden to respond to. If you do need further time on this  
4 one point, get your solicitors to send an e-mail to the  
5 registry and I can give you whatever extension you need, if  
6 I think that is appropriate.

7 MR. BARRETT: Thank you, my Lord.

8 MR. ROBERTSON: As to the other point that you just raised, which  
9 is the first iteration that we have in the disclosed  
10 documents, we cannot say hand on heart that definitely was the  
11 first iteration but I am not going to press that point,  
12 because we do not have an earlier iteration to disclose.

13 THE CHAIR: We will work with what evidence we have.

14 MR. ROBERTSON: We will work on that basis.

15 I was just going to briefly go through the IRSP. As  
16 I say, we have explained what it is in the supplemental  
17 skeleton at paragraphs 24-26.

18 THE CHAIR: You are looking at the version at page 145.

19 MR. ROBERTSON: Yes.

20 THE CHAIR: What is the date of that one?

21 MR. ROBERTSON: This is the one, this is page 157, and it says it  
22 was last modified on 25th November.

23 THE CHAIR: That is the date after -- no, it is three days after.

24 MR. ROBERTSON: Three days after execution. It is the last one in  
25 the bundle, but it is really just to do a page turn on it and

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2 see if there are any points on which I can assist you further.  
3 We covered this in some detail this morning in relation to the  
4 reference rate communication and I think now we have  
5 understood its authorship. It is the transaction manager,  
6 that is why he knows this and is recording it so that the  
7 Authority has a proper record. Why is it important to have a  
8 proper record, other than just principles of just good  
9 governance? The answer is, of course, this funding comes from  
10 central government. As you have seen this morning, there is a  
11 funding, revenue split with the sponsoring Ministry for  
12 Housing and Local Government. This report, again I hesitate  
13 to use the phrase "I am instructed" but I did ask, I do wish  
14 to help the tribunal, I am instructed that the report itself  
15 does not go to the Ministry, it is kept on the Authority's  
16 records. The Ministry have the right to call for this report  
17 and all other reports relating to all other loans that are  
18 made from the fund. What is pulled from this report are  
19 details as to -- what the Ministry does get is a report in  
20 spreadsheet form of essentially the revenue from the fund so  
21 that the Ministry can check what funding is due to it and what  
22 revenue can be retained by the Authority and applied for the  
23 Authority's purposes. I do not have anything specific that  
24 I want to draw the tribunal's attention to in relation to the  
25 IRSP. I have said what I want to say in writing in the

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2 supplemental skeleton.

3 THE CHAIR: Okay. Because Mr. Barrett took us through, and it was  
4 quite helpful the way he did it, identifying where he said the  
5 battle line is drawn, he had his various criticisms. He had  
6 the SPV point. He had the point about that it was predicated  
7 looking at the position of that company, which ultimately went  
8 into voluntary liquidation. Then you had in the equivalent  
9 Mr. Whitaker, but there is no appraisal, no information about  
10 his own credit situation, because you do not know what his  
11 liabilities are, which are different from a limited company.  
12 He had quite a few ----

13 MR. ROBERTSON: We have responded to those.

14 THE CHAIR: If you have responded to those ----

15 MR. ROBERTSON: In the supplemental skeleton, at paragraph 27.

16 THE CHAIR: Let us have a look at those, then. Let us have this  
17 open and your supplemental skeleton. I want to make sure that  
18 you have covered those.

19 MR. ROBERTSON: Yes.

20 THE CHAIR: They are in the Annex 1.

21 MR. ROBERTSON: Yes.

22 THE CHAIR: (Pause) Okay.

23 MR. ROBERTSON: The documents that we put into the main bundle  
24 this morning, when I drew your attention to them in  
25 housekeeping, include the Companies House declaration of

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solvency.

THE CHAIR: That is a requirement, is it not?

MR. ROBERTSON: Yes. My learned friend repeatedly referred to XQDL going insolvent. It did not.

THE CHAIR: It went into liquidation.

MR. ROBERTSON: It went into liquidation.

THE CHAIR: The question I raised is, is it insolvent or solvent liquidation. I do not think there is any dispute, it is not an insolvent liquidation. His point is slightly different, which is that you have the SPVs, but you are not looking solely at the SPVs and deciding what the rates are, or one of the factors. You are looking at a company, that company then goes out of the picture because it has gone into liquidation for whatever reason and for that you get substituted Mr. Whitaker. As regards Mr. Whitaker, whilst of course he may have received the novation, which will include whatever the cash reserves are of the company, it does not tell you about what personal liabilities he has, whether or not he has other guarantees elsewhere. I think that is the point Mr. Barrett was making.

MR. ROBERTSON: Yes.

THE CHAIR: You say in relation to that point?

MR. ROBERTSON: We say, first of all, that XQDL was used as a proxy to demonstrate the level of funding available in the

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2 Renaker group, that is paragraph 27.1. In 27.2 the finances  
3 of the wider Renaker group were considered by the GMCA, and  
4 that is referred to in the Gateway paper and we have also seen  
5 their management accounts, and we have given you the reference  
6 at 27.2 of Annex 1 (ii).

7 In the process that you have been taken through as we  
8 went through the chronology, there has been no doubt raised as  
9 to the overall solvency of what appears to be the highly  
10 successful Renaker group; solvency I use in the loosest term.  
11 It is capable of funding these developments, it has funded a  
12 number of them. As I say, the Authority has never lost a  
13 penny. On the contrary, they have been successful  
14 revenue-generative developments. The Authority has taken  
15 appropriate security in relation to these two loans.

16 THE CHAIR: Yes, but if we look at page 154, the point that  
17 Mr. Barrett is saying is that you are looking at a reference  
18 to the regulations, okay, and he is talking about the Subsidy  
19 Control Regulations 2022. He is saying it is an element in  
20 the interest calculation that you look at the credit rating.  
21 His case is on a number of levels: first of all, you are  
22 looking at the SPVs and there is no guarantee; secondly, if  
23 you want to look as a proxy of anything, you looked initially  
24 at XQ Developments which would have audited accounts so you  
25 can see roughly what the liabilities are on the other side of

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2 the sheet. When they come out, you then say, well, we have  
3 looked at XQ Developments and we are going to rely on XQ  
4 Developments, which has now gone into insolvency, as a proxy  
5 for Mr. Whitaker's financial position. On the basis of that,  
6 he is saying, what are you looking at his financial position  
7 for given that he is not the borrower. If you are looking at  
8 that as a proxy for his financial position, the figures of XQ  
9 Developments do not tell you what his liabilities are.

10 Mr. Barrett, have I summarised you fairly?

11 MR. BARRETT: You have, my Lord. That is an insertion in the  
12 middle, once XQ drops away, all that is left is Mr. Whitaker,  
13 and I say (unclear).

14 THE CHAIR: Exactly, once you get back to saying you are just look  
15 at Mr. Whitaker, you have the two objections: one is he has  
16 not given a guarantee, so why are you looking at him rather  
17 than the SPV? Two is fair enough, you want to look at him,  
18 let us look at the other half.

19 MR. BARRETT: Yes.

20 THE CHAIR: We can see of course he probably has lots of assets.  
21 He has shares in all these companies. He has probably got the  
22 cash taken out of XQ Developments, but that does not tell you  
23 whether or not there is some sort of back-to-back guarantee.

24 MR. BARRETT: That is the submission, due diligence.

25 MR. ROBERTSON: The SPVs in question, you will recall that it is a



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condition of the loans that they are equity funded to a very high level.

THE CHAIR: They are equity funded to a high level. That is true.

SIR IAIN McMILLAN: May I ask a question here for clarification, I think it is probably a question to both Mr. Robertson and Mr. Barrett. It is about XQ Developments. They went into liquidation, was it insolvent or was it not?

MR. ROBERTSON: It was not insolvent. As we say in our supplemental skeleton, at paragraph 27, Annex 1, paragraph 27.3, at the time of the voluntary liquidation of XQDL it had substantial reserves of cash which would be returned to Mr. Whitaker after the voluntary liquidation was completed.

THE CHAIR: Give me the reference. Let us have a quick look at the documents, shall we?

MR. ROBERTSON: It is in the main bundle. It starts at page 2128. You see at 2128 a notice of appointment of liquidator and a members or creditors voluntary winding up. Then on 2131, we get the notice of statutory declaration of solvency. On page 2134 there is Mr. Whitaker's declaration as the sole director of XQDL: "I have made a full inquiry into the affairs of this company and having done so I have formed the opinion this company will be able to pay its debts in full together with interest at the official rate within a period of 12 months from the commencement of the winding up."

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2 Then, on 2135, you see the estimated statement of assets  
3 and liabilities at 14th October 2024. The assets are set out  
4 in the right-hand column: liabilities, nil; preferential  
5 creditors, nil; debts secured by floating charges, nil. Some  
6 minor other creditors, some accruals and there we see the  
7 figure for total surplus. It is highly solvent.

8 SIR IAIN McMILLAN: Mr. Barrett, do you agree with that, that it  
9 was a voluntary liquidation and it did not go into liquidation  
10 because it was insolvent and it was to avoid wrongful trading?

11 MR. BARRETT: I am not sure on that last point, my Lord, but other  
12 than that last point, I am in full agreement with everything  
13 you just said, there is no dispute.

14 SIR IAIN McMILLAN: No dispute there. Thank you.

15 THE CHAIR: The point is that if it was an insolvent liquidation,  
16 obviously that would be highly material, but it is not. You  
17 still have the points that Mr. Barrett has made about the  
18 proxy point, I do not want to summarise it all again, but you  
19 still have the points that he has made. You say you have  
20 given your answer to it and we have to take a view.

21 MR. ROBERTSON: Yes, the SPVs ----

22 THE CHAIR: You have nothing he is to add.

23 MR. ROBERTSON: ---- the equity arrangements before the loans  
24 means that you have a high degree of assurance in the SPVs.  
25 If you are a banker looking at Renaker, you have their past

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2 performance for similar structures, there is a relatively low  
3 loan to value. You look at the quality of the security they  
4 are offering, you look at where they have already got to on  
5 forward sales.

6 THE CHAIR: Some of those are ones that you would expect them to  
7 be really interested in. Others, at least one of those, is  
8 not so clear; but yes, okay.

9 MR. ROBERTSON: Whilst there is no parent company or personal  
10 guarantee from Mr. Whitaker, you do have  
11 cross-collateralisation to a certain extent as between the two  
12 borrowers. You have additional security on properties falling  
13 outside the two projects. It is a reasonable view to take  
14 that this is a commercial proposition. That is the approach  
15 that the Authority has taken and has withstood external  
16 scrutiny through its Gateway Panel and through the Credit  
17 Committee from people who are highly experienced in this  
18 industry. What else can an Authority do?

19 THE CHAIR: I am sure Mr. Barrett has a lot to say about that last  
20 proposition, about what an Authority might do.

21 MR. ROBERTSON: It is what one could reasonably expect of an  
22 Authority.

23 That is all I wanted to say on the chronology.  
24 I indicated that I had something to say on relief and it will  
25 not be long. That is my fourth and final topic.

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2 THE CHAIR: What we will do is, you deal with relief. We will  
3 then have our afternoon break. Then Mr. Barrett can have the  
4 last slot of the day.

5 MR. ROBERTSON: As I say, I am slightly ahead of time.

6 THE CHAIR: You are going at a sensible speed.

7 MR. ROBERTSON: In terms of relief, this is in our supplemental  
8 skeleton.

9 THE CHAIR: You are saying if we take the view that section 3(2)  
10 was not engaged and that in fact it was a subsidy, you want to  
11 have a further hearing or at least the right to file further  
12 submissions on the consequences of that finding. For my part,  
13 I have no problem with that, because I think everyone is going  
14 to see where we land. I know what Mr. Barrett's position is,  
15 if we decide that it falls outside 3(2), we just simply quash  
16 it. You say, no, it is not as simple as that, there is a  
17 number of permutations. What he says is, we just quash it and  
18 you sort out the mess and you make a new decision or change  
19 the terms or whatever. Sorry, Mr. Barrett.

20 MR. BARRETT: It may be helpful if I say something about that.

21 MR. ROBERTSON: I think it might be more convenient if I were to  
22 say ----

23 THE CHAIR: If he is happy once you have the decision, for us to  
24 come back on the form of relief, then if that is ----

25 MR. BARRETT: That is the point, my Lord.

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2 THE CHAIR: That is very helpful. That saves time. That is what  
3 I would be inclined to in any event.

4 MR. ROBERTSON: There is one follow-up point I wanted to place on  
5 record, it is this and it was reminded to me in morning. It  
6 did not make its way into the skeleton, but it is worth  
7 bearing in mind, as I mentioned earlier, the fund came to an  
8 end in March and we are just in run-off. This is not a  
9 situation where if everything was quashed, the Authority could  
10 necessarily go back and award a new loan because the fund is  
11 closed. It closed in March. I just wanted to place that on  
12 record.

13 THE CHAIR: There is all sorts of things that could happen.  
14 I think Mr. Barrett agrees with the tribunal that this is best  
15 to be dealt with once we have the ruling of the tribunal on  
16 the key point.

17 MR. ROBERTSON: Sir, unless I can assist the tribunal further,  
18 those are the Authority's submissions.

19 THE CHAIR: Mr. Barrett, how long do you think you are going to  
20 be?

21 MR. BARRETT: My Lord, can I suggest, what I intend to do, if you  
22 tell me it is unhelpful and you want something different,  
23 I will change my tact. What I intend to do at the moment is  
24 seek to deal with what I apprehend from the debate to be the  
25 more significant issues and seek to give you my substantive

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2           answers on those points. Frankly, I have not had the time to  
3           give detailed references for the various points of principle  
4           or substance I want to make, what I would therefore wish to do  
5           is make the submissions on the substance today, give you my  
6           answers to my learned friend's main points as I understand  
7           them to be. Then, as part of the further submissions you  
8           mentioned if I am able to follow that up with, as it were, a  
9           referenced and slightly more detailed version of that in  
10          writing so that you have that. That would be my preferred  
11          approach. If that is the approach I take, I think I will be  
12          around 45 minutes.

13       THE CHAIR: Let me see if Mr. Robertson agrees with that approach.

14       MR. ROBERTSON: I am content for Mr. Barrett to put his case as he  
15          sees fit.

16       THE CHAIR: He is saying he is going to give a run through, not  
17          necessarily with all the references, and he wants to file a  
18          more detailed submission with those points with the references  
19          on Tuesday. It is one thing for him to say, "Look, I am going  
20          to make five points, I will say what my points are, and I will  
21          give you the references in my document on Tuesday." I am very  
22          happy with that.

23       MR. ROBERTSON: Yes.

24       THE CHAIR: If what he is saying is, "I want to effectively put in  
25          a new submission", then it is a bit more complicated.

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MR. ROBERTSON: I did not understand him to be saying the latter.  
I understood him to be saying, "I am going to be making a  
reply and I will give you the references in due course."

THE CHAIR: I am happy with that.

MR. ROBERTSON: That is perfectly fine.

THE CHAIR: I am not happy to have another run on these points.

He has made his points pretty clearly in opening and I think  
we have got to a stage where I think we all understand where  
the lines between you are. I do not think it is going to help  
to have another detailed submission because there is a limit  
to how much paper is going to be of any assistance to us.

Mr. Barrett, if you put in a document saying, "Here are the  
headlines, here are the references", that is very helpful.

MR. BARRETT: That is what I have in mind. It certainly would not  
be any longer than six or eight pages. That is what I have in  
mind, I think.

THE CHAIR: Yes, as long as you are not putting in new points.

MR. BARRETT: I do not intend to do that.

THE CHAIR: That is fine. Okay, we will come back then at 3.30.

(A short break)

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THE CHAIR: Mr. Barrett, not to put any pressure on you, but it is all up for grabs in the sense that during the hearing, I put points to both of you, but none of that is concluded views. Having spoken to my colleagues just now, we have not come up with the answer. I presume that is of no great surprise to you, but we will clearly appreciate having your submissions in reply and then we will look at whatever comes in on Tuesday and we will start the process of trying to work out the answer.

MR. BARRETT: Yes. Thank you, my Lord. My Lord, may I begin just by recapitulating what I say is the essential question for the tribunal in this case: was there a lawful, reasonable decision that the pricing of the loans complies with the CMO principle? That is the central issue. That is why we are here.

As you know, we say no for a number of reasons. The first strand of my case, if I can try and distill it in this way, is as follows. The responsible decision-maker in this context is what I have referred to as the GMCA Committee. My learned friend has taken objection to that terminology in his skeleton. He says he does not like that. It is just a defined term intended fairly to describe the Committee which comprises them there and the Council members ----

THE CHAIR: You just mean the Committee of 22nd March 2024.



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MR. BARRETT: It is that body ----

THE CHAIR: Those people.

MR. BARRETT: It is that body which exercises the relevant statutory functions. It is that body, if one is being very precise, as we should be, in my respectful submission, which is subject to the section 12 duty which the Act imposes. It is that body which exercises the function -- I say very importantly in this case -- of considering and deciding whether what is being done by way of these loans is or is not consistent with the CMO principle. They are the ones with the legal authority and the legal responsibility to ask and lawfully answer that question.

Now, I do submit, my Lord, that it is now common ground, in the light of our respective submissions, that on the evidence, there was no advice given to that Committee at any stage about whether the loans reflect the market rate or whether the loans were compliant with the CMO principle, as a matter of fact the evidence, in my submission.

In the course of the debate with my learned friend this morning, it was suggested at one stage that it may be the position that, as a matter of law, it is not necessary for the GMCA Committee to have received advice about whether these loans are consistent with the market rate and comply with the CMO principle. I would submit, in light of this morning's

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exchanges, that that appears to be a very important difference between the parties. My submission is that, as a matter of law, it is absolutely essential. It is a prerequisite to any lawful decision in this case that that body, the GMCA Committee, does have advice before it about whether the pricing of these loans complies with the market rate and CMO principle. That is a critical submission from me in this case.

THE CHAIR: What I think Mr. Robertson is saying is that you have got this committee. The actual rates are being done on the transaction level. It has been negotiated and what has been negotiated is something at market rates and is not giving any advantage to Renaker. I think that is what they are saying.

They are not saying that the Committee itself, when you look at the minutes, specifically addressed itself to the issue of subsidy or no subsidy. It just simply looked at the rates which had been presented as effectively the rates which had been negotiated, but they say they had been negotiated bearing in mind market conditions and what they have come up with is something that does comply with the CMO principle. I think that is where the dividing line is between you.

MR. BARRETT: My Lord, I would accept that summary of my learned friend's case.

THE CHAIR: That is what I am saying, that is his case.

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MR. BARRETT: My submission in response is that it is not legally good enough, it is legally insufficient, if the responsible decision-making body, the GMCA Committee, does not at least have some advice before it on the question of compliance with the market rate and the CMO principle. That is my essential submission. Absent that being done, I say there can be, and in this case was, no lawful decision for the purposes of the Subsidy Control Act. Can I make, my Lord, a series of propositions or submissions in support of that?

THE CHAIR: Yes, and that case you have just summarised came out loud and clear in your opening, but yes, I am happy to have, let us say, a thumbnail list of points just to make sure I do not miss anything.

MR. BARRETT: Yes. Let me just take them in turn, my Lord. First of all, the relevant statutory duty you are concerned with is section 12 of the Act. I say that is self-evidently ----

THE CHAIR: The section 12 duty.

MR. BARRETT: Self-evidently, I say, that is an important statutory duty. It gives effect to the UK's obligations pursuant to the TCA. It is a core statutory duty in the Act. The second point is the magnitude of the sums involved in this case, so approval in respect of £140 million of public money ultimately with loans with a value of £120 million.

THE CHAIR: 140 down to 120, yes. Whichever way you look at it,

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2 these are large sums of money.

3 MR. BARRETT: Yes.

4 THE CHAIR: Both in absolute materials and in relative terms when  
5 you look at the overall book available at the date.

6 MR. BARRETT: Yes, just to explain the basis of my reliance on  
7 that, my Lord, it might be arguable or it might be argued that  
8 if one were dealing with loans of much smaller sums, there  
9 might be scope for a different approach to the  
10 decision-making, arguments around proportionality so on and so  
11 forth. My submission is that when one is talking about sums  
12 of public money of this magnitude, that is a contextual or  
13 factual consideration which strongly reinforces that at the  
14 decision-making body level, there must be proper advice on  
15 this very important point.

16 The third proposition is that I say the analysis I rely  
17 upon is very strongly supported by the statutory guidance.

18 I took you through that in writing in my skeleton and also in  
19 my oral submissions. I say that that very much supports ----

20 THE CHAIR: Give me the paragraph number of your skeleton.

21 MR. BARRETT: I do not have that to hand, my Lord.

22 THE CHAIR: That will be on your sheet.

23 MR. BARRETT: Yes, of course.

24 THE CHAIR: That is fine.

25 MR. BARRETT: It strongly supports, in my respectful submission,



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provisions of their effectiveness.

My final point under this heading is that that construction or approach to the application of the section 12 duty, I do say would be inconsistent with any other important or material statutory public law duty which I can think of. I cannot think myself of any analogy that one could look to or point to in terms of ----

THE CHAIR: Shall we quickly look at section 12?

MR. BARRETT: Of course. It is tab 1, my Lord.

THE CHAIR: I am looking at this. Are we dealing with something which is circular? I think what Mr. Robertson is saying is that there has never been a decision to give a subsidy. I am not saying he is right or wrong, but that is where one of the battle lines lies. If the Committee was being asked to approve a subsidy, then of course section 12 applies, but what he says is that they had never been asked to consider a subsidy because we do not have a subsidy -- can you see how we have got that circular thing ----

MR. BARRETT: Let me try and help.

THE CHAIR: ---- of the poor old hamsters on the wheel.

MR. BARRETT: Let me try and help with that, if I may. I entirely accept, of course, that this is not one of those cases where we are concerned with an accepted remitted subsidy and that is put before the statutory decision-making body for a decision

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about compliance with the subsidy control principles. That is, if you like, the simpler type of case that engages section 12.

We are dealing today -- and this tribunal in the previous case that was brought under that also had to deal with -- the second category of case, which is what I usually think of or call a subsidy or no subsidy case.

Now, in that scenario, if the Authority is proceeding on the subjective belief that it is not giving a subsidy, of course it is not going to be presented to the statutory decision-making body on the premise that it is a subsidy. It is going to be presented on the basis that there is some form of financial assistance being given and it is going to be presented on the basis that is consistent with -- and this is the nub, I think, to answer my Lord's question -- what is provided for in section 3(2), i.e. it is consistent with the CMO principle. In that second type of case, the subsidy/no subsidy case, the essential question for the statutory decision-maker and the essential question on which there must be proper advice, in my submission, is what is the basis for asserting that this financial assistance is consistent with section 3(2)?

THE CHAIR: I will just make a note. (Pause) Yes, thank you.

MR. BARRETT: So I say, my Lord, when one understands the

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relationship between 12 and 3(2), there is not a circularity. Actually, the provisions interface and operate together perfectly.

THE CHAIR: You are saying that you have the section 12 point, but you have Mr. Robertson's point in reply, which is that we are not in subsidy territory at all. There is a dispute about that. Of course, they are not going to be asked to consider under section 12 because they say that we are not even in subsidy territory. So you then go back and say if that is right, then you have got to at least satisfy yourself that where you are lending to someone, that lending does not fall foul of, or at least he is actually not conferring a financial assistance which is conferring an economic advantage within the terms of section 3. What you say is that the relevant committee never considered section 3 because it was never put to them on that basis.

MR. BARRETT: There was just never any advice to the GMCA Committee about whether the loans were consistent with market rates or consistent with the CMO principle. There was never any such advice.

It is just repeating one of my other points, but I would just urge, my Lord, that if one reads the statutory guidance -- the paragraph references are set out in my skeleton -- it does, in my submission, make very clear that that needs to



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happen. It tells you how it needs to happen and it tells you about the level of the detail of evidence.

THE CHAIR: Then you look at the statutory guidance. Let us have a look at that. Where is that? Let us have a look at it now. We might as well get to the bottom of it.

MR. BARRETT: It is tab 2, my Lord. Let me just find my skeleton.

THE CHAIR: That is fine. This is an important part of your submissions and I think it helps if we look at it. (Pause)

You set it out in your opening skeleton.

MR. BARRETT: I did, paragraph 59 onwards.

THE CHAIR: Sorry?

MR. BARRETT: It begins in the skeleton. Paragraph 59 is the beginning of the relevant section.

THE CHAIR: I have it now.

MR. BARRETT: If it is helpful, if I will take you through that if it is of assistance. Paragraph 6 tells us that Annex 6 describes how public authorities should consider, how they should go about doing that, how the test is met.

My next reference is paragraph 61. I take you into next Annex 1 and I work through the relevant steps. 15.7: "If there is any doubt as to whether financial assistance confers an economic advantage, a public authority should carry out a detailed analysis with regard to the market in question." What follows from 15.57 is the working out of that. It gives you

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these three methodologies which are recommended. I accept that they are not presented as the only ways to go about the process, but they are the three approved methodologies.

THE CHAIR: When you look at 15.57, is the Authority going to say, "We never had any doubt on that so we do not need to go through this whole exercise"?

MR. BARRETT: In my respectful submission, in this case, that would be hopeless because what you see the Authority then doing is later -- very hard, in those circumstances, to say this was so blindingly obvious no one had to think about this -- Mr. Walmsley, in response to the pre-action letter, did have a go at thinking about it.

If I can just round off that point, my Lord, my final point on that important submission of the respondent, I would say that if this court were to hold that that is the correct position under the FCA, to the best of my knowledge, it would be a unique piece of primary legislation. I am not aware of any other UK statute, any other piece of primary legislation that imposes these kinds the duties, where it has been held by a court that the statutory decision-maker does not need to have advice on a relevant provision of this sort.

That was my first main point. My second point is ancillary to that. It is just trying to meet what I understand is my learned friend's case. You have my



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with market rate and CMO principle by an officer absent any delegation, in circumstances where it is accepted -- you have seen the evidence and my learned friend has confirmed it in his oral submissions -- that that consideration of Mr. Walmsley's paper never goes before any relevant decision-maker, I say that is wrong as a matter of law.

My Lord, you have got the authorities in the bundle. The key authority for this purpose is National Association of Health Stores and also Revenue and Customs Commissioners v Tooth, the Supreme Court authority. There is no concept of collective knowledge as a matter of public law in England. The Authority is not entitled to seek to attribute officer's knowledge or thought processes to relevant decision-making bodies and my learned friend has not touched those authorities. You gave him the opportunity to file his supplemental skeleton.

THE CHAIR: It never went to the Credit Committee and it never went to what you call the GMCA committee.

MR. BARRETT: It is common ground that this specific issue, which is what this case is about, never went to Gateway, never went to credit, never went to GMCA, that I think is common ground between the parties. My learned friend submits to you that does not lead to a finding of unlawful ness, that is where we disagree, I think.

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THE CHAIR: I can see where the battle lines lie on that. Yes.

MR. BARRETT: My Lord, we say that where that takes one as a matter of the correct legal analysis is there has never been any lawful decision by the Authority that these loans comply with the CMO principle or the Subsidy Control Act. There has been no legally relevant decision on that issue at all. What we say is that therefore this actually is a very unusual type of case. The much more common type of case, in my respectful submission, is that there will have been some form of analysis by the relevant decision-making body of that question. Then there will be a complaint, it will be said there is a legal flaw of some description in the process of analysis that has been conducted. This is, in my respectful submission, an unusual and extreme case. The way the decision-making process has been conducted has meant that the relevant legal question has never been tackled at all by the responsible statutory body. I will seek to develop this in the following parts of my submissions, I do say that has quite significant implications then for the approach which follows as a matter of, for example, relief and the relevance of some of the other points my learned friend seeks to rely upon. I say it follows that the decision simply falls.

My Lord, for all of those reasons, as you know, my primary case is that neither I nor this tribunal needs to

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grapple with Mr. Walmsley's IRSP paper, because I say on proper analysis it is legally irrelevant for the reasons I have sought to explain.

If I am wrong about that, my Lord, then obviously I need to deal with the substance of Mr. Walmsley's reasoning. I do say that it was quite revealing today the lack of enthusiasm which my learned friend had for taking you to dealing with ----

THE CHAIR: You took us through that.

MR. BARRETT: I did.

THE CHAIR: You identified what your criticisms were.

MR. BARRETT: Yes.

THE CHAIR: I think I summarised the key ones fairly.

MR. BARRETT: Yes.

THE CHAIR: Mr. Robertson was given the opportunity to say whatever he wished to, and he has done that. He has said what he said. You may say that is not an answer, but it is an answer, whether it is accurate, is correct or not is for us to determine. Unless you really want to, you do not need to take you to that paper because I think we know what your criticisms are.

MR. BARRETT: I am certainly not going to turn it up, but I am going to try and deal with the points which emerged in the course of the submissions and the debate, what seemed to be

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the important points.

My Lord, first of all, the strand of Mr. Walmsley that is based on the 2022 subsidy control regulations. My Lord will have the transcript, I do submit my learned friend did not really give you an answer to this, he sort of avoided it and moved on quite quickly. You have my main submissions about that, I am not going to repeat those.

THE CHAIR: You say that was wrong.

MR. BARRETT: I say his reasoning was wrong for the three reasons that I sought to explain in my opening submissions. First of all, he says in terms he is not looking at the entity to which the loan has been given, he is looking at XQDL which is a different legal entity. That is not what the regulations require. Secondly, the regulations are not a legal mechanism for establishing you are in a no subsidy case. They are a legal mechanism for quantifying the proxy value of a subsidy, when it is accepted one is being given. Thirdly, the exercise that he conducted produced an outturn as the market rate for a loan of this nature of 5.3%, which in my respectful submission on anyone's case, the two cases you have before you, manifestly and obviously was not the market rate or close to the market rate. I do say three fundamental misdirections or legal errors.

THE CHAIR: The actual rate was, it was obviously substantially

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2 higher than that.

3 MR. BARRETT: Yes.

4 THE CHAIR: You are saying the fact that he has come down to that  
5 rate shows there is something wrong somewhere.

6 MR. BARRETT: It shows something has gone wrong somewhere. At  
7 this stage of the analysis I am in a world where I need to  
8 deal with Mr. Walmsley's reasoning, that is the reasoning of  
9 the Authority and I need to deal with it. I say if that is  
10 the position we have reached, these are material legal  
11 misdirections and they are hard-edged errors of law and if one  
12 is at this stage these are the reasons of the Authority and  
13 the fall, they fail the test of lawfulness for the reasons  
14 I am explaining. Those cannot be lawful reasons to support or  
15 justify the decision.

16 THE CHAIR: When you look at the interest rate setting paper, does  
17 that directly engage the 2008 notice?

18 MR. BARRETT: It does, in my respectful submission.

19 THE CHAIR: Can we look at that bit now?

20 MR. BARRETT: Could I possibly pick that up, my Lord, in the  
21 course, I am going to deal with that as a heading.

22 THE CHAIR: You have it as a separate heading.

23 MR. BARRETT: This is the 2022 Regulations.

24 THE CHAIR: You have the 2022 Regulations.

25 MR. BARRETT: There are three strands to Mr. Walmsley's reasoning:





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THE CHAIR: What page are you looking at?

MR. BARRETT: It is page 102 and third from last paragraph, so towards the foot of the page, the anti-penultimate paragraph. He is telling us his view, creditworthiness of XQDL is satisfactory.

THE CHAIR: (Pause) What they are saying is it is going to be a condition of the loan that there is going to be equity injected by the borrower, that is going to be provided by XQ, which later changed to Mr. Whitaker. That is why you look at that as a proxy, so although it is not a guarantor, it is the entity which is providing the equity which is a necessary condition of the drawdown of any loan. The odd thing, as you set out in opening, when you look at the front sheet it talks about guarantor accounts information, they said, yes.

MR. BARRETT: Yes.

THE CHAIR: And there is no guarantee.

MR. BARRETT: No.

THE CHAIR: You are looking at an entity, I understand it is a relevant entity in the sense it is providing the equity, and that later became Mr. Whitaker himself, but it is not in fact a guarantor. If you have a problem, they do not as a matter of law have to pick up the bill.

MR. BARRETT: That is absolutely right, my Lord. As my learned friend submitted when asked this morning, the point is that

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these are three-year loans. One is not just concerned with the position on day 1 when the equity is going in, these are three-year loans. As I sought to explain in my opening submissions, paragraph 7.2 of the investment policy makes very clear what one is concerned with is financial risk, strength of the financial covenant against which you have recourse, and the risk is the risk of rainy days over the course of a three-year term. It is not an answer, in my respectful submission, at all to say that the equity for the initial billed fees is going in at the start. Of course that is a good thing, I am not seeking to suggest that is not an absolutely sensible approach as a matter of the security arrangements; of course it is. It is not an answer or certainly not close to a complete answer, in my respectful submission, to this concern. This part of the assessment is about creditworthiness, financial covenant and recourse over the whole life of a three-year loan.

THE CHAIR: Yes.

MR. BARRETT: The first sentence is about it is XQDL that is assessed as satisfactory. I want to show you that if you go back to page 96, this is when Mr. Walmsley is looking at his fund methodology strand of reasoning, that is the Commission communication. You see in the proposed fund pricing decision what he does is to say "I have analysed XQDL, the rating I am



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contract, you should pretend it is not in the contract. That is not a sustainable submission. The first point is, this contract has been varied on at least I think two occasions since leaving the EU. This has not been removed by the parties. The parties have absolutely kept it in the contract. The reasons for that, my Lord, are obvious and essential to the whole contract.

The first point, I think as you mentioned in the course of debate, my Lord, one of the things it does is obviously just define the fundamental financial basis of the contract, how the contract works. It is what defines what money goes back to central government and what money the Authority gets to keep.

The suggestion from my learned friend that somehow that could be excised, removed from the contract. It is absolutely central to the contract. The contract would fall down, it would not make any commercial sense.

The second point is that it is obviously absolutely critical from central government's perspective when it devolves these sort of funds that it includes a contractual mechanism that seeks to ensure compliance with the subsidy control requirements. There is always a mechanism one finds in these agreements to try and do that. They have stuck with this. They have made a decision to do that. One might say,



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MR. BARRETT: Yes.

THE CHAIR: Thirdly, you say when you look at this the only explanation for what is on page 96 is he has purported to follow it through. Your point is he purported to follow it through, he has not applied it properly for the reasons we do not need to go round again.

MR. BARRETT: Indeed, that is my third point.

My fourth point is, the annex of this morning adds to this because it tells us that this paper was not just produced for this case, this practice, this methodology we are told is the consistent practice on all loans.

My Lord, the second half of the inquiry debate is what does the communication on its proper construction require or permit? I make a number of points about that, my Lord. The first point is I do say it states in terms what one is looking at is the creditworthiness of the borrower, that is what it says, those are the words, plain as day on the page.

Secondly, its whole purpose, and you see this in the description in the introductory section which has explained the history and the purpose of the instrument, the key purpose is to establish a mechanism which is simple, easy to apply and consistent. That is the express purpose of the communication. You see that spelled out on the face of the document. That is why one has a table with two relevant inputs. That is to give

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effect to the fundamental purpose of the instrument. What the communication in my submission does not either mandate or permit on any available construction is for individual Authorities to be adopting, if you like, their own individual nuanced, bespoke approach. That is, in my submission, the antithesis of the purpose one sees in the instrument. The purpose is stated to be simplicity, clarity and consistency. Everyone doing their own thing would be the very opposite of that.

I think it has been put in a number of different ways, sometimes it has been handcuffs, sometimes it has been tramlines, at one stage I think it was straitjacket, I would submit those are not apt characterisations of this instrument. The instrument has two elements which are used to determine the outturn or output of the required analysis. One is creditworthiness, the other is collateralisation. My learned friend's case, and I will come on to deal with it, but the burden of his case today has been to submit to the tribunal that the collateralisation on this transaction is so good, so robust that effectively one would be entitled to disregard or not take into account the creditworthiness of the SPV borrowers. I am sure I am simplifying his case, I do not mean to do it any injustice, he will put it in a more sophisticated, better way, but the burden of the case is look



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at all this security, this must be rational, you must say this is a reasonable package and therefore lawful. That is the submission.

THE CHAIR: There is obviously more than one way of looking at this.

MR. BARRETT: Of course.

THE CHAIR: You said in opening that the 4% uplift, effectively when you have an SPV over the margin, on one view you can say is mandatory. We may or may not accept that. Another view is to say, you have that as a guide, it may be that when you look at what you are looking at under section 3(2) where what is available out there, you will find that is not an apposite thing in absolute terms because when you are competing with they would not follow this and would not say we are bound by the 4%, banks will not follow this, that is for sure.

MR. BARRETT: Yes.

THE CHAIR: Then you can say, well, if you are going to apply this as you purport to and you are going to deviate from the 4% uplift for an SPV, you need to have rational reasons to explain why you are doing that. What you have here is you have SPVs and clearly if you had, for example, a guarantee by the company or Mr. Whitaker, you could easily say that we can discount that 4% because although it is an SPV you have a guarantee of, let us say, a related entity of Mr. Whitaker

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which means you do not need to apply it.

What you are saying here is that although you can say the starting point is 4% and you accept that there has to be some flexibility on that, depending on the circumstances, this not a case where there is flexibility in that sense, and the reason why they have gone outside that 4% is not adequate for a number of reasons, not just the absence of a guarantee, but that once you take out the company you have Mr. Whitaker and because you have Mr. Whitaker you can see he has a huge amount of assets, that is not the problem. There are many people with a huge amount of assets, what really matters is what their net asset position is and what their liabilities are, and the potential timing of those liabilities; because you can have assets worth billions but if you are not able to realise them in the time that your liabilities arise, then you have a squeeze. There are a number of different ways of looking at this.

MR. BARRETT: There are, my Lord. Can I try and explain what I say is the correct framework, because there are actually a number of different principles in play and stages of analysis in play, which tend to run together which I think may obscure. In my respectful submission, the first stage of analysis which I respectfully suggest is a relatively simple analysis is that you are reviewing what in fact was done here, you are

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judicially reviewing the approach adopted by the Authority. The approach that was adopted by the Authority, which it was required to adopt for all the reasons I have sought to explain, was to apply the communication. I say that as a matter of communications construction, construing that document, it does provide for a simple clear approach (i.e. you apply the matrix to the particular borrower taking account of collateralisation). In terms of the flexibility in that as a matter of construction of that document, I would accept I think that if there was a guarantee from a parent then that could be relevant. That I think is as far as I could or would go in terms of the scope for flexibility in assessing creditworthiness. I say if one reads that document properly, having regard to the emphasis placed on the borrower's creditworthiness, the need for clarity and simplicity, anything that is more sophisticated, more nuanced than here we have a clear parent guarantee from the parent just is not what the communication mandates or permits; that is inconsistent with the need for clarity and consistency.

There is then a further state of the analysis potentially, I think this is what you are putting to me, certainly it has been put in some of the questions. Let us assume there has been an error at this stage of the analysis, what the Authority itself has been doing, what you are putting

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to me is in the real world this is not necessarily what banks do, it is not what private creditors do. Therefore, the fact there has been this error does not necessarily mean that the end result, the outturn is consistent with what the private creditor would reach through their own different process.

THE CHAIR: You look at the wording of section 3(2) as to what you are looking for, you need to premise what is let us say the competition which are other sources of finance which are not public bodies.

MR. BARRETT: Yes. I will try and deal with that, my Lord, it is very morning, in my respectful submission, to understand what has happened in this case. In this case, the Authority has never asked or answered that question. In this case, this Authority has never looked at the market, what a third party bank or lender of any sort would or might provide by way of interest rate for this type of loan. That has never been done. What has happened in this case is that in so far as there has been any analysis, it is Mr. Walmsley and his paper using this process.

Again, I do say this is an unusual case, this is an unusual and quite extreme case. Much more common would be a case that would come before this tribunal where there will have been some inquiry by the public body that is said to be insufficient or inadequate in a number of ways. In that sort

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of case I can absolutely understand this tribunal may well be in territory where it is saying the Authority may have got something wrong here, but here we have a body of evidence before us about what the third party market would or would not provide. We can look at that, perhaps we have expert evidence too, we can look at that and reach a satisfactory conclusion in the light of that evidence before us, about what the correct process or lawful process would or would be very likely to lead to. What I say in this case is because of the curious way in which this decision-making process has unfolded, that inquiry has never even been started, no such evidence has been obtained and it is not before the tribunal.

I think the way my Lord has articulated it on a couple of occasions is that there are three possible types of case. What I say is for those reasons, the analysis really is this. Mr. Walmsley did the process that he did. It is the only process the Authority has. It has not got other evidence. If Mr. Walmsley has erred, in this case, in these circumstances, that really is the end of it.

My Lord, you have obviously got the further stages of my argument on this point. I am not going to repeat them unless it is helpful. The end point of the analysis is that a loan agreement is signed and the XQ Developments entity has been liquidated. There is absolutely no dispute that it was a

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solvent liquidation. The point we make is that it is no longer on the stage. It is no longer available on any analysis as a point of reference. The only available potential point of reference is Mr. Whitaker. It is common ground between us, in the light of my learned friend's submissions, that there was never any due diligence done into Mr. Whitaker's financial position. So, as my Lord observed, one knows that he got a large quantity of assets and value from XQ Developments, but unfortunately one does not know and cannot know what ----

THE CHAIR: History tells you that there are plenty of very big figures, who everyone thought were extremely wealthy judging by their external assets, but then found out later, like Mr. Maxwell, that what was on the tin was not actually what was inside the tin.

MR. BARRETT: Yes. We were in the High Court last week with Mr. Richard Desmond with a similar sort of debate. The point, if I can put it as simply as possible, is this. This is all about risk. This is all about strength of the financial covenant. The essential point is that it cannot possible be right to be conducting a lawful assessment of creditworthiness without looking at all to the creditworthiness of that individual if he is what you are relying upon. We respectfully submit that cannot be right.

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So, my Lord, I come then to the next stage of the analysis. If I am correct on stage 1 of my analysis, that is to say, the Authority has not taken a lawful decision at all so there is unlawfulness for that reason, or stage 2 of my analysis, that the Authority is entitled to rely on Mr. Walmsley, but there is a material error in his analysis, I think the question that then arises, having regard to the debate you had with my learned friend, is can it be the case, or is it the case, that nonetheless this court would hold that there is a lawful decision because its objective analysis is that these loans either are, or are likely to be, consistent with CMO principle?

THE CHAIR: Can I just make a note.

MR. BARRETT: Of course. (Pause)

THE CHAIR: You are saying what if the CAT decides that whilst the exercise was done on a flawed basis and that the CMO section 3(2) was not properly considered by the relevant decision-maker, the loans do fall within section 3(2) or are likely to do so, once you look at all the terms, you say, "We are satisfied that when you look at the ultimate rates being paid" ----

MR. BARRETT: Absolutely, on your objective analysis.

THE CHAIR: ---- "these are rates that one would expect within the market and they are not rates that appear to be unduly low",





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THE CHAIR: You are saying that in those circumstances, we cannot make a decision for the first time that has never been made by the decision-maker.

MR. BARRETT: Yes.

THE CHAIR: That is what you said in opening.

MR. BARRETT: That is my first submission. The second submission is that even if I was wrong about that, so I am not right on the principle, if it is permissible in principle possibly to do that, as I sought to explain, there just is not the evidence in this case safely or properly to do that. The tribunal no doubt has immense experience in this field. That is why it exists and is convened in this sort of case.

I do say, though, my Lord, a significant degree of caution is required in this sort of exercise. We are dealing here with a very specific sort of transaction at a particular point in time, and because of the way the case has evolved, there is simply no evidence before the tribunal. There is no evidence about what was happening in this market at this point in time. In those circumstances, the only way that I can contemplate or envisage the tribunal grappling with this sort of question would be effectively for the tribunal to be thinking itself about possible comparable transactions that you have encountered in your own experience. In my respectful submission, it would be very problematic, from a process

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perspective, for the tribunal to be conducting that sort of analysis in circumstances where it has never been in evidence and none of the parties have addressed it. It is really quite a substantive analysis, in my submission.

THE CHAIR: What happens if it is like an elephant situation where you say when we look at the effective rate here and all the security and risks and everything, it is pretty obvious that it is what one would expect to be available on the market. If we are unsure -- we have not even been through this discussion ourselves yet -- if at the end of the day we say, "Look, we really do not know whether or not this falls within the area", what we do know, based on your submissions, is that it has never really been properly considered by the decision-maker. If the chap who did look at it has come up with an analysis which does not actually follow the guidance that he is meant to be following, for the reasons that you have given, then of course I can see where you are coming from on that basis.

MR. BARRETT: Yes, can I try and deal with that in this way. It does, in our respectful submission, really depend on the evidence that is before the tribunal. The high watermark of the submissions that my learned friend made to you about evidence is to point to the club loans which were made by GMCA, together with the pension fund ---

THE CHAIR: Yes, exactly. They say that is a useful starting



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However, we are going to have to look at everything in the papers and everything on this case to take a view as to where this lies.

MR. BARRETT: My Lord, my first submission is that for those reasons that I have sought to explain, it is not an exercise that, in principle ----

THE CHAIR: You are saying that we should not do it.

MR. BARRETT: It can and should not be done as a matter of principle. Then I say that if one is engaging in the exercise that my Lord has just indicated, I say that the evidence here is in a form or in a state in which it cannot, on a proper analysis, support a finding of that sort in favour of the Authority.

So the high watermark of my learned friend's submission is the pension fund club loan. That was approved in December 2020, so around four years ago, at the height of the Covid pandemic. The first point of reference is if you look at statutory guidance -- I do not have the reference so I will give you that in my written note -- what the statutory guidance requires, and this is also what Mr. Walmsley said he needed to do in his paper -- you may recall his language, "I need to look at the loans available in the market today", entirely consistent with the statutory guidance -- what the statutory guidance says you must do is look at the loans



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comparable to our loan here, so one can understand why the interest rate was roughly double, roughly double what the Authority and the pension fund were charging at the same time. So he has got his points of distinction.

THE CHAIR: Okay. When you do your submission, pick up what he says, a reference to the loans, so I can see what the rates are.

MR. BARRETT: Of course.

THE CHAIR: Do not spend too much time on it. I think that it has not really been explored in any detail at this hearing.

MR. BARRETT: No. The big point he makes, ironically given my learned friend's reliance on the pension fund loans, is to say that this was a number of years ago and you cannot possibly look at this as a reference point for today's market rate. That is his big point.

The second big point is to say the LTVs were higher and the other commercial terms were a bit different, but there are obvious points going the other way. In the Maslow loans, Maslow insists that it gets XQ Developments as a counterparty. It insists that it gets the entity of substance with no thank you to the SPVs. It insists on a much more robust security package.

So, I am not say submitting to you, my Lord, that it all goes one way, if you see what I mean. I do not go as far as

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that. I say that, first of all, if one is looking at evidence, it is the best evidence because it is the third party CMO, and, secondly, if one is thinking about the big ticket points, particularly getting XQ Developments on the hook as the counterparty insisting on that, in my respectful submission, that is a very material point if one is looking at the relative risk between the two transactions.

I do not think, in my respectful submission, I need to go further than this for present purposes. There are two points of reference and there are arguments on both sides of the equation, perhaps, that one could make as to which is the better reference point. First of all, the Authority never looked at this at all and thought about it at all. As part of its decision-making process, the Authority could, and should, have looked into Maslow. It is all public domain information. That is how we found out about it and put it before the tribunal. It was never considered. That is why you have got this very odd situation where it is addressed in an e-mail from Mr. Whitaker a week or two before the tribunal.

So if one thinks about that, my Lord, in my respectful submission, this is really just trying to make good what is the tribunal to do? Is the tribunal really to sit down today, in these circumstances, where that sort of thing has never been thought about by the Authority, and reconstruct for

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itself and make its mind up for itself, as to which it thinks  
is the better evidence and why? In my respectful submission,  
that is going quite a distance too far.

THE CHAIR: So, what we have got, though, in the Authority's  
documents, is that you do not have a comparative analysis,  
looking at the position in 2024.

MR. BARRETT: No.

THE CHAIR: Saying this is what is out there. The most you have  
is the table you have got in relation to the other loans in  
Greater Manchester.

MR. BARRETT: Yes.

THE CHAIR: Two of which are on a club loan basis, and they say at  
the time, the pension fund got independent advice on, let us  
say, the comparables.

MR. BARRETT: Yes.

THE CHAIR: Putting that to one side, and whether or not that  
helps you, no one here has put in an expert report doing an  
analysis where you say, "Look, whatever may have happened at  
the time, here is my analysis of the market and this is where  
we are and you can see this transaction, that transaction, and  
you can see that this is either outside what one would say is  
a normal range, or you can say that this is within a normal  
range." We just do not have it and you say that that  
evidential void should not be filled by the panel.



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MR. BARRETT: I do.

THE CHAIR: My view, for what it is worth, is that one way of looking at this is to say that unless we can be clear, in our own minds, that this is a case one way or another, that evidential void works to your advantage rather than to the advantage of the Authority, given what you say are valid criticisms of the interest rate setting paper, which is, you say, the only real evidence that that analysis is being done to justify the rates. I am not saying you are right or wrong; I am just trying to summarise where we are.

MR. BARRETT: Yes.

THE CHAIR: Yes, okay.

MR. BARRETT: Thank you. So my Lord, if I move on to my next heading, which is tackling, so if I have been wrong thus far ----

THE CHAIR: How long are you going to be? You have to finish by five to five.

MR. BARRETT: I will finish by then. This is my last substantive point.

THE CHAIR: We have something else at five so we need to deal with that.

MR. BARRETT: I will finish, thank you. My last heading, my Lord, is if I have to assume that I have been wrong thus far in the analysis to date, if I need to tackle the tribunal looking at

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this for itself, seeking to fill the gap and dealing really with what I seek to characterise as the substance of the submissions that my learned friend sought to make during the course of today, which I hope I summarise fairly in this way, there was a significant security package in relation to these loans. There was a process of due diligence conducted, which addressed a number of relevant matters, which included the valuation of the property, the expected costs of the development, and also a range of other important or relevant considerations that go to risk in a broad sense.

So, my Lord, I say there are two fundamental problems with that case. The first fundamental problem is that in a very important sense, it simply does not engage with the concern or the complaint in this case at all. The applicant has not sought to contend that looked at in isolation, the security package in this case is not a reasonable security package or that the due diligence process is not a reasonable due diligence process. I think I would go further, my Lord, than that. I think I would accept, certainly on the due diligence, that it looks like a conventional exercise, an orthodox exercise that one would expect to see in a transaction of this sort.

The point we make, my Lord, is that these other activities, these other strands of due diligence or inquiry,



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When one looks at the documents that you have been shown --  
I would ask you to read the minutes carefully -- they show the  
relevant individual saying, "These look like reasonable and  
sensible security measures. Actually, push a bit more here or  
let us look into this and add things." There is absolutely no  
thought process or analysis suggesting, "In our view, there is  
such a fantastic security package here that we do not need to  
think about or should not think about creditworthiness."

THE CHAIR: You say that they are two separate things. You can  
have a security package that is so strong that, for example, a  
security package could be fully collateralised in cash ----

MR. BARRETT: Cash in an account, absolutely.

THE CHAIR: ---- that you do not really care about the  
creditworthiness. The Swiss bank seems to have credit or cash  
or whatever where they do not really care about that because  
they have got everything 100% secured and they just call in  
the security and that is the end of it.

MR. BARRETT: I say that this case ----

THE CHAIR: Or performance money. There are all sorts of reasons  
in practice, but you say this is not that case.

MR. BARRETT: Precisely so. I say that on any proper analysis, on  
any view, it is far removed from that sort of case. This is  
not money in a bank account which one can take if it is liquid  
and it makes you good. If you do not mind, I will be quite

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direct, quite blunt. These are two towers, high-rise towers in the middle of Manchester. With the best will in the world, GMCA is not going to be taking possession of those towers and finishing the job itself if there is a problem. It cannot do that. My Lord will know more than me, there are about three alternative companies in the UK you would seek do negotiate with and bring in to do that work.

THE CHAIR: You say they looked at creditworthiness, and they got that wrong.

MR. BARRETT: They got that wrong, but the big point is I say if the submission is that the Authority is justified either in not considering creditworthiness or not considering creditworthiness lawfully, this is not a case where one could possibly say rationally or lawfully there is something so special about the security package here, you did not need to do that.

THE CHAIR: Okay.

MR. BARRETT: I think, my Lord, unless I can help further ----

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THE CHAIR: That is fine. Let us see what everyone wants to submit by Tuesday, we are not going to be particularly prescriptive, because you are both quite persuasive advocates and when you listen to one you think he is right and listen to the other you think he is right. This is a case where some of the issues are really easy, other issues are not so easy, and the more help we get the better to get the right result.

As I understand it, you are going to put in an eight-page submission summarising the key points on your side with the references to the evidence plus anything additional that we said today. You are also going to respond, if you want to, about this witness statement that is going to be given close of business tomorrow on what you call the instructions points, and they have agreed to do that.

Is there anything else that is going to come from your side, Mr. Barrett?

MR. BARRETT: I do not think I am expecting anything else at the moment, my Lord.

THE CHAIR: If you do think of anything just write in some time tomorrow and I can come back with a view and say that is a good idea, or it is not a good idea. Sometimes you leave a hearing and you say "I wanted to cover that and I have not". We have tried to compress what could potentially be a three-day case into a two-day case. That is what we are going

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to get from you.

Mr. Robertson, what are we going to get from you?

MR. ROBERTSON: You are going to get a response to the paper making allegations about Ms. Blakey.

THE CHAIR: Yes.

MR. ROBERTSON: You are getting the witness statement on instructions. You are also getting the authorities cited by Bacon J in her textbook, referred to at 2.4. You are getting the guide to the loan agreement.

THE CHAIR: That document.

MR. ROBERTSON: That document. I think that is what is on our shopping list.

THE CHAIR: That is your shopping list. That is fine. There is nothing come out this afternoon that you feel that you need to deal with.

MR. ROBERTSON: There is one further point we are going to confirm on, which is the letter about the documents that went to the Credit Committee.

THE CHAIR: That is true, that is the Credit Committee thing. That is all part of the instructions point.

MR. ROBERTSON: That is what I thought.

THE CHAIR: I think that can be dealt with in that way.

One of the key differences between you is, they say that a decision has to be made on the CMO principle specifically by

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the decision-maker. Do you think you have said everything you want to say on that or do you want to add something? I think it would probably help us if you have anything else further to say on that big point that he is making over and above what is in his submissions, then I am quite happy for you to put your response on that at the same time, five o'clock on Tuesday. You do not have to, think about it. It is a fundamental difference between you both and he has set out his pitch pretty clearly this afternoon on why he says that you have to do that exercise and you have not done that exercise. He says that we should not be doing that exercise for the first time as the tribunal if you have not done it yourselves, I think that is the effect of it.

MR. ROBERTSON: My simple response to that is my submissions on burden of proof, the task is that outlined by Hickinbottom J in R (Sky Blue Sports) v Coventry City Council (No. 1), you are looking at what the Authority did at the time, and look at the decision it took and see whether that was on commercial terms affording the Authority a wide margin of judgment or appreciation. There is no separate requirement to go out and take specific legal advice as to the application of the CMO principle.

THE CHAIR: You have covered that point. His point is a different point. His point is that when you look at the structure of



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DISCUSSION

the legislation and the guidance and the wording of  
section 3(2) with let us say his reading of section 12, that  
in order to fall within section 3(2), the Authority has to  
address the question in section 3(2) specifically and make a  
decision on it. Whereas, he is saying the relevant body never  
made a decision on whether or not this falls within  
section 3(2). That is what his case is.

Think about it, look at the transcript and if you want  
to put something further on that question, please do by  
five o'clock on Tuesday. It is a fundamental distinction  
between you two, which I do not feel has been fully explored.  
Just think about it.

MR. ROBERTSON: I will accept that invitation. The headline point  
is, it is not a subsidy, which is the point that you made ----

THE CHAIR: That is the point, that you can make in relation to,  
I think it is section 12. His point is that if he is wrong  
about the section 12 point, he has a section 3(2) point. His  
section 3(2) point is that has to be considered by a  
decision-maker and it has not been.

MR. ROBERTSON: There is not a single piece of authority in  
support of that proposition, in the cases under the  
application of the market economy operator principle or in the  
interim regime.

THE CHAIR: You do not need to argue it now, address it.

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DISCUSSION

MR. ROBERTSON: I will address it in writing.

THE CHAIR: Address it in writing because it is a fundamental distinction between both of you, and it could be relevant when it comes to when we start thinking about what the answer is.

MR. ROBERTSON: I will happily accept that invitation.

THE CHAIR: It is an invitation. I am not cutting anyone off on something which could assist the tribunal.

I must say the case has been presented extremely well by both sides. There is a lot of food for thought on this. I am not guaranteeing we are going to come up with a decision next week, but we will try and do it as soon as we can. We are not going to start deliberating until we have all the submissions on Tuesday and at that point we will then sit down together and start thinking about what the answer is. We have an open mind about this case and it is not a case where you can say this is a hopeless judicial review that has been done on the spec, it is a serious judicial review that requires serious consideration. At the end of the day it may be right, it may be wrong, but we have to do that work and analysis.

The help you have given us today and on Tuesday has been extremely valuable in helping us understand. We really do understand what the issues are and where the battle lines go. We do have further work to do before we can come to a landing on them.

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DISCUSSION

I will rise and you will get the decision when it is  
ready.

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