Neutral citation [2025] CAT 41

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1642/12/13/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

24 July 2025

Before:

HODGE MALEK KC
(Chair)
SIR IAIN MCMILLAN CBE FRSE DL
TIMOTHY SAWYER CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

MR AUBREY WEIS

Appellant

- v –

GREATER MANCHESTER COMBINED AUTHORITY

Respondent

Heard at Salisbury House on 27 and 29 May 2025 and remotely on 6 June 2025

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Joseph Barrett KC (instructed by Walker Morris LLP) appeared on behalf of the Appellant.

Mr Aidan Roberston KC (instructed by DLA Piper UK LLP) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[✂]") relate to confidential information.

A. INTRODUCTION

1. This is the Tribunal's judgment on the Appellant's application for review, under s.70(1) of the Subsidy Control Act 2022 (the "Act"), of the Respondent's decision to grant alleged subsidies, as defined in section 2(1) of the Act, comprising: (i) a loan in the sum of £70.8 million to Trinity Developments (Manchester) Limited ("Trinity"), and (ii) a loan in the sum of £69.2 million to New Jackson (Contour) Investments Limited ("Contour" or "Jackson") (together, the "2024 Renaker Loans").[1] The Appellant submits that the loans would not have been granted by a commercial operator and that the loans have been concluded on non-market terms and have distorted the proper and fair operation of the relevant market in and around Manchester.

2. Trinity and Jackson are each private limited companies and special purpose corporate vehicles ("SPVs"). Trinity is engaged in the development of four high-rise residential tower blocks on two parcels of land known as "Trinity Islands" located by The River Irwell and Trinity Way. Jackson is engaged in a development of two high-rise residential tower blocks known as "Contour" in the Great Jackson Street area. Trinity and Jackson herein referred to as "Renaker", are within what may be loosely described as the "Renaker Group".

3. Renaker, the intended recipient of the alleged subsidies, is a third party to these proceedings and has not applied for permission to intervene. It is owned and operated by Mr Daren Whitaker ("Mr Whitaker"), who is the 100% shareholder and sole director.

4. The loans are made under the Greater Manchester Housing Investment Loans Fund ("GMHILF") by the Greater Manchester Combined Authority ("GMCA"), that is the mayoral combined authority in Greater Manchester and the Respondent to these proceedings. The GMCA is made up of representatives from the ten Greater Manchester councils and the Greater Manchester Mayor.

[1] While these are the approved loan amounts, the loans granted on 22 November 2024, in accordance with the relevant facilities agreement signed on that date, were £59.3 million (Contour) and £60.7 million (Trinty).

It carries out various statutory functions, including relating to economic redevelopment and regeneration in Greater Manchester.

5. The Appellant, Mr Aubrey Weis, owns and controls various corporate structures, referred to in the Appellant's supporting witness statements as the 'Weis Group', with substantial property development investments and projects in and around Manchester. The Appellant seeks a declaration that the Respondent has granted an unlawful subsidy to Renaker and an order prohibiting the provision of the subsidies and/or quashing of loan arrangements.

B. BACKGROUND

(1) Procedural history

6. On 7 June 2024, the Appellant filed his Notice of Appeal ("NoA") under s.70 of the Act. At that juncture, as set out by the Respondent in its Defence dated 2 August 2024, GMCA had taken the decision in principle to make loan facilities available to Renaker. However, the due diligence process pursuant to which the commercial terms of the 2024 Renaker Loans would be finalised and entered into by Renaker, had not yet been completed so that the Respondent contended that there had been no subsidy decision within the meaning of s.70(1) of the Act capable of challenge. Accordingly, the Respondent sought a stay of the proceedings pending the completion of the 2024 Renaker Loans to enable the Tribunal to undertake the s.70 review of the loan arrangements on the basis of their finalised terms. By letter dated 16 August 2024, the Appellant opposed the stay on the basis that the matter should be expedited urgently. Given the contested nature of the stay application, a case management conference was listed to hear that application and set out directions to progress the litigation. At the time of the first case management conference on 30 October 2024, no disclosure had yet been provided by the Respondent to the Appellant.

7. In his NoA and supporting witness statement of Mr Benjamin Rose, a property development consultant who provides his services to the Weis Group, the Appellant asserted that the disclosure of key documents relating to the

commercial terms of the loan arrangements by the Respondent was necessary to enable the Appellant to articulate his appeal under s.70(1) of the Act.

8. In its Defence and supporting witness statement of Ms Laura Blakey, who is the Director of Strategic Finance & Investment of GMCA with operational responsibility for the GMHILF, the Respondent denied making any alleged subsidy decision on the basis that, irrespective of whether the loans when granted might constitute a subsidy, which was denied, no decision to make the 2024 Renaker Loans had yet been completed.

9. By the Tribunal's Ruling made at a case management conference on 30 October 2024 before the Acting President Mr Justice Roth, as formalised in an Order of the same date (the "Directions Order") and subsequently amended by a Consent Order made on 20 December 2024, the Tribunal: (i) permitted the Appellant to adduce suitable expert evidence; and (ii) ordered the establishment of an external lawyers and experts only confidentiality ring which would apply to the disclosure being provided following completion of the 2024 Renaker Loans. The Directions Order, as amended, granted a stay and set out a procedural timetable for the filing of amended pleadings following disclosure into the ring of the requested documents. A second case management conference was to be listed following the closure of the pleadings.

10. By letter dated 26 November 2024, the Respondent informed the Appellant and the Tribunal that it had formally completed the 2024 Renaker Loans on 22 November 2024, and consequently disclosure of the requested key documents as ordered at the first case management conference was then able to be provided to the Appellant. A confidentiality ring was established by Order made on 29 November 2024 (the "CRO"). The documents were inspected by the Appellant's legal advisors and four experts from Grant Thornton, who had been retained by the Appellant as his experts in these proceedings. It appears that they provided the Appellant with some provisional advice, but ultimately they were stood down by the Appellant on the basis that the cost involved was too expensive.

11. By his application dated 31 January 2025 and supporting witness statement of Mr Joel Weis, the Appellant requested that Mr Joel Weis be added to the CRO and sought an extension to the extant deadline for the filing of an Amended Notice of Appeal ("ANoA") and any supporting evidence, which fell due on 31 January 2025, until 28 days after the requested unredacted documents are disclosed to Mr Joel Weis. As set out in his first witness statement, Mr Joel Weis is the son of Mr Aubrey Weis, the Appellant, from whom he assumed responsibility from around 2012 for the day-to-day responsibility of the management of a property portfolio, trading under the name "Combined Property Control" or "CPC", forming part of the Weis Group.

12. In its Ruling of 29 April 2025 ([2025] CAT 27), as formalised in an Order of the same date, the Tribunal (Hodge Malek KC sitting alone as Chair) admitted Mr Joel Weis to the confidentiality ring in the proceedings in respect of certain documents.

13. The Appellant filed his ANoA on 6 May 2025, together with supporting witness statements from Mr Joel Weis and Mr Murray Lloyd. This amended pleading provided for the first time the specific grounds on which it was alleged that the 2024 Renaker Loans were said to be not on commercial terms and hence amounted to a subsidy, focusing in particular on the specific interest rates provided therein. On 14 May 2025, the GMCA filed its Reply to the ANoA, along with the fifth witness statement of Ms Laura Blakey.

14. The hearing of the Appeal took place over two days on 27 May 2025 and 29 May 2025. At the end of that hearing the parties were given permission to file further written submissions on specific aspects and in the case of the Respondent it was given permission to file a witness statement covering two points on which Mr Robertson KC had covered in his oral submissions on the basis of instructions, which the Tribunal wanted to be confirmed in writing.

15. Pursuant to an Order of the Tribunal dated 6 June 2025, the Respondent filed the witness statement of Mr Michael Walmsley on 9 June 2025. Mr Walmsley is one of the senior transaction managers at GMCA. He was responsible for the

2024 Renaker Loans subject to these proceedings, as well other recent loans to Renaker.

16. Neither party filed any expert evidence on the key issue between them as to whether the 2024 Renaker Loans were on commercial terms within the sense provided in section 3(2) of the Act. A significant amount of documentation was provided to the Tribunal on the background to the 2024 Renaker Loans, the process followed, the material considered at various levels in the approval process, and its specific terms and security. The Tribunal using its expertise, including the two members of the panel with extensive banking and lending experience, was able to understand the process and form a clear assessment as to the terms of the 2024 Renaker Loans.

(2) Overview of the GMHILF

17. Funding for GMCA to operate the GMHILF is provided by Central Government under a facility agreement dated 27 March 2015 (the "Facility Agreement"), which was amended by Deed on 15 February 2024. The original facility agreement was with the Department for Communities and Local Government while Central Government funding has latterly been overseen by the Department for Levelling Up, Housing and Communities ("DLUHC").

18. The GMHILF closed for new investment in March 2025, and so GMCA is no longer able to use it to award loans. There is a three-year run-off period which will end in 2028.

19. The primary objective of the GMHILF is the creation of new homes in the Greater Manchester area. The GMHILF should achieve its target of delivering 10,000 homes in the Greater Manchester area by the time that the fund closes in 2028 and the various construction projects that have been funded have been completed.

20. Other objectives include supporting small and medium sized developers and generating income for the GMCA to support wider housing priorities.

21. The GMHILF has been revenue-generative for both the GMCA and Central Government. The last publicly reported income figure that GMCA has retained from the GMHILF was £29.1m in December 2023. Under the terms of the Facility Agreement, DLUHC receives the interest on the loan up to the reference rate under the State Aid rules, while GMCA receives any interest charged above this up to an annual cap of £2,500,000.

22. To date, the GMHILF has not lost any money, and while extensions to payment terms have been agreed (not to Renaker), no enforcement action has been taken to recover outstanding loans and where repayment terms have been extended, interest has continued to accrue and be payable to GMCA.

(3) Process of awarding GMHILF loans

23. The process of awarding a loan under the GMHILF has several stages, including the delegation of authority at a public GMCA meeting. This stage does not confer on the borrower a legal right to receive the loan. This only comes on completion of the loans, which occurs once GMCA's solicitors have received the authority from GMCA to go ahead and complete on the basis of the sealed and signed loan documentation, as is the case for a private sector loan.

24. This process[2] (see below) was developed by GMCA in consultation with external banking and consulting expertise and was intended to allow the GMCA to perform a similar level of due diligence to a private sector lender. The process is reflected in the GMHILF Revised Investment Strategy dated 25 October 2019 which covers, *inter alia*, governance (para 5), financial risk management (para 6), and legal considerations (para 7):

> "**5. GOVERNANCE**
>
> 5.1 The Core Investment Team is responsible for managing the GMHILF. Both the 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

[2] As set out in Ms Blakey's first witness statement.

membership was rotated and two new members were appointed at the start of 2019.

5.2 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.

5.3 Projects are fully developed before being presented to 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 investments of more than £2m before approval is recommended to the GMCA.

5.4 The governance arrangements for Small Loans (less than £2m) differ from larger loans as proposals are not reviewed by the Gateway Panel but are subject to review and approval by the Credit Committee. Given the non-negotiable nature of the terms being offered for Small Loans, these governance arrangements are considered robust and adequate.

5.5 GMCA will enter into loan agreements with counterparties that are common across other UK government programmes and which therefore require information sharing to mitigate shared risks. The existing governance arrangements for the GMHILF include regular sharing of management information with government departments to allow for national monitoring of counterparty exposure. These arrangements will continue while the Fund is operational.

6. FUND RISK MANAGEMENT

6.1 The management of risk in relation to each individual project will primarily be focused on the following:

- Risk will be mitigated as far as is reasonably practicable
- Structural risk mitigation measures will be used to limit project risk
- Robust exit strategies will be required
- Robust due diligence will support all investment decisions and Private sector leverage will be maximised
- Loans will be priced to reflect the risk of each project

6.2 Individual project investment decisions will be taken with consideration to the impact on the Fund risk profile. Project structures are assessed on a case-by-case basis and approved through the governance process to ensure project risks are acceptable, within acceptable tolerances and monitored at a Fund level.

6.3 A City Centre review was undertaken by JLL in January 2019 to underpin further City Centre investment. The review concluded that demand continues to outstrip supply and supports the City Centre investment decisions taken to date and to be made in the short term. City Centre schemes being considered in the future and non-City Centre schemes will continue to be subject to location specific Red Book Valuations to confirm demand for specific projects

prior to investment decisions being finalised. The City Centre review will continue to be undertaken on a biennial basis as a minimum.

6.4 An annual review of the Fund's processes and procedures by the MCC Internal Audit team is undertaken. The review undertaken in April 2019 provided "positive assurance" over the Fund's arrangements. This review will continue to be undertaken annually.

6.5 Critical to the success of the Fund is the ongoing monitoring of projects and ensuring timely repayment of funds. The identification of the early warning signs of project distress will be achieved through the covenants set out within the loan documentation and be highlighted through the monthly monitoring undertaken by the team, supported by an external monitoring surveyor. A bad debt policy has been developed to ensure appropriate protocols exist in the event that projects do not perform as anticipated. This has been the subject of review by MCC Internal Audit in March 2016. To date the Fund has not incurred any bad debts.

6.6. A separate monitoring team with appropriate skills and experience has been created within the Core Investment Team to provide focussed technical oversight of all loans being provided. A technical support role has been recruited to the team to provide necessary additional technical resource to undertake this function. The Risk Director continues to sit on the Credit Committee and Gateway Panel and review scheme approvals. A risk team set up within the Core Investment Team ensures compliance of arrangements as loans are entered into and reviews monthly monitoring reports produced for each project. These arrangements are considered satisfactory. The arrangements will be reviewed as capacity constraints are identified.

7. **LEGAL CONSIDERATIONS**

7.1 The proposed operation of the Fund under the updated Investment Strategy remains within the parameters of the legal agreement with MHCLG.

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

(a) Initial consideration of the loan

25. There is no formal application form for GMHILF loans. Would-be borrowers inquire about the specifics of the loan that they might receive.

26. At this initial stage, the borrower may be rejected for seeking a loan that is too small (e.g. seeking to borrow to construct two houses). In the event that the loan is too large for GMHILF to fund on its own, GMCA may consult with other

potential lenders about whether a club loan would be viable (see below for an explanation of club loans).

27. The "Transaction Manager", a GMCA employee responsible for the transaction of the loan, will typically ask for a development appraisal and a cash flow report as an initial request, to be followed up with a detailed list of requirements to meet the requirements of the gateway paper (see below).

28. The manager will initially look at the amount of leverage being envisaged, the strength of the security being offered, the strength of the cost overrun protections offered, the borrower's track record (not necessarily with GMCA but overall, in terms of delivery).

29. At the end of this stage, if the manager is satisfied that the application is potentially viable, they will write a gateway paper on a pro forma basis which includes detail such as the borrower, details of the proposal, loan value, track record of the borrower and key personnel, etc.

(b) Gateway Panel

30. Once the initial information gathering has been done and the project appears to be viable, loans of over £2m proceed to the Gateway Panel phase (loans of under £2m go straight to the Credit Committee stage detailed below). The Gateway Panel then consider the gateway paper related to the application.

31. The Gateway Panel consists of three independent external advisors who all have significant experience in the private housebuilding sector. The Gateway Panel is there to assess the robustness of the investment case. The Gateway Panel considers all the salient points from the gateway paper that is presented to them.

32. The Gateway Panel will not necessarily provide a straight yes/no answer. The panel can provide a qualified approval based on due diligence of a specific point, or it could request that further information be provided. The panel can refuse a loan application. While due diligence is intended to be confirmatory (i.e. to

ensure that the position of the borrower and lending is as the GMCA expects), it is nonetheless an important feature of the approval process.

33. The Gateway Panel will agree that the application can proceed to the Credit Committee, but does not have any direct interaction with it, its function being merely to act as an advisory committee.

(c) Credit Committee

34. The Credit Committee receives the same gateway paper that the Gateway Panel received and may ask how the Gateway Panel considered the paper. Additional comments are provided on a one-page document by an individual (the "Credit Manager") not associated with the deal on the credit implications of the proposed loan. This focuses on the financials: security offered, costs overrun guarantee, etc.

35. With regard to the latter, for every scheme, the GMHILF requires a guarantee, which will fund a given percentage of costs overrun to allow, for example, for an increase in construction costs. The guarantee may take different forms: from a simple guarantee to cash set aside or an asset which can be sold. The different forms have different relative strengths which are considered in the credit proposal.

36. The Credit Committee consists of a mixture of senior GMCA staff members and external advisers. The Credit Committee's focus is on how robust the proposal is in terms of the likelihood of repayment of the loan.

(d) Chief Executive and Treasurer

37. Once the Gateway Panel (where relevant) and Credit Committee have considered the loan application, the application will be considered by the GMCA Chief Executive and the Treasurer who consider wider political and strategic issues.

38. This stage technically forms part of the Credit Committee stage.

(e) Summary paper to the Portfolio Leader

39. Once the Chief Executive has confirmed consent, the application goes to the Portfolio Leader. The Portfolio Leader is a Local Authority politician who has been appointed to the GMCA and who has responsibility for the housing portfolio. A summary paper is provided to the Portfolio Leader which is similar to the Part B Report which will be provided to the Combined Authority.

40. The Portfolio Leader considers loan applications at a monthly briefing, which Ms Blakey (Director of Strategic Finance & Investment) attends. The Portfolio Leader needs to be comfortable with the recommendation as it will be going forward to the GMCA meeting in their name.

(f) Preparation of the Part A and B Reports

41. Once the Portfolio Leader is happy to recommend the loan application to the GMCA, the Part A and B Reports are generated.

42. The Part A Report is a high-level overview of the proposal which contains high-level factual information. Details such as the loan amount, the identity of the borrower and the location of the development are included.

43. The Part B Report is more detailed and includes elements such as the proposed commercial terms (including interest rate, arrangement and other fees, conditions and security), what the programme looks like, what the exit strategy is and the level of security.

(g) GMCA public meeting

44. At the public meeting, if approved, the GMCA will delegate authority to the Treasurer acting in conjunction with the Monitoring Officer to review the due

diligence and sign off on the commercial terms and legal documentation in relation to the loan application.

45. Heads of Terms can be issued before or shortly after this stage. They are not legally binding and consider elements such as the loan amount, the security, the term and due diligence requirements. The Heads of Terms form the basis of discussion with the borrower on the terms and ultimately the legal documentation for the loan which is to be drawn up.

46. No formal notification is sent to the borrower following the GMCA meeting.

47. By the time of the public meeting, the officers of the GMCA need to have enough information on the loan application in order to recommend it at a public meeting and demonstrate that there has been a detailed review of the proposal and the borrower in order to get to this stage. However, this stage is followed by a due diligence process, which may alter the terms of the proposed loan.

48. Loans may fail to proceed after the GMCA public meeting. Loans may also fall away because the applicants have been able to get better terms from elsewhere (i.e. from the private sector).

(h) Further due diligence

49. While a desktop valuation of the property to be lent against will have usually been done prior to the GMCA public meeting, a Red Book valuation is usually only done after the meeting has taken place. A Red Book valuation is a valuation by a Royal Institute of Charter Surveyors ("RICS") accredited surveyor in accordance with their principles.

50. There is also a report by an external "Monitoring Surveyor" who is appointed at this stage, and who reviews and opines on the construction costs and other construction matters. This report will recommend what collateral warranties GMCA may want to take (which is a way to tie the contractor and subcontractor into the agreement with the borrower).

51. Letters of reliance may also be recommended at this stage by the Monitoring Surveyor: for example, in relation to any environmental reports or rights to light reports.

52. At this stage, GMCA will also instruct legal advisors to carry out legal due diligence, including a review of the report on title, which sets out whether the borrower has a good marketable title to the land being lent against as well as other property matters such as the status of any leases on the land. Lawyers will also produce a construction report detailing key issues to consider in the construction documentation.

53. The outcome of this process may result in the terms of the loan agreement being changed from those originally envisaged: for example, if the valuation report is lower than anticipated.

54. Monitoring surveyors, lawyers and valuers are procured in accordance with GMCA's procurement procedures.

55. The due diligence reports will all be reviewed by the Credit Manager. Part of the role of the Director of Strategic Finance & Investment is to review a summary of the due diligence reports for all GMHILF loan applications.

(i) Sign-off by the Treasurer

56. Any due diligence outcomes will be reported by the Director of Strategic Finance & Investment of GMCA to the Treasurer, which allows them to sign off on the loan.

57. Following sign-off, the legal advisors prepare the final versions of the loan documents for sealing and signature.

(j) Completion

58. Once the loan documents have been sealed and signed by the parties, they are then sent back to the external legal advisors. The documents are held to order until the instruction is given to release them and complete the loans.

59. It is only after the formal completion of the loan documentation that the borrower has a legal right to the funds (provided that the conditions precedent to drawdown are complied with).

(k) Drawdown

60. Following completion of the loan, the Monitoring Surveyor will engage in a monthly site visit alongside the Transaction Manager and GMCA's in-house surveyor. The Monitoring Surveyor will prepare a report following this site visit, which contains a recommendation of the drawdown amount as well as any conditions recommended for that drawdown (e.g. renewal of professional indemnity cover if cover has since lapsed).

61. The Transaction Manager summarises the Monitoring Surveyor's report in their own report as well as adding further information on the status of sales and exit for the development. The Credit Manager receives the Transaction Manager's summary and the Monitoring Surveyor's report to review in order to sign off on drawdown.

62. The Director of Strategic Finance & Investment of GMCA receives and reviews these reports for sign off. The reports are then sent to the Treasurer along with the formal drawdown paperwork. This then goes to the finance team for payment of the loan instalment to the borrower.

(l) How loans are priced

63. In accordance with the Facility Agreement, loans are priced at the minimum of the State Aid rate: a risk margin is then applied on top of the State Aid rate reflecting the risk associated with the individual loan being considered.

64. Indicative interest rates for the loans are outlined by the Transaction Manager at the initial consideration stage once some initial information has been provided and then get shaped as the process continues. The rate is based on the strength of the security and the strength of the covenant. There is a range of interest rates that will be considered. The GMHILF loans also have arrangement and other fees applied, which increase the costs for borrowers over and above the headline interest rates.

65. It is common for the rate to be discussed at the Credit Committee.

66. GMCA does not tend to look formally at other loans available on the market but does have market intelligence on what other lenders are charging from various sources. One such source is borrowers who will come to GMCA with an indication of the rate being offered.

67. Additionally, GMHILF has lent side-by-side with commercial lenders in club loans where the GMHILF lends on the same terms as commercial lenders. GMHILF has been involved in several club loans with other commercial lenders such as the Greater Manchester Pension Fund, which is independently run on a commercial basis.

68. A club loan is where there is a single loan but various lenders each take a piece of it, with equal security and equal interest rates. For example, for a £100m loan, GMHILF could loan £30m with other lenders covering the other £70m on the same terms.

69. While leverage is very important, it is also important to consider risks around exit and how GMCA might be able to get out of the loan alongside developer,

construction and market risk. External input into the interest rate is provided by the Credit Committee.

(m) Subsidy Control safeguarding

70. The Facility Agreement requires that at least the State Aid reference rate is charged by GMCA to borrowers, with DLUHC receiving this level of interest and GMCA receiving the remainder up to a £2,500,000 per year cap.

71. A check is then done with reference to the interest rates set out in the Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022 SI 2022 No 1186 (the "2022 Regulations") to ensure that the Subsidy Control rules are adhered to.

72. Given that a risk premium is being added to the interest rate, these checks tend to show that the higher interest rates charged by loans given under the GMHILF are well in excess of the State Aid and Subsidy Control levels. The risk premium is intended to reflect GMCA's view on construction risk, market risk, developer risk as well as the strength of security.

73. The Appellant disputes whether the Respondent actually followed all of the processes set out in above when approving the 2024 Renaker Loans.

(4) The 2024 Renaker Loans

74. On 11 December 2023 the Gateway Panel conducted its initial overview of the proposed lending.

75. On 13 February 2024, there was a meeting between officers of the Respondent (Mr. Enevoldson) and Mr Whitaker. No minutes or notes of the meeting appear to have been taken. The Appellant refers to what it says is an important email exchange between the Respondent and Mr Whitaker which records, in relevant part:

"[The Respondent] I think we agreed the following:

3.65% margin for D1 reducing to 3.3% if we move to sales covenants

3% margin for Contour

…

[Daren Whitaker] We agree to your understanding of what we agreed."

76. The Gateway Panel met on 22 February 2024. This was attended by the following individuals: Mr Neil Fitzsimmons (Chair of the Gateway Committee and previously was the Chief Executive of Redrow Homes and Avant Homes), Ms Karen Hirst (Managing Director of Maple Grove Developments - the development division of Eric Wright), and Mr David Chilton (Managing Director of Rowlinson, an experienced contractor and developer). Mr Bill Enevoldson (GMCA's Transaction Manager) and Ms Laura Blakeley (Director of Strategic Finance & Investment of GMCA) also attended the meeting.

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

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

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

80. On 21 March 2024, the Appellant wrote to the Respondent explaining his concerns regarding the loans to Trinity and Jackson being approved.

81. On 22 March 2024 there was a meeting of the GMCA where the 2024 Renaker Loans were approved and authority to sign the loans was delegated. There was an open public Part A Report and a private, unpublished, Part B Report. The Part A and B Reports were produced by Councillor Ged Cooney, Portfolio Lead for Housing and Steve Rumbelow, Portfolio Lead Chief Executive for Housing, Homelessness and Infrastructure.

82. The Part A Report stated:

> "**Recommendations:**
>
> The Combined Authority is requested to:
>
> 1. Approve the GMHILF loans detailed in the table below, as detailed further in this and the accompanying Part B report;

BORROWER	SCHEME	DISTRICT	LOAN
Trinity Developments (Manchester) Ltd	Tower D1, Trinity Island	Manchester	£70.8m
New Jackson (Contour) Investments Ltd	Contour	Manchester	£69.2m

> The recommendation is to approve the above as a cap on lending, with the Combined Authority committing to provide £120m across the two schemes and having the option to provide a further £20m if there is surplus funding available.
>
> 2. Delegate authority to the GMCA Treasurer to change the funding source of GMHILF loans to the Brownfield Housing Fund in advance of 31 March 2024.
>
> 3. Delegate authority to the GMCA Chief Executive acting in conjunction with the Portfolio Lead for Housing to approve funding and urgent variations to existing funding for GMHILF, City Deal Receipts and/or the Brownfield Housing Fund funding in the period 22 March 2024 to 31 May 2024.
>
> 4. Delegate authority to the GMCA Treasurer acting in conjunction with the GMCA Monitoring Officer to prepare and effect the necessary legal agreements.
>
> 5. Note that any recommendations that are approved under the delegation will be reported to the next available meeting of the Combined Authority.
>
> …
>
> This report seeks the Combined Authority's approval to the GM Housing Investment Loans Fund ("GMHILF" or "the Fund") loans detailed in the recommendation below.

The value of the loans for which approval was sought were up to £70.8 million and £69.2 million.

"*Recommendation – Key points for decision-makers*":

> "The development will support GM in continuing to bring forward the supply of the new, high quality housing required for GM to realise its full economic potential. The scheme represents a major development, sustaining a significant number of jobs within the construction sector both on site and within the supply chain. The development will provide opportunities for apprenticeships in a number of construction trades.""

83. As to the Part B Report:

"Introduction

GMCA is asked to approve two loans totalling a minimum of £120m for two new city centre developments being brought forward by Renaker, to be funded from GMHILF. Approval is being sought to an option to provide a further £20m if there is surplus funding available within GMHILF or other funds managed by GMCA and/or City Deal Receipts or become available, should Government agree GMCA's request to recycle these funds once existing investments (which include £21m within GMCA's existing £120m lending to Renaker's Bankside & Trinity Tower 02 schemes, as detailed below) repay.

The two schemes are:

- Contour: a 50-storey building with 494 apartments in the Great Jackson Street area of Manchester city centre;

- Trinity Tower D1, a 60-storey building with 532 apartments on the western portion of the site known as Trinity Island, also in Manchester city centre.

Lending to Renaker

In comparison to other developers operating in the city-centre, Renaker stands alone in terms of the scale of development that it will ordinarily have under construction, and it has consistently demonstrated its ability to achieve both sales to the open-market and disposal of completed schemes to institutional investors.

GMCA has to date provided loans for 8 Renaker developments, two of which are currently 'live': £54.1m for the Bankside scheme in the Greengate area of Salford and £65.6m for the first tower, D2, to be built on the Trinity Island site. Construction of the schemes is expected to complete in **[✂]** and **[✂]** respectively. In both cases, the sales position on these schemes is **[✂]** in due course providing the assurance necessary to now bring forward proposals for further lending.

The new lending is expected to start drawing in mid-2025, by which time the **[✂]** is expected to be **[✂]**. The amount which Renaker is able to draw at any point across the existing and new facilities will be capped at £120m, or £ 140m in the event that the option to lend an additional £20m is implemented.

In 2020, the owner of Renaker, Daren Whitaker, established a new housebuilding company, Kellen Homes, as part of a strategy to expand and diversify the business beyond its focus on city-centre developments. GMCA is currently providing a £12.6m loan for Kellen's Mill Vale development, where it is delivering 167 traditional houses for sale to the open market alongside 99 houses for a PRS investor and 45 for First Choice Homes. The funding for this scheme would not be counted with the cap outlined above.

Programme and exit strategy

Construction has commenced for both schemes, with enabling works currently being carried out on the **[✂]** already completed at the Trinity site. In both cases, construction work is expected to complete **[✂]**.

The Contour scheme is being sold to the open market. Sales activity commenced in January 2024, and Renaker has to date taken sales on **[✂]** of the 494 units, with **[✂]** of these having already progressed to exchange of contracts with a deposit of at least **[✂]** paid. While a **[✂]** proportion of the buyers are **[✂]**, this has been the case with previous Renaker developments for sale to the open-market and where occupancy levels, underpinned by the strength of the city-centre rental market, are running at around **[✂]**. Renaker has not yet determined **[✂].**

A condition of loan drawdown will require **[✂]**. Repayment of the loans will have full priority over disposal proceeds for each scheme, with repayment longstop dates to be set for March 2028 in line with the current timeframe for GMCA to return GMHILF funds to Government.

Financial information

The total development cost for the two schemes is **[✂]**, of which Renaker will fund **[✂]** depending on whether the option for GMCA to lend an additional £20m is implemented (which would be split between the two schemes on a pro-rata basis). Regardless of the final amount of the lending, **[✂]** before it starts to draw on each loan.

The estimated values of the completed schemes are **[✂]** (Contour) and **[✂]**. Against these, the proposed lending of £140m has a Loan to Value of **[✂]**, reducing to **[✂]** if the lending goes forward at the lower amount of £120m. This is significantly below the 50% limit that will normally be considered for city-centre schemes.

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

At the minimum lending of £120m and adopting the higher margin for the interest on the Trinity D1 loan, the proposals are forecast to generate approximately **[✂]** of income to GMCA. This would increase to **[✂]** if the additional £20m is lent. Renaker will also meet all legal, due diligence and monitoring costs incurred by the Fund.

Security

The following security will be provided:

- A debenture over each SPV incorporating a fixed charge over the development properties;

- A charge over the shares in the SPVs;

- A fixed charge over additional Renaker property valued at **[✂]**;

- Collateral warranties incorporating step-in rights to the construction contract, sub-contracts and design team appointments.

Conclusions & Recommendation

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

The Combined Authority is therefore recommended to approve the lending."

84. The investment proposal table contained in the Gateway Paper is set out below.

HOUSING FUND - INVESTMENT PROPOSAL			
BORROWER	Renaker SPVs	**LOCAL AUTHORITY**	Manchester
SCHEME NAME	Tower D1 - Trinity Island Contour - Great Jackson Street	**ANTICIPATED FIRST DRAWDOWN DATE**	**[✂]** -Trinity D1 **[✂]**- Contour
FUNDING REQUESTED	£140m	**TERM / EXPIRY**	March 2028

PURPOSE/BRIEF OUTLINE

- Proposals for combined £140m senior lending to Renaker comprising two facilities:
  - £70.8m for a development of 532 apartments, Tower D1 being the second of four towers proposed in the planning consent for the Trinity Island site;
  - £69.2m for a development of 494 apartments known as "Contour", the latest phase of Renaker's investment the Great Jackson Street area.
- GMCA's £54.1 loan for the Bankside development is forecast to repay **[✂]**, with the £65.6m loan for Trinity Tower D2 expected to repay in **[✂]** - the proposals therefore effectively roll forward GMCA's current lending as a final commitment to Renaker schemes from the Housing Fund in its current form.
- A detailed profile for the current and proposed Renaker lending is included later in this paper, with the commitment across the various facilities to be managed through a £140m cap on the amount Renaker is permitted to draw in aggregate.
- The Loan to Cost for each scheme is **[✂]**, with the structure for each facility seeing all **[✂]**. Whereas Contour will be sold to the open-market, Renaker **[✂]**. A sales covenant is proposed for the Contour facility to effect that, at the point of**[✂]**. In view of the conservative Loan To Value for Trinity D1, the flexible approach Renaker is seeking is considered justifiable.
- In lieu of a cost overrun guarantee, a charge will be provided over two Renaker sites valued at **[✂]** which are currently being used to provide additional security for the Bankside & Trinity loans.

SOURCES AND APPLICATION OF FUNDS SUMMARY (0005)				**KEY DATA**	
CATEGORY	%	**AMOUNT**	**COMMENT (if required)**		
Senior Loan	**[✂]**	£140m	**[✂]** *of development costs excl. finance costs*	Recycled funds Y / N (%)	N
Mezzanine				No. units to be Developed	1,026
Equity	**[✂]**	**[✂]**	**[✂]** *of development costs, plus* **[✂]** *for finance costs*		
Total funding		**[✂]**		Loan to Cost (LTC)	**[✂]**
				Developers profit as % of cost	**[✂]**
Split					
Land, planning & pre-construction fees	**[✂]**	**[✂]**		Gross Development Value (GOV)	**[✂]**
Construction	**[✂]**	**[✂]**	*Contingency with Renaker Build contract sums shown separately below*	Loan to Gross Development Value (LTV)	**[✂]**
Infrastructure			*Incl. above*	Peak funding	**[✂]**

Contingency	[✂]	[✂]	*Contingency allowances of* [✂] *included within* [✂] *contract sums*	GDV psf	[✂]
Total Fees	[✂]	[✂]	*Sales & Marketing costs - design fees etc incl. in construction cost*	Estimated Fund Interest Charge	[✂]
Total Finance Costs	[✂]	[✂]		Fund arrangement fees	[✂]
Total costs		[✂]		(any contribution towards prof costs)	[✂]

FINANCIAL COVENANTS	**RATIO**	**COMMENT (if required)**
LTC	[✂]	Actual LTC is [✂]
LTV	[✂]	Actual LTV is [✂]
Contour Sales Covenant	[✂]	Total facility amount to be covered by exchanged sa1es at point of first drawdown
SECURITY DESCRIPTION	**VALUE (000s)**	**COMMENT (if required)**
Debenture with each borrower incorporating fixed first charge over development properties	[✂]	[✂]
Charge over shares in SPV		
Charge over additional Renaker property	[✂]	Equivalent to [✂] of construction contract sums
Construction package		Security assignments of key appointments/contracts, and collateral warranties incorporating step-in rights.

PRICING		**COMMENT (if required)**
EU Reference rate	5.65%	*Variable*
EU state aid margin	1.00%	*Based* on *'strong' collateral/ 'satisfactory' counterparty*
Fund Risk Premium	[✂] - Trinity D1 [✂] - Contour	*Trinity D1 interest to reduce to* [✂] *if scheme is forward sold* *For each facility,* [✂] *of Fund Risk Premium to be charged as a loan monitoring fee*

Total rate proposed	[✂] Trinity Dl [✂] Contour	

Recommended by: Date: February 2023	Michael Walmsley	Transaction Manager
Supported by: Date: February 2023	Laura Blakey	Investment Director

85. The Respondent's published record of the decision made by the GMCA Committee states:

> "1. That the GMHILF loans, detailed in the table below, be approved, as detailed further in this and the accompanying Part B report. The recommendation is to approve as a cap on lending, with the Combined Authority committing to provide £120m across the two schemes and having the option to provide a further £20m if there was surplus funding available.
>
> 2. That authority be delegated to the GMCA Treasurer to change the funding source of GMHILF loans into the Brownfield Housing Fund in advance of 31 March 2024.
>
> 3. That authority be delegated to the Chief Executive Officer GMCA & TfGM, in consultation with the Portfolio Lead for Housing, to approve funding and urgent variations to existing funding for GMHILF, City Deal Receipts and/or the Brownfield Housing Fund funding in the period 22 March 2024 to 31 May 2024.
>
> 4. That authority be delegated to the GMCA Treasurer, in consultation with the GMCA Solicitor & Monitoring Officer to prepare and effect the necessary legal agreements.
>
> 5. That it be noted that any recommendations approved under the delegation will be reported to the next available meeting of the GMCA."

86. In a paper provided by Mr Walmsley entitled "*Interest rate setting proposal*" dated 25 November 2024 (the "IRSP")[3] the Respondent stated:

> "**<u>Stage 1 – State Aid Rate Setting</u>**
>
> **Security (Collateralization)**
>
> The lending is structured on a cost to complete basis, and the collateralization can therefore be assessed on a straightforward Loan to Value basis.

[3] The bundle for the main hearing contained 10 drafts of the IRSP, culminating in the version dated 25 November 2024.

Based on the values reported in independent Red Book Valuations instructed by GMCA and carried out by Knight Frank, the GDVs of the completed developments (based on sale of individual units to the open market) are as follows:

- Contour: **[✂]**

- Trinity D1: **[✂]**

The above values compare to **[✂]** (Contour) and **[✂]** (Trinity D1) adopted by Renaker in its own appraisals, in line with its normal pricing strategy to deliver sales in volume rather than maximizing income.

The facility amounts are: £59.3m Contour / £60.7m Trinity D1.

Against the open-market GDVs reported in the RBVs, the Loan to Value is **[✂]** for each scheme. The approved Loan to Value covenant is **[✂]** for each facility: covenant compliance is achieved by GDV of **[✂]** for Contour and (**[✂]** less than the RBV) and **[✂]** for Trinity D1 (**[✂]** less than the RBV).

The covenant-compliant GDV for each scheme could be reduced by **[✂]** before the Loan to Value would breach the EC State Aid threshold of 60%.

The lending for Trinity D1 was approved in recognition that Renaker had not determined its preferred exit strategy for the scheme, and was exploring a PRS sale as well as the option to sell direct to the open market. In November 2024, Renaker entered into a Forward Sale Agreement to sell the completed development to a PRS operator. The sale price is **[✂]**. Against this value, the Loan to Value is **[✂]**, i.e. within the approved covenant.

The analysis set out elsewhere in this paper (e.g. around sensitivity) is based on the GDV under Renaker's appraisal for Contour (where a large part of the assumed value has now crystallised through contracted sales) and the forward sale price for Trinity D1 - **[✂]**.

Proposed fund pricing decision

The collateralization is considered HIGH.

Credit-worthiness

The borrowers are SPVs. At the point of first drawdown, development work in progress will amount to expenditure of **[✂]** at Contour, **[✂]** at Trinity D1, **[✂]** that is fully subordinated to GMCA. Should it be necessary to repay the GMCA lending, the value of the development work in progress could be written down by a third (with no value attached to additional WIP funded with the loan) before it was insufficient to cover the debt.

There is no guarantee being provided for the loan. However, in judging creditworthiness and risk, the financial position of key entities within the Renaker group, and therefore Daren Whitaker as the sole owner of the business, is relevant.

The key point of reference to assess Daren Whitaker's financial position is XQ Developments, which is the holding company under which Renaker delivered

its Deansgate Square, Crown Street Phase 1 and Chester Road developments. Following the completion of those schemes, the returns to Daren Whitaker were largely retained within XQ for on lending to other Renaker developments.

XQ entered voluntary liquidation in October 2024, with the lending it was providing to various Renaker SPVs understood to have been novated to Daren Whitaker and funds held within the business repaid to him as shareholder.

Under its audited accounts for FYE May 2023, XQ Developments had a net balance sheet of £321m, up from £280m the previous year, with £297m of this in the form of amounts owed by connected companies - this lending is understood to include the being provided at the time for The Blade and Collier's Yard (which have now completed), and The Circle (due to complete April 2024). Management accounts for the quarter ending September 2023 show movement in the lending to other companies (as a result, for example, of the subordinated debt coming out of The Blade and Collier's Yard), with £108m cash at bank - i.e. reserves from which the equity for Contour and Trinity D1 will be sourced.

Prior to its liquidation, Dun & Bradstreet gave XQ Developments a 5A1 rating (lowest risk of failure).

Proposed fund pricing decision

On the basis of the financial position of the wider Renaker business, it is proposed that the borrowers should be categorised as a SATISFACTORY credit risk (as defined in the State Aid guidance).

The CRR score (from the attached matrix) is 4.

…

Market Risk:

- The Renaker 'product' is proven in the market place, with the company having delivered over 6,000 apartments in Manchester /Salford city centre since its establishment in 2006. GMCA has direct experience of this, having providing lending to eight Renaker developments delivering over 4,600 new apartments and where, regardless of whether the exit strategy has been based on disposal of individual units to the open market or bulk sale to PRS investors, commitments to sales have reached a level sufficient to repay the loan well in advance of construction completion.

- Alongside the success of the Renaker product generally, there is further direct experience available in the specific location of the Contour and Trinity D1 schemes. Renaker is about to complete the development known as 360 in Great Jackson Street, close the Contour scheme, for which GMCA provided a loan that **[✂].** When last reported in August 2023 **[✂]**, Renaker had exchanged sales (with deposits of upwards of **[✂]** of the 445 apartments. Similarly, Renaker is currently constructing a second tower on part of the Trinity Island site known as D2 - the scheme is branded as Vista

River Gardens. To the beginning of February 2024, Renaker has exchanged sales on **[✂]** of the 484 apartments.

- Notwithstanding the underlying assessment of Renaker's proven success in capturing demand, the lending terms include a sales covenant for the purpose of the Contour facility requiring Renaker **[✂]** paid to underline purchaser commitment) **[✂]**. Effectively, subject to the construction being completed, GMCA is proceeding with a **[✂]**, with Renaker having taken sales reservations to the start of February 2024 on **[✂]** of the 494 apartments.

- In light of the risk mitigation resulting from the sales covenant on the Contour facility and the **[✂]** Loan to Value, a sales covenant is not being applied to the Trinity D1 facility. At the point the lending was approved, Renaker had not determined its exit strategy for Trinity D1. It has now entered into a Forward Sale Agreement with a PRS operator to sell the completed development for **[✂]**, with the buyer's commitment secured by a **[✂]** deposit.

Conclusion: The key factor to determine the risk is the de-risking impact of the Contour sales covenant and the contracted sale for Trinity D1. It is considered that the Market Risk has a LOW impact and therefore 10 bps is added to the Fund Risk Premium.

Developer Risk:

- As noted above, Renaker has an extensive, long-established track record, and represents one of the most active developers within GM. First and foremost a construction company which has cultivated development capability, the business employs around 300 people. Alongside the founder and owner of the business, Daren Whitaker, key personnel including Dave Gough (Renaker Build Operations Director), Andy Lofthouse (formerly Renaker Build Commercial Director, and now Chief Executive of Renaker Build) and Mark Schilling (Investment Director) have been with the business for several years, providing significant stability to its operations. In recent years, these key staff have been supplemented with a Sales Director.

- The Contour and Trinity D1 schemes are typical Renaker developments - tall towers on city centre sites. Their construction will overlap with other Renaker developments including the completion of the Bankside and Trinity D2 schemes and, potentially, new developments at **[✂]**, this level of development in delivery is not unusual for Renaker.

- The development appraisal for each scheme delivers a **[✂]** profit on cost to Renaker. While this is **[✂]** that will normally be adopted for valuation purposes in calculating residual land value for example, **[✂]** delivery to be maintained if there are adverse changes in cost or value (noting that this risk is in any event significantly mitigated by **[✂]**, well above the **[✂]** Loan to Cost that the Fund would ordinarily expect to see on schemes such as this, **[✂]** subordinated to the lending).

Conclusion: The key factor to determine the risk is Renaker's proven track record. It is considered that the Developer Risk has a LOW to MEDIUM impact and therefore a range of 10bps to 35bps is added to the Fund Risk Premium.

Construction Risk:

- The two buildings are tall towers of 51-storeys (Contour) and 60-storeys (Trinity D1) with subterranean basements, and therefore represent extremely complex construction propositions in and of themselves, added to which they are in city-centre locations. Again, however, they typical of the sort which Renaker has constructed elsewhere, with no obvious points on the design that sit them outside that experience and capability. The same assessment applies to the design consultants Renaker has appointed, which again replicates the teams it has used on previous developments.

- For each scheme, the construction work will be significantly progressed by the point of first loan drawdown - to the extent that for Contour the **[✂]** (the same milestone occurs around **[✂]** months into drawdown for Trinity D1). While nominally being delivered at arms length under construction contracts between Renaker development SPVs and Renaker Build Ltd, there is no true transfer of risk and completion of the construction as planned is contingent on the ongoing viability of the Renaker business generally. Further, as a result of the common ownership of both parties to the construction contract, **[✂]**. However, should this risk materialise, GMCA will have the benefit of collateral warranties from all sub-contractors with design responsibility incorporating step in rights to facilitate completion of the construction, together with significant headroom within the security to offset any additional costs, over and above those provided for in the appraisals, it may incur.

Conclusion: The key factor to determine the risk is the scale and complexity of the construction, regardless of the measures which mitigate the lending risk around this. It is considered that the Construction Risk has a HIGH to SIGNIFICANT impact and therefore a range of S0bps to 75bps is added to the Fund Risk Premium.

Security Risk:

The normal suite of SPV security will be provided to GMCA, including:

- A debenture over each SPV, incorporating a fixed, first ranking charge over each development property.

- A charge over the shares in each SPV, providing additional options around the exit strategy under which GMCA could recover the lending.

- Full subordination of all inter-company lending to the SPVs from other Renaker entities, amounting to over **[✂]** across the two schemes.

- Renaker is providing additional security by way of fixed first ranking charge over two additional sites known as **[✂]**. Although nominally in lieu of the **[✂]** cost overrun and completion guarantee that the Fund would normally require, the charges will secure the borrowing liabilities generally. Under Red Book Valuations instructed by GMCA, at April 2023 the two sites had a value of **[✂]** (which is equivalent to **[✂]** of the combined construction cost for the two schemes). That this value has not deteriorated will be confirmed ahead of first drawdown, and unlike the cap on recourse that is usually available through a guarantee, the amount GMCA is able to apply to the lending liabilities is not limited.

- Even using the **[✂]** required by the covenant (**[✂]** resulting from the GDV adopted in Renaker's appraisals), the Loan to Value for each facility is well below the **[✂]** that the Fund would normally consider for the purpose of lending to large city centre developments such as this. While the strength of the collateralization for EU base rate purposes is already assessed as high - and therefore the highest categorization possible - the extremely conservative LTV serves to underline the strength of the security position.

- GMCA will have the benefit of a Step In Agreement with the purchaser of the Trinity D1 scheme, allowing it to complete the construction and realise the sale with a 12 month buffer for completion against the date by which Renaker's programme would see the scheme finished.

Conclusion: The key factor to determine the risk is the **[✂]**. It is considered that the Security Risk has a LOW impact and therefore 10bps is added to the Fund Risk Premium.

Sensitivity Risk:

Conclusion: The key factor to determine the risk is the lending exposure being significantly below the normal **[✂]** LTV and therefore resilient to fall in GDV or any requirement for GMCA to incur additional costs. It is considered that the Sensitivity Risk has a LOW impact and therefore 10bps is added to the Fund Risk Premium.

Pricing decision

…the table below shows key metrics for the Collier's Yard scheme against the two new facilities covered in this paper:

	Collier's Yard	**Contour**	**Trinity D1**
Senior Facility	£64.4m	£59.3m	£60.7m
Loan to Cost (actual / covenant)	**[✂]**	**[✂]**	**[✂]**
GDV as per RBV (open-market sales)	**[✂]**	**[✂]**	**[✂]**
Loan to Value (based on RBV)	**[✂]**	**[✂]**	**[✂]**

Equity invested ahead of debt	**[✂]**	**[✂]**	**[✂]**

Conclusion:

It is proposed to set the margins as follows:

- Contour **[✂]** (this is particularly in light of the sales covenant being applied to this facility)

- Trinity D1 - **[✂]**, the lower margin to apply as a result of Renaker having entered into a Forward Sale Agreement, but to increase to **[✂]** if that agreement is terminated etc (the increased rate to be applied retrospectively)

As demonstrated above, these margins exceed the minimum of **[✂]** that the Fund Interest Rate Setting methodology determines applicable.

Alongside this, GMCA also needs to consider the appropriate interest rate in light of the requirements of the Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022.

Determination of the base rate for the loan is based on the lending term. In this instance, first drawdown of the Trinity D1 facility is forecast for **[✂]**, with first drawdown of the Contour facility in **[✂]**. Planned completion of each scheme is forecast for **[✂]** - given the sales covenant for Contour, there are reasonable grounds to expect repayment within a **[✂]** following completion. The timing of the repayment is less assured for Trinity D1 given that Renaker has not yet determined its preferred exit and there is no sales covenant on this facility - although past experience does lend itself to a positive assessment regarding Renaker's ability to secure sales, whether via the open market or PRS, ahead of construction completion.

In any event, the loan repayment longstops will be set for March 2028 which gives a lending term of< 3years - a term of anything up to 5 years attracts a base rate of 4.3% under the Regulations.

The second element of the interest rate determination under the Regulations is based on credit rating. In this respect, XQ Developments is considered the appropriate Renaker company to test as a proxy for Daren Whitaker's financial position. Prior to its liquidation, Dun & Bradstreet gave the company a SA1 rating (lowest risk of failure, with a net worth of **[✂]**).

This is understood to be comparable to an 'BB' rating from other credit reference agencies cited in the Regulations (and corresponds to the assessment of SATISFACTORY creditworthiness). Given that the lending benefits from a high level of collateralization such that there is significant headroom to sustain deterioration in GOV and/or additional cost before there would be a risk around inability to fully recover the lending, the assessment is that loss in the event of default would be no more than **[✂].** A mark up rate of **[✂]** is therefore applicable.

The conclusion is therefore that an interest rate of not less than **[✂]** complies with the Regulations.

> Based on the current EU Reference Rate, the all in rate will be [✂]% for Contour and either [✂]% or [✂]% for Trinity D1 depending on the exit route. This [✂] the amount prescribed by Subsidy Control Regulations, and the interest rate therefore be confirmed as compliant with the Regulations."

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

88. On 15 April 2024, the Appellant (by his solicitors) sent a Subsidy Control Information Request in accordance with s.76 of the Act seeking the key decision-making documents.

89. Heads of Terms were issued on 24 April 2024. Prior to signing the Facility Agreement, the Credit Manager reviewed the Facility Agreement against the Heads of Terms to ensure that all points within the Heads of Terms had been appropriately reflected. Exceptions to this were noted in the Credit Wrap-up Report.

90. On 30 April 2024, the Respondent (by its solicitor) responded. The response provided none of the documents or information requested by the Appellant.

91. On 2 May 2024, the Appellant requested confirmation from the Respondent of its position on the following points:

    (1) Whether the Respondent accepted that it had made a decision to provide the loans to Trinity and Jackson.

(2) If so, on what date was the decision taken?

(3) Whether it was the Respondent's position that the loans do not constitute 'subsidies' for the purpose of the Act? And, if so, to clearly and transparently state the reasons for that conclusion and provide the contemporaneous documents evidencing the assessment said to support that conclusion.

92. On 9 May 2024, the Respondent stated:

> "1. GMCA has not, at the time of writing, legally committed to granting the loans to Trinity Developments (Manchester) Ltd and/or New Jackson (Contour) Investments Ltd which were discussed at the meeting on 22 March 2024, i.e. the loans have not been "given" within the meaning of section 2(5) of the Act"; and
>
> …
>
> "3. In the event that GMCA commits to granting these loans, it has determined that they would not constitute subsidies within the meaning of section 2(1) of the Act. This is on the grounds that the loans would be made on a commercial market operator ("CMO") basis, which GMCA has confirmed by reference to the interest rates set out in the Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022 in order to ensure that zero financial assistance is provided."

93. On 14 August 2024, there was a meeting of the Respondent's Overview and Scrutiny Committee which addressed the loans.

94. Red Book Valuations were obtained for each of the developments on 12 September 2024. The Red Book Valuations did not change the original view of the estimated value of the sites.

95. On 15 October 2024 the Credit Committee approved of matters arising from the proposed forward sale of the Trinity D1 development and amended the arrangements around payment of arrangement and cancellation fees.

96. At an unspecified date in October 2024, Mr Whitaker arranged for his company XQ Developments ("XQDL") to enter into voluntary liquidation with an estimated surplus after paying debts in full of £345,545,610. Thereafter it was

Mr Whitaker rather than XQDL who was to provide the subordinated lending as borrowers equity in Trinity and Jackson.

97. Project Cost Reviews were obtained by external monitoring surveyors to cover whether the budget in the development appraisal for development of the sites is sufficient. They also give advice and recommendations around matters such as where collateral warranties should be taken, the status of planning conditions, the capability of the professional team and sub-contractors, the levels of professional indemnity insurance held and any reliance letters that they recommend are requested amongst other matters. Construction reports were obtained for each of the developments from external lawyers. For the 2024 Renaker Loans, Dalbergia was appointed as Monitoring Surveyor for Contour and Naismiths for Trinity D1. A Project Cost Review of Contour was produced by Dalbergia on 24 October 2024; Naismiths produced a report for Trinity Island, Tower D1 on 11 November 2024.

98. On 7 November 2024 a note was produced for the Credit Committee setting detailed terms of the forward sale agreement. The Credit Committee was recommended to approve the proposals.

99. A Wrap-Up Report seeking Credit Committee approval was created on 19 November 2024. Reports on Title were created on 22 November 2024. The Loan Agreement Credit Report, signed by Ms Blakey as Director of Strategic Finance & Investment and by GMCA Treasurer Mr Wilson, was also created on this date, as was the Facilities Agreement.

C. LEGAL FRAMEWORK

(1) Relevant law: Subsidy control regime

100. S.2(1) of the Act defines "subsidy" as follows:

> "In this Act, "subsidy" means financial assistance which— (a) is given, directly or indirectly, from public resources by a public authority, (b) confers an economic advantage on one or more enterprises, (c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with

> respect to the production of goods or the provision of services, and (d) has, or is capable of having, an effect on— (i) competition or investment within the United Kingdom, (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom."

For the purposes of the Act, the means by which financial assistance may be given include a direct transfer of funds (such as grants or loans): s.2(2)(a).

S.2(5) provides that financial assistance is to be treated as "given" for the purpose of the Act when an enforceable right is acquired:

> "For the purposes of this Act, financial assistance is to be treated as given to an enterprise if the enterprise has an enforceable right to the financial assistance."

101. S.3 of the Act provides:

> "**3 Financial assistance which confers an economic advantage**
>
> (1) This section makes provision about determining whether financial assistance confers an economic advantage on an enterprise for the purposes of section 2(1) (b).
>
> (2) Financial assistance is not to be treated as conferring an economic advantage on an enterprise unless the benefit to the enterprise is provided on terms that are more favourable to the enterprise than the terms that might reasonably have been expected to have been available on the market to the enterprise."

This is known as the commercial market operator ("CMO") principle.

102. In *Sky Blue Sports & Leisure Limited v Coventry City Council* [2014] EWHC 2089 (Admin), Hickinbottom J stated at [88]:

> "88… the following principles can be derived from the case law. They are uncontroversial.
>
> i) A public authority such as the Council is elected to serve the overall public interest in the area it serves. In pursuit of that obligation it is required to act prudently with regard to public money.
>
> ii) In exercising its functions, a public authority may undertake and invest in economic operations in the same way as private companies.
>
> iii) However, when it does so, articles 107-109 TFEU prohibit the State engaging in "State aid". Whether action by the State amounts to State aid is a

"global question" (R v Customs & Excise Commissioners ex parte Lunn Poly [1999] 350 at 360); but it has several well-recognised characteristics set out in cases such as R (Professional Contractors Group Limited) v Inland Revenue Commissioners [2001] EWCA Civ 1945 at [28], and in guidance prepared by the European Commission (e.g. Commission Communication – Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the Commission Directive 80/723/EEC to Public Undertakings in the Manufacturing Sector (1993) (OJ C307/3) ("the 1993 Communication") and Draft Commission Notice on the Notion of State Aid pursuant to Article 107(1) TFEU (2014) ("the 2014 Draft Communication")), and by the Department for Business, Innovation and Skills ("BIS") (e.g. The State Aid Guide: Guidance for State Aid Practitioners (June 2011), especially at paragraphs 76 and following). The BIS guidance (at page 2) identifies the characteristics in these terms, namely that, so far as the aid is concerned:

a) it is granted by the State or through the State resources;

b) it favours certain undertakings;

c) it distorts or threatens to distort competition; and

d) it affects trade between Member States.

iv) Whether aid distorts or threatens to distort competition, depends upon the objective test of whether a rational private investor, creditor or vendor (as the case may be) might have entered into the transaction in question on the same terms, having regard to the foreseeability of obtaining a return and leaving aside all social and policy considerations (Cityflyer Express Limited v Commission [1998] ECR II-757, [1998] 2 CMLR 537 at [51], and Neue Maxhütte Stahlwerke GmbH v Commission [1999] ECR-II 17 at [120]-[122], and [131]-[133]) ("the private investor test" or "the market economy operator test"). Where the State acts in a way that corresponds to normal market conditions, its transactions cannot be regarded as State aid.

v) The court is concerned with whether a transaction is or is not State aid. It is not concerned with the different question of whether, if it is State aid, it is justified. That is a question for the Commission; hence the standstill provisions whilst the Commission makes such a determination, in article 108 TFEU.

vi) Whether the transaction was one which a rational private market operator might have entered into in the same circumstances is a question for the court to consider objectively and to decide, on the basis of the information available at the time of the decision, and developments then foreseeable (Commission v Électricité de France [2012] 3 CMLR 17 at [105]). Therefore, where a Member State seeks to argue that a transaction was one which a market operator might have entered upon, it must be on the basis of evidence showing that the decision to carry out the transaction was taken at the time on the basis of economic evaluations comparable with those which a rational market investor would have carried out in the same circumstances, which will normally include a business plan justifying the decision (the 2014 Draft Communication at paragraphs 81-82). Subsequent justification is irrelevant: the transaction cannot be evaluated on the basis of whether it was in the event actually profitable or not.

vii) The market economy operator comparator is, of course, hypothetical; but whilst, for the purposes of applying this test, all policy considerations relating to the State's role as a public authority have to be ignored, the comparator rational private operator must be assumed to have similar operational characteristics to the public body concerned. For example, if the transaction is a loan by a public authority with a shareholding in the relevant undertaking, then the comparator is, not a new incoming private investor, but a private investor with a similar shareholding.

viii) Some private investors look to speculative or other short-term profit. However, some have long-term objectives with a structural policy and are guided by a longer-term view of profitability; and, if an investor is a shareholder in the relevant undertaking, he may be more likely to have such long-term objectives (see 1993 Communication, paragraph 20). As the General Court put it in Corsica Ferries France SAS v Commission (2012) Case T-565/08:

> "However, in making that distinction between economic activities, on the one hand, and public authority intervention, on the other hand, it is necessary to take account of the fact that the conduct of a private investor, with which the intervention of a public investor must be compared, need not necessarily be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term. That conduct must, at least, be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectoral – and guided by prospects of profitability in the longer term…".

State investment may therefore satisfy the market economy operator test where there is a "reasonable likelihood" that the assisted undertaking will become profitable again (Neue Maxhütte at [116]).

ix) In particular, the European cases draw a distinction between a private creditor and a private investor: the creditor is primarily concerned with the most effective means of recovering his debt, whereas the investor's commercial interests may well include ensuring that the undertaking concerned avoids going into liquidation because, in the investor's view, profitability might reasonably return in the future (see, e.g. Re Déménagements-Manutention Transport SA [1999] ECR I-3913; [1999] 3 CMLR 1: Advocate General Jacob's Opinion at [35]-[36], and Court Judgment at [24]-[25]). Summarising the relevant jurisprudence, the 1993 Communication therefore says:

> "20. … A private investor may well inject new capital to ensure the survival of a company experiencing temporary difficulties, but which after, if necessary, a restructuring will become profitable again…
>
> 30. … Where this call for finance is necessary to protect the value of the whole investment the public authority like a private investor can be expected to take account of this wider context when examining whether the commitment of new funds is commercially justified…".

x) Although the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market. Consequently, a public authority has a wide margin of judgment (see, e.g. the 1993 Communication at [27] and [29] ("… a wide margin of judgment

> must come into entrepreneurial investment decisions…")); or, to put that another way, the transaction will not fall within the scope of State aid unless the recipient "would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation…" (Déménagements-Manutention Transport at [30]: see also Westdeutsche Landesbank Girozentrale v Commission [2003] ECR II-435 at [260]-[261]). Therefore, in practice, State aid will only be found where it is clear that the relevant transaction would not have been entered into, on such terms as the State in fact entered into it, by any rational private market operator in the circumstances of the case."

103. On appeal (*R (Sky Blue Sports) v Coventry City Council (No 1)* [2016] EWCA Civ 453), the Court of Appeal emphasised the breadth of discretion given to the Council in determining whether an investment in a sports arena was on commercial terms, to meet the market economy investor principle (the EU equivalent of s. 3(2) of the Act). Tomlinson LJ (with whom Treacy and Floyd LJJ agreed) said this:

> "13…the Appellants have a difficult task to the extent that they seek to persuade us that both the Council and the judge exceeded the respective generous margin of judgment or appreciation afforded to them."

104. The *Sky Blue Sports* approach to review was followed by the Court of Appeal in *British Gas Trading v Secretary of State for Energy Security and Net Zero (Bulb Energy)* [2025] EWCA Civ 209.

105. *Bulb Energy* was a judicial review brought under the interim subsidy control regime which came into place after the end of the EU State aid regime and before the entry into force of the Act on 4 January 2023. The case involved the terms on which Octopus Energy were permitted by the Secretary of State for Energy Security and Net Zero to acquire the business of the Bulb Energy after the latter was placed in administration. Unlike *Sky Blue Sports*, it does not concern a loan advanced by a local authority.

106. The Court of Appeal approved the *Sky Blue Sports* analysis to identifying commercial market terms not involving the grant of subsidy. Zacaroli LJ, with whom Underhill and Dingemans LJJ agreed, held at [97]:

> "Although it may be said that the question, here, is one of law (was there a subsidy to Octopus at all?), the answer to it is dependent on the application of a test which involves the exercise of commercial judgment (the market

> economy operator test). While the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market; accordingly, in practice State aid will only be found where it is clear that the relevant transaction would not have been entered into, on the terms the State in fact entered into it, by any rational market operator: *Sky Blue Sports & Leisure Limited v Coventry City Council* [2016] EWCA Civ 453, at §16 and §23-29 (approving in particular §88(x) of the decision of Hickinbottom J at first instance in that case). Moreover, … even if error of law is asserted, where – as here – 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 that it would be set aside."

107. "Subsidy schemes" are defined in s.10(1) of the Act and mean "*a scheme made by a public authority providing for the giving of subsidies under the scheme*".

108. The Tribunal provided an explanation of subsidy schemes in the first subsidy control case filed in the Tribunal: see *The Durham Company (t/a Max Recycle) v Durham County Council* [2023] CAT 50, at [49]-[51].

109. S.12 of the Act states:

> "(1) A public authority –
>
> (a) must consider the subsidy control principles before deciding to give a subsidy, and
>
> (b) must not give the subsidy unless it is of the view that the subsidy is consistent with those principles.
>
> (2) In subsection (1) "subsidy" does not include a subsidy given under a subsidy scheme.
>
> (3) A public authority –
>
> (a) must consider the subsidy control principles before making a subsidy scheme, and
>
> (b) must not make the scheme unless it is of the view that the subsidies provided for by the scheme will be consistent with those principles."

110. To ensure transparency of subsidy decisions, public authorities must upload details of the subsidies and subsidy schemes they have given or made to the subsidy database. S.33 of the Act states:

> "**Duty to include information in the subsidy database**

(1) A public authority must ensure that an entry in the subsidy database is made in respect of—

(a) a subsidy given by the authority (subject to subsection (2)), and

(b) a subsidy scheme made by the authority.

(2) Subsection (1)(a) does not apply to a subsidy if—

(a) it is given under a subsidy scheme,

(b) an entry is made in the subsidy database in respect of the scheme, and

(c) the amount of the subsidy is no more than £100,000.

(3) An entry in the subsidy database must be made in respect of a subsidy or scheme—

(a) if given as a subsidy in the form of a tax measure, within one year beginning with the date of the tax declaration,

(b) if made as a subsidy scheme in the form of a tax measure, within three months of the confirmation of the decision to make the scheme, or

(c) if given or made in any other form, within three months of confirmation of the decision to give the subsidy or make the subsidy scheme.

(4) A public authority must ensure that an entry it makes under this section is maintained on the subsidy database for six years beginning with the date on which the entry is made, or for the duration of the subsidy or scheme if longer."

111. S.70 of the Act provides in relevant part:

"(1) An interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal for a review of the decision.

(2) Where an application for a review of a subsidy decision relates to a subsidy given under a subsidy scheme, the application must be made for a review of the decision to make the subsidy scheme (and may not be made in respect of a decision to give a subsidy under that scheme)."

...

(5) In determining the application, the Tribunal must apply the same principles as would be applied—

(a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review.

…

(7) In this Part— "interested party" means—

(a) a person whose interests may be affected by the giving of the subsidy or the making of the subsidy scheme in respect of which the application under subsection (1) is made, or

(b) the Secretary of State;

… "subsidy decision" means a decision to give a subsidy or make a subsidy scheme..."

112. The Act replaced the EU State aid regime which ceased to apply at the end of 2020 and the interim regime which was in place from then until the entry into force of the 2022 Act on 4th January 2023.[4]

113. There is statutory guidance on the legislation, to which public authorities must have regard in relation to subsidies (s.79(6) of the Act), which explains public authorities' legal obligations under the UK subsidy control regime.

114. The Act was adopted to give effect to the UK's obligations under the Trade and Cooperation Agreement ("TCA") entered into at the end of 2020.

115. Section 89(2) of the Act provides that:

> "Section 30 of the European Union (Future Relationship) Act 2020 [EUFRA] (interpretation of agreements: public international law) applies where a court or tribunal has regard to the Trade and Cooperation Agreement or a supplementing agreement for the purposes of interpreting a provision of this Act."

116. Section 30 EUFRA 2020 provides that:

> "A court or tribunal must have regard to Article 4 of the Trade and Cooperation Agreement (public international law) when interpreting that agreement or any supplementing agreement."

117. Article 4 TCA provides:

> "1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their

[4] Northern Ireland remains subject so far as goods are concerned to the EU State aid rules under Article 10 of the Windsor Framework to the EU-UK Withdrawal Agreement, but that is not relevant to this appeal.

> context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.
>
> 2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party."

118. As to the interpretation of Article 4 TCA, see the Ruling of the Permanent Court of Arbitration in PCA Case No 2024-45 *UK-Sandeel (EU v UK)*, 28 April 2025, [434]-[440].

119. The UK has World Trade Organisation ("WTO") obligations in the subsidy control field through the WTO Agreement on Subsidies and Countervailing Measures ("ASCM") which forms part of Annex 1A to the WTO Agreement.

120. As to the appropriate standard and intensity of review, this was addressed by the Tribunal in *Dye & Durham Ltd and another v CMA* [2023] CAT 46 (a statutory judicial review of a merger decision under s120 Enterprise Act 2002):

> "56. The Applicants' challenge to the Decision is governed by s.120 of the 2002 Act. Accordingly, the Tribunal must apply "the same principles as would be applied by a court on an application for judicial review" (s.120(4)).
>
> 57. As to judicial review proceedings before the Tribunal, the Court of Appeal held in *Office of Fair Trading and others v IBA Health Limited* [2004] EWCA Civ 142 ("IBA") that, notwithstanding its specialist composition, the Tribunal is to apply the ordinary principles of judicial review in determining applications pursuant to s.120(4) of the 2002 Act (see IBA at [53] and [88]). As regards the intensity of review, Carnwath LJ observed that:
>
> > "91. Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (de Smith para 13-056-7). Examples are *R v Secretary of State, ex p Nottinghamshire CC* [1986] AC 240, and *R v Secretary of State ex p Hammersmith and Fulham LBC* [1991] 1AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' ([1991] 1AC at 596-597 per Lord Bridge). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:
> >
> > 'Review is stricter and the courts ask the question posed by the majority in Brind, namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression

was justifiable.' (De Smith para 13-060, citing *Brind v Secretary of State* [1991] AC 696).'

92. A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment (see *Brind* [1991] 1AC at 767, per Lord Lowry). On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene:

> 'Such questions are to be answered not by reference to Wednesbury unreasonableness, but 'in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge'' (*R v Takeover Panel ex parte Guinness plc* [1990] 1QB 146, 184, per Lloyd LJ).

93. The present case, as the Tribunal observed (para 223), is not concerned with questions of policy or discretion, which are the normal subject-matter of the Wednesbury test. Under the present regime (unlike the [Fair Trading Act 1973]) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to enquire whether there was adequate material to support that conclusion (see *Tameside* case, [1977] AC at 1047 per Lord Wilberforce)."

58. *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25 ("BSkyB") concerned a judicial review application under s.120 of the 2002 Act in respect of the Competition Commission's finding that there was a relevant merger situation which was expected to result in an SLC and recommendation that there be a partial divestiture of ITV shares that Sky had purchased. In that case Sky submitted that Parliament chose to allocate the power of review to the Tribunal, a specialist body, as opposed to a generalist court, and Parliament must be taken to have anticipated particular consequences for the intensity of review that would follow from that choice. Thus, whilst applying the same principles as the Administrative Court would apply, the Tribunal should do so with a greater intensity of review because it is a specialist judicial body. The Tribunal did not accept this submission and clarified that, although the Tribunal is a specialist body and enjoys a degree of familiarity with the statutory regime, relevant case law and some of the legal and economic concepts which arise:

> "62. However, in our view none of this means that the Tribunal is applying judicial review principles in a different way or is exercising a higher intensity of review than would be the case if the matter were before the Administrative Court. Further, by no means all of the findings which may be the subject of a section 120 challenge are such as would necessarily call for expertise in competition law and practice. For example, in the present case there is a challenge to a finding by the Commission that, by reason of (in particular) the size of its shareholding, Sky is likely to be able to exercise material influence over the policy of ITV through its ability to block a special resolution or a scheme of arrangement. In assessing the adequacy of

the factual basis for this finding the Tribunal can, of course, bring to bear the business knowledge and experience of its panel members, but has no other intrinsic advantage that might not be found in the Administrative Court.

63. […] We consider that the principles we should apply in this application are those which are helpfully set out and discussed in, in particular, Tameside and IBA, and which were applied in the Tribunal decisions cited to us. As the Commission and the Secretary of State submit, the Tribunal must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits. We shall need to bear this distinction in mind when we come to deal with the specific points raised by Sky in relation to the factual basis upon which the Commission reached the challenged 28 findings. It is one thing to allege irrationality or perversity; it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the Commission. The latter is not permissible in a review under section 120."

59. Sky appealed against the Tribunal's decision, contending amongst other things that the Tribunal erred in law as to the content of its obligation to apply judicial review principles. In *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2 ("BSkyB (CA)"), the Court of Appeal rejected Sky's argument and endorsed the Tribunal's reasoning in BSkyB at [63] (see BSkyB (CA) at [32] and [41]). It is this approach that applies in relation to the present Application.

60. Regarding the grounds of challenge relating to legal error, the Applicants correctly submitted there is no margin of appreciation to be afforded to the CMA – the construction of a legal provision is either right or wrong (*Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48, HL).

3. Rationality and Proportionality

61. *Stagecoach Group PLC v Competition Commission* [2010] CAT 14 ("Stagecoach") concerned a judicial review application under s.120 of the 2002 Act. One of the grounds of challenge was that the Competition Commission acted irrationally by arriving at a counterfactual that was not supported by sufficient or any evidence. The Tribunal applied the approach set out by the Court of Appeal in IBA and endorsed in *BSkyB* (CA) (see *Stagecoach* at [41]) and observed that:

"42. […] it is not the Tribunal's task to reassess the relative weight of different factors arising from the evidence before the Commission. The task is to assess whether the Commission had an adequate evidential foundation for arriving at the factual conclusions that it did, in the sense that, on the basis of the evidence before it, it could reasonably have come to those conclusions. […]

45. […] Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the

evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be weary of a challenge which is 'in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review' […]

46. The Commission also reminded us that it is important to consider the evidence relied on in the Decision 'taken as a whole' and that the Decision should not be analysed as if it were a statute. The Tribunal must consider the materiality of any 'fact' found by the Commission which the Tribunal determines has no evidential foundation – not every failure in fact-finding and analysis by a decision making body requires or permits its finding or decision to be quashed.

[…]

48. […] The question we must ask ourselves, paraphrasing the description of the Wednesbury test expressed by the Vice Chancellor (as he then was) in *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142, is whether the Decision is so unreasonable as to be a decision which no Commission properly instructed and taking account of all, but only, relevant considerations could arrive at."

62. The Tribunal considered the standard of rationality in *BAA Limited v Competition Commission* [2012] CAT 3 ("*BAA*") when determining a judicial review application under s.179 of the 2002 Act. The *BAA* case concerned a report by the Competition Commission following a market investigation, which found that a number of features of the market each gave rise to an adverse effect on competition ("AEC") and required BAA to sell one of its Scottish airports and both Gatwick and Stansted airports. BAA's challenge included the submission that the Competition Commission was obliged to carry out its functions in a way that is compatible with Convention rights and the divestiture remedy it imposed on BAA involved a disproportionate interference with its Convention right as set out in Article 1 of the First Protocol to the ECHR. The Tribunal applied *IBA* and *BSkyB (CA)* and held at [20(3)] to [20(8)] that:

"(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the change in government policy which was likely to preclude the construction of additional runway capacity in the south east in the foreseeable future): see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC 'must do what is necessary to put itself into a position properly to decide the statutory questions': *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's

primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in Khatun:

> 'The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made.'

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45].

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion 'reasonably, carefully and in good faith', but will include examination 'whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'' (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135- 138). However, exactly what standard of evidence is required so that the reasons adduced qualify as 'relevant and sufficient' depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding 'the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken' are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is 'manifestly without reasonable foundation': *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the 'manifestly without reasonable foundation' standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken

by such a body 'is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion': Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA [1998] is essentially equivalent to that given by the ordinary domestic standard of rationality. […]

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see I*BA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in 'second guessing' the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt; (8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council*

v Porter (No. 2) [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> 'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.' In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports as to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

63. The 2002 Act stipulates that applications brought under s.120 or s.179 are to be determined by applying judicial review principles. Therefore the principles set out in *BAA* equally apply in the context of a review under s.120 of the 2002 Act. This was recognised by the Tribunal in *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2017] CAT 6 ("*ICE*") at [30].

64. In *ICE*, which was a judicial review application under s.120 of the 2002 Act, the Tribunal applied the principles set out in *BAA* and stated that:

> "101. We agree that divestiture by ICE of its interest in Trayport would be an intrusive step, but not so seriously intrusive as an order for divestiture in a market investigation. This is because, in the case of a completed merger, the merging parties have taken the foreseeable risk that the CMA may make an order for divestiture. In contrast, an order for divestment in a market investigation context may be more intrusive, since it requires a change in the status quo and intervenes in an existing structure which, quite possibly, comprises integrated activities that represent the product of investment and development over a long period of time. This distinction however does not undermine the fact that divestiture is an intrusive remedy where one would

> expect the CMA to have exercised appropriate care in the analysis of the SLC and selection of the remedy required. Even in such a case as emphasised in *BAA* at para 20(7) the CMA retains a wide margin of appreciation and discretion. […]".

65. Accordingly, the standard of review applied by the Tribunal in *ICE* was:

> "124. […] whether the CMA had a sufficient basis in light of the totality of the evidence available to it for making the assessments that it did, as to which there must be evidence available to the CMA of some probative value on the basis of which the CMA could rationally reach the conclusion that it did.""

121. The Tribunal will review a *"subsidy decision*" by the application of ordinary judicial review principles.

122. The applicable public law principles may be shortly summarised as follows:

(1) A decision-maker is obliged to take into consideration only relevant matters, and to exclude "*matters that were irrelevant from what he had to consider*": *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1064-1065. Irrelevant considerations include those which are not logically material to the decision at issue: e.g., *R v Secretary of State for the Home Department ex p Venables* [1998] AC 407; *R v Tower Hamlets ex p Chetnik Developments Ltd* [1988] AC 858 at 879.

(2) The decision-maker must further "*take reasonable steps to acquaint himself with the relevant information to enable him to [make the decision] correctly*": *Tameside*, ibid. That obligation "*includes the need to allow the time reasonably necessary, not only to obtain the relevant information, but also to understand and take it properly into account*": *CPRE Kent v Dover DC* [2018] 1 WLR 108, [62]. The "*wider the discretion conferred on [decision-maker], the more important it must be that he has all relevant material to enable him properly to exercise it*": *R (Plantagenet Alliance) v Secretary of State for Justice and others* [2014] EWHC 1662 (QB), [100(6)].

123. There are two principal aspects to rationality: (1) whether the decision is outside the range of reasonable decisions open to the decision-maker, and (2) "*[a] decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error*": *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, [98].

124. The views or knowledge of officers or other third parties are irrelevant, unless they were communicated to the decision-maker and actually taken into account by the decision-maker during the decision-making process: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, (per Keene LJ):

> "73. Where the decision is in truth one taken personally by a minister, the normal principles of administrative law will apply, so that on a challenge by way of judicial review the court will consider whether the minister as decision-maker has taken into account irrelevant considerations or failed to take into account relevant ones. Where the decision- maker is in fact a civil servant, the same principles apply to that civil servant's decision, albeit the discussion will nominally refer to "the Secretary of State". This approach accords with the decision of the High Court of Australia in the *Peko-Wallsend* case. As Gibbs CJ said in his judgment in that case at pages 30 – 31:
>
> > "Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the Departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law.""

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

> "40… the breadth of the deference to be accorded to the decision maker may vary as between different grounds of challenge. It is, however, important to

recognise that, because of its expertise, it is quite possible that the CAT will be critical of relatively complex evaluations by the decision maker, even where a non-specialist court might not be. That is a necessary corollary of the CAT having been instituted as a specialist body tasked to conduct precisely that sort of exercise.

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

(2) The 2022 Regulations

126. The scope of the 2022 Regulations is set out in Regulation 3, which provides:

"**Gross Cash Amount and Gross Cash Equivalent Amount**

3.— (1) These Regulations make provision about how the gross cash amount or the gross cash equivalent amount of a subsidy(1) is to be determined for the purpose of—

(a) section 33(8) of the Act (Duty to include information in the subsidy database),

(b) section 36(5) of the Act (Minimal financial assistance),

(c) section 38(5) of the Act (Services of public economic interest assistance),

(d) section 41(2) of the Act (Exemption for certain subsidies given to SPEI enterprises), and

(e) provision in regulations or schemes made under the Act.

(2) In the provisions mentioned in paragraph (1)(a) to (e)—

(a) references to a subsidy being provided in cash are to be taken to mean a subsidy which is given by means of a grant, and

(b) references to a subsidy provided otherwise than in cash are to be taken to mean a subsidy given by any other means.

(3) Accordingly, in these Regulations—

(a) references to the gross cash amount of a subsidy are to be taken to refer to a subsidy which is given by means of a grant, and

(b) references to the gross cash equivalent amount of a subsidy are to be taken to refer to a subsidy which is given by any other means."

127. Regulation 8 states:

> "**Determining the interest rate for a loan that might reasonably have been expected to have been available on the market**
>
> 8. Where the subsidy is given by means of a loan to a person with a strong, good or satisfactory level of creditworthiness, the interest rate at which a loan of the same kind might reasonably have been expected to have been available on the market may be calculated by adding—
>
> (a) the relevant base rate, which is determined by identifying the period over which the loan is to be repaid, as set out in Table 1 in Schedule 2, and
>
> (b) the relevant mark-up rate in the third column of Table 2 in Schedule 2, which is determined by identifying—
>
> (i) the person's level of creditworthiness in accordance with regulation 2(2), and
>
> (ii) the percentage loss that a public authority(1) may experience if the person in receipt of the loan does not repay the loan, as set out in the second column of Table 2 in Schedule 2."

128. The Tables in Schedule 2 are reproduced below:

Table 1
Determining the base rate for loans

Length of loan	*Base rate per annum*
One month	4.3%
Three months	4.3%
Six months	4.3%
One year	4.3%
Two years	4.3%
Five years	3.8%
Ten years	3.4%
25 years	3.1%

Table 2
Determining the mark up rate for loans

Level of creditworthiness	*Loss in the event of default*	*Mark up rate per annum*
Strong	None	1%
Good	None	1%
Satisfactory	Not more than 30%	1%
Satisfactory	More than 30% and not more than 60%	2.2%

Satisfactory	More than 60% (or not known)	3.4%

(3) Relevant guidance

129. The statutory guidance for the United Kingdom Subsidy Control Regime is issued pursuant to section 79 of the Act and was published in January 2025 (the "Guidance")[5]. It states:

> "1.24. Public authorities must establish if financial assistance they are proposing to provide meets the definition of a subsidy under the Act. For financial assistance to be a subsidy it must meet four specific conditions. These are discussed under Chapter 2 of the guidance, and in further detail in Annex 1.
>
> …
>
> 2.1. The subsidy control regime does not apply to all types of financial assistance given by public authorities. In the early stages of decision-making, it is therefore key that public authorities assess whether the proposed financial assistance falls under the definition of a subsidy that is set out in the Act.
>
> …
>
> 2.3. The second part of the chapter sets out what public authorities should consider in determining whether the subsidy control regime is engaged. The definition of a subsidy consists of a four-limbed test, of which each condition must be met for the financial assistance to constitute a subsidy. This test allows the UK to meet national policy objectives and international obligations. Where each limb is met, the financial assistance will be a subsidy and therefore must be given in accordance with the Act.
>
> …
>
> 2.13. It is important to emphasise that there are many examples of financial assistance that satisfy one or more limbs, but not all four – these are therefore not subsidies. It is important for those giving financial assistance to be clear that their measure meets all four limbs, to understand whether to proceed to apply the subsidy control requirements as set out in the rest of this guidance.
>
> 2.14. For some measures, this will be straightforward to determine – for example, a grant given by central, devolved, or local government to a commercial business is very likely to be a subsidy. In other instances, it will be important to consider carefully – for example, if there is a question as to whether the financial assistance is provided on commercial terms, or whether

[5] Statutory Guidance for the United Kingdom Subsidy Control Regime: Subsidy Control Act 2022.

the recipient of the assistance is engaging in economic or non-economic activity.

…

2.20…it must confer economic advantage, meaning that the financial assistance is provided on favourable terms. Financial assistance will not confer an economic advantage if it could reasonably be considered to have been given on the same terms as it could have been obtained on the market. This is known as the 'commercial market operator' (CMO) principle.

Examples of financial assistance that may not meet this test include:

…

- a loan, guarantee or equity investment provided on CMO terms (meaning that it could reasonably have been provided by a private investor on the market), for example by being given on the same terms at the same time as a significant private sector investment, or evidenced via benchmarking or profitability analysis, or both.

2.23. Further detail on each of the 4 limbs of the test is set out in Annex 1. This annex describes how public authorities should consider whether the test is met, where there is any doubt.

…

2.25. A scheme is a set of rules that describes the eligibility, terms, and conditions for any number of possible subsidies to be given under the scheme for a similar purpose. Before making a scheme, a public authority must be of the view that any subsidy given compatibly with the scheme's terms and conditions would be consistent with the subsidy control principles.

…

13.8 The Tribunal can also review these subsidy decisions on general public law grounds."

130. Annex 1 provides:

"15.51. For some types of financial assistance this will be a straightforward determination, since they are generally not provided on market terms – for example, a grant or a tax relief. For others – such as a loan, an equity investment, or the purchase of goods or services – this will be for the public authority to consider.

…

How will an economic advantage be assessed?

15.57 If there is any doubt as to whether financial assistance confers an economic advantage, public authorities should carry out a detailed analysis, with regard to the market in question.

15.58 Terms of financial assistance will be considered in line with market terms (meaning it will not be considered more favourable than those that might be reasonably available on the market) where the financial assistance provided is on terms that could be considered to be made available on the market by a private operator that is driven by commercial objectives.

15.59 Throughout this guidance, this condition is referred to as the 'commercial market operator (CMO) principle'.

15.60 For the purposes of the CMO principle, it is only a public authority's commercial objectives that are relevant for the assessment. Any public policy objectives should not be included when assessing whether the financial assistance in question confers an economic advantage, on the basis that such objectives would not be applicable to private operators in the relevant market.

…

How is the CMO principle applied?

15.62 In terms of scope, the CMO principle will consider the market at the time at which the financial assistance is given.

How can public authorities show compliance with the CMO principle?

15.63 Where seeking to rely on the CMO principle, it is important that public authorities obtain sufficient evidence to show that the financial assistance provided could be made available in the market by a private operator with commercial objectives and is provided on terms that would be acceptable to such a private operator. In certain instances, public authorities can establish compliance with the CMO principle directly by using evidence that is specific to the financial assistance in question, for example where financial assistance is given at the same time and on the same terms as a significant investment by a private operator (also known as 'pari passu'). However, other evidence-based assessments may be undertaken, including the use of benchmarking and profitability analysis.

15.64 Any evaluation of compliance with the CMO should be undertaken with input from experts with appropriate skills and experience. In cases where the commercial assessment is not straightforward, it is recommended that public authorities commission a reputable third party to conduct a report as evidence that the actions proposed to be taken are in accordance with the CMO principle (as it would be in the case, for example, of co-investment with private operators on the same terms or the procurement of goods and services in accordance with public procurement rules). Where public authorities are operating schemes, the CMO assessment can be made at scheme level."

Further information on the application of the 3 approved methods is provided in the Guidance at paras 15.65 - 15.78.

131. The EU Commission has promulgated a proxy mechanism to calculate a market rate of interest in respect of public body loans throughout the EU and the UK: '*Communication from the Commission on the revision of the method for setting the reference and discount rates*' (OJ C 14, 19.01.2008, p.6) ("the Reference Rate Communication").[6]

132. The methodology uses two components, (i) the base rate, and (ii) the margin.

133. The applicable base rate is determined by the EU Commission from time to time and published in a table which sets out the applicable interest rate for each EU member state and the UK.[7] The UK base rate between 1 January 2024 and 1 December 2024 was 5.65%.

134. The margin is determined by applying a table that allocates a number of basis points (and therefore an interest rate) based on the creditworthiness of *"the borrower"* and the level of collateral provided for the loan ("*The premium applied to obtain the reference rate for a loan is calculated according to the borrower's creditworthiness and collaterals*").

Loan margins in basis points			
Rating category	**Collateralisation**		
	High	**Normal**	**Low**
Strong (AAA-A)	60	75	100
Good (BBB)	75	100	220
Satisfactory (BB)	100	220	400
Weak (B)	220	400	650
Bad/financial difficulties (CCC and below)	400	650	1000

135. The Reference Rate Communication provides:

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

[6] c_01420080119en00060009.pdf.
[7] 248565f9-7b6e-411f-9aa9-08404deaded1_en.

D. GROUNDS OF CHALLENGE, THE PARTIES' SUBMISSIONS AND THE TRIBUNAL'S ANALYSIS

136. In his ANoA, the Appellant raised seven grounds of challenge:

(1) The Respondent misdirected itself and/or failed, whether at all or lawfully, to inquire into and/or consider what, if any, alternative sources of third-party finance were available to Renaker in respect of the funding sought.

(2) The Respondent misdirected itself and/or failed, whether at all or lawfully, to inquire into and/or consider the rates of interest charged by third party lenders in respect of the funding sought.

(3) The Respondent misdirected itself and/or failed, whether at all or lawfully, to inquire into and/or consider whether Renaker could be charged a higher rate of interest in respect of the loans sought.

(4) The Respondent misdirected itself and/or failed, whether at all or lawfully, to inquire into and/or consider the assessment of Renaker and/or its own constituent council (Manchester City Council) that the projects for which funding was sought were unviable and/or required exemption from affordable housing requirements.

(5) The Respondent misdirected itself and/or failed, whether at all or lawfully, to inquire into and/or consider concentration risk arising from its lending to Renaker.

(6) The Respondent misdirected itself and/or failed, whether at all or lawfully, to inquire into and/or consider: (i) the dissolution of the Renaker company that it had treated as the relevant Renaker corporate entity for the purpose of risk assessment, (ii) the financial circumstances of Mr Whitaker, and/or (iii) the financial status of each of the borrowing Renaker entities.

(7) The Respondent misdirected itself and/or failed, whether at all or lawfully, to inquire into and/or consider the interest rates which it had previously charged for lending to Renaker related entities.

137. However, many of the grounds were not particularised in the ANoA and the Appellant's submissions were of a general nature. The issues that fall to be determined in this Appeal can be summarised as follows:

(1) Has a subsidy decision been made by the Respondent within the meaning of section 70 of the Act? If so, when was the decision taken? (Issue (1)).

(2) Would the 2024 Renaker Loans have been approved by a commercial market operator ("CMO") and did the rates of interest and other charges applied reflect the market rate? (Issue (2)).

(3) In relation to the appeal has the Respondent breached its duty of candour and, if so, in what respects and what are the consequences? (Issue (3)).

138. We consider each of these issues in turn. Once we have considered each of the issues, we will provide our brief analysis in relation to each of the grounds of appeal.

Issue (1): Has a subsidy decision been made by the Respondent within the meaning of section 70 of the Act? If so, when was the decision taken?

The parties' submissions

The Appellant

139. The decision of the GMCA Committee was made on 22 March 2024. It was a decision to approve the loans and delegate authority to sign the loans to the two relevant officers. There was no delegation of any wider decision-making authority. That remained at all relevant times with the Committee. When a

public body makes a decision to approve a loan or a grant, subject to confirmatory due diligence (as occurred here), that is a decision which is capable of being challenged under the Act, it is a subsidy decision. There was no later or subsequent decision of the committee. The relevant point of reference is the decision of 22 March 2024.

140. A decision to give a subsidy and actually giving a subsidy are separate concepts. S.12(3) of the Act deals with the making of a subsidy scheme. It states that the duty is to consider the subsidy control principles before making a subsidy scheme.

141. As regards a subsidy scheme, a public body makes a decision it is going to establish a subsidy scheme. The scheme then sits there for it may be months or years, it may at some point in the future give subsidies under the scheme, it may not. There is a temporal gap and difference necessarily. A prospective appellant is required to challenge the scheme as soon as there is a decision about it; it does not have to wait until the subsidy is actually given.

The Respondent

142. S.2(5) of the Act stipulates that a subsidy decision is only taken when an enterprise has an enforceable right to the financial assistance in issue. That did not take place until execution of the loan documentation on 22 November 2024.

143. As at 22 March 2024, the decision to grant the 2024 Renaker Loans had not yet been made and the 2024 Renaker Loans had not been entered into. The parties with whom GMCA was in negotiation in relation to the 2024 Renaker Loans at that point did not have any "*enforceable right to the financial assistance*" within the meaning of s.2(5).

144. Accordingly, there was no subsidy decision made by the GMCA on 22 March 2024 within the meaning of section 70(1) capable of challenge by the Appellant as set out in the ANoA or otherwise.

145. The 2024 Renaker Loans were not in fact completed until 22 November 2024. That is the date of any subsidy decision.

146. As at the date of the substantive hearing, the loans had not yet been drawn down by Renaker, which has indicated to the Respondent that it will not do so while the legal position remains uncertain. This is clear on the plain wording of the legislation. It also accords with good policy, as the terms of any agreement are still not fixed and may indeed not proceed until there is an enforceable right.

147. The Appellant now submits that this interpretation is inconsistent with the provisions in the Act concerning "subsidy schemes".

148. A subsidy scheme is different from a subsidy decision. A subsidy scheme is where an Authority sets out a scheme under which it will be granting financial assistance in the future provided certain terms are met. It is a subsidy scheme that can be challenged under the Act. You do not read into the concept of a subsidy scheme the concept of a subsidy decision. They are two different things.

149. The Respondent provided an explanation of subsidy schemes in *The Durham Company (t/a Max Recycle) v Durham County Council* [2023] CAT 50, [2023] PTSR 2128, at [49]-[51].

The Tribunal's analysis

150. A distinction is made in the Act between a subsidy and subsidy scheme. In the present case the Tribunal is not considering a subsidy scheme within the meaning of s.10. In s.12 dealing with the application of the subsidy control principles it is made clear for that purpose a "subsidy" does not include a subsidy given under a subsidy scheme.

151. In the present case, it is alleged that the subsidy decision was taken on 22 March 2024 by the GMCA Committee when it decided to approve the granting of the two loans, subject to due diligence and actual wording of the loan agreements,

delegating the authority to the Treasurer to sign and enter into the 2024 Renaker Loans.

152. Although it is not until the date of the entry of the 2024 Renaker Loans on 22 November 2024 that the borrowers had an enforceable right to financial assistance within the meaning of s.2(5), this does not mean that there was no subsidy decision challengeable before then. S.70(1) of the Act provides that an interested party aggrieved by the making of a subsidy decision may apply to the Tribunal for a review of the decision. Under s.70(7) a subsidy decision means a decision to give a subsidy (or make a subsidy scheme). It is not a requirement under s.70 that before an application is made to the Tribunal financial assistance must have already been given within the meaning of ss.2(5) and 3(2) of the Act. The subsidy decision within the meaning of s.70 was taken on 22 March 2024.

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

Issue (2): Would the 2024 Renaker Loans have been approved by a commercial market operator ("CMO") and did the rates of interest and other charges applied reflect the market rate?

The parties' submissions

The Appellant

154. The relevant purpose of the Act is to prevent the giving of unlawful subsidies by public authorities, because such activity undermines the efficient functioning of competitive markets.

155. The 2024 Renaker Loans would not have been approved by a CMO and the rates of interest applied to the loans do not reflect the market rate and therefore give rise to subsides within the meaning of s.2(1) of the Act. In summary, the Respondent failed to take lawful or sufficient steps to ensure that the interest rates on the loans reflected market rates and it failed to implement any of the three approved methodologies provided for by the statutory guidance that has been issued under the Act, namely: (i*)* pari passu investment by a CMO, (ii) benchmarking by reference to properly comparable CMO loans, and/or (iii) profitability analysis based on comparison with profit rates accepted by CMOs in properly comparable circumstances (see below). Nor did the Respondent obtain third party expert advice supporting reliance on the CMO principle. In the context of loans comprising c. £120 million of public money, it is to be inferred that the CMO principle is not satisfied.

156. The Respondent failed to undertake any lawful or sufficient consideration of, or inquiry into, the commercial terms available to Trinity and Jackson on the market and/or what interest rate would be required by CMOs for providing the loans.

157. The Respondent's decision to approve the loans was made with regard to irrelevant considerations, in particular the Respondent's public policy objectives in its capacity as a public body related to supporting employment, training and housebuilding in Manchester.

158. Mr Whitaker's strategy for his commercial negotiations with the Respondent was specifically to obtain agreement on the pricing on the interest rates that would be applied *before* any engagement with any of the Respondent's governance processes or committees; this is evident from an email exchange between Mr. Enevoldson and Mr. Whitaker dated 13 February 2024: see para 75 above. The pricing was agreed at this stage. The agreement was, at this point in time, between the Respondent and Mr Whitaker.

159. From this flawed starting point, there then ensued an unlawful process. The approval of the 2024 Renaker Loans and the pricing was subsequently taken

through the Respondent's decision-making processes without the relevant decision-maker (that being a committee comprising council members and also the Mayor of Manchester) ever being provided with any advice as to the basis on which the loans were priced or whether the pricing was compliant with the Act. As a consequence of that, the Respondent was unable to give any consideration as to whether the pricing was appropriate or the requirements of the Act were met.

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

161. The Respondent needed to consider the market rates and compliance with the CMO principle: there are important statutory duties contained in s.12 of the Act read together with ss.2 and 3 and the magnitude of the sums of public money involved. If the Appellant is wrong that the responsible decision-maker is not the GMCA Committee, it says that the only possible alternative is the Monitoring Officer and Treasurer. They did not have any advice about market rates/compliance with CMO principle either and did not make any decision in respect of these matters.

162. If a public authority was not subject to a public law duty to consider whether financial assistance met the definition of *"subsidy"*, it would never identify that it was proposing to give a *"subsidy"* within the meaning of the Act, and therefore would never perform the required s.12 subsidy control principles assessment. The purpose of the Act (namely preventing the giving of unlawful subsidies) would be substantially circumvented or undermined.

163. The same analysis also applies in respect of s.33 of the Act, which imposes the duty to effect publication in respect of *"subsidies"*. This is the principal mechanism in the Act to enable interested third parties to acquire knowledge of,

and be able to challenge, potentially unlawful subsidies. Once again, if a public authority was not subject to a public law duty to consider whether proposed financial assistance met the definition of a *"subsidy"* it would never identify that it was proposing to give a *"subsidy"* within the meaning of the Act, would never effect any publication pursuant to s.33 and the statutory purpose of the Act (namely preventing the giving of unlawful subsidies) would be substantially circumvented or defeated.

164. In relation to the delegation arrangements that were entered into by the GMCA Committee, the only relevant delegation was to execute the loans (assuming there were no material adverse changes) and there was no delegation of authority to consider whether the loans should be approved. In any event, the Respondent's own evidence makes clear that there was never any advice to, or consideration by, the Treasurer or Monitoring Officer as to whether the loans complied with market rates/the CMO principle.

165. The Respondent was subject to a public law duty to have regard to and apply the EU Reference Rate Communication and to do so correctly: (1) the Respondent was required to by its contract with Central Government (which seeks to ensure the Act is complied with and defines what revenue goes to the Respondent and what goes to Central Government); (2) the Respondent was also required to comply with the Reference Rate Communication pursuant to its own written policy, namely the 2019 Investment Strategy; and (3) the IRSP demonstrates that as a matter of fact Mr Walmsley was purporting to apply the Reference Rate Communication.

166. In terms of what the Reference Rate Communication requires of the Respondent, **t**he Appellant submits that: (i) the required assessment is expressly stated to be creditworthiness of *the borrower* (not a sibling entity against whom there is no legal recourse for lender); (ii) the purpose of Reference Rate Communication is expressly stated to be establishing a methodology that is simple, clear and can be consistently applied; (iii) the Reference Rate Communication does not provide for or permit individual public bodies taking their own subjective approach based on positive past experiences or fact that a

borrower has sibling companies (which are not giving guarantees) with assets; (iv) the focus is on risk of non-payment and recourse provided to the lender, i.e. the legal entity and security in respect of which the lender actually acquires enforceable rights; (v) the Respondent's approach would be the antithesis of the simplicity and consistency which this document states its purpose is to ensure; and (vi) the specific language clear as regards SPVs.

The Respondent

167. The grounds advanced by the Appellant do not allege any error of law, procedural unfairness or irrationality relevant to a review of a subsidy decision under s.70 of the Act.

168. In general, the Appellant's submissions are no more than disputing the Authority's risk assessment under the GMHILF. All of which ignores GMHILF's proven record of success in delivering construction projects specifically with Renaker and more generally with other developers.

169. Doubtless different commercial property developers may have different views as to assessing commercial risk, but none of the Appellant's grounds on any view come close to establishing a ground for judicial review.

170. The Respondent carried out a detailed examination of the investment case for the 2024 Renaker Loans, involving external advisors with significant experience in the private housebuilding sector through the Gateway Panel and Credit Committee, as documented in the Gateway Paper and IRSP.

171. Further, at this point in the Fund's life, the GMHILF had extensive experience in pricing loans on a commercial basis and the interest rate for the 2024 Renaker Loans was further informed by recent lending for Blade and Collier's Yard where the Greater Manchester Pension Fund (which is a totally independent organisation run by its own fund manager) commissioned its own independent analysis.

172. The Respondent also has market intelligence from various sources (including potential borrowers) and has lent side by side with commercial lenders in several club loans, including with the Greater Manchester Pension Fund (independently run on a commercial basis). It had previous profitable loans to Renaker. The decision to proceed with the 2024 Renaker Loans on the terms that were entered into was an entirely rational investment decision for the Respondent to take.

173. The Respondent submits that in applying the CMO principle it enjoys a margin of judgement or appreciation: see *Sky Blue Sports & Leisure Limited v Coventry City Council* [2014] EWHC 2089 (Admin), *R (Sky Blue Sports) v Coventry City Council (No 1)* [2016] EWCA Civ 453, and *British Gas Trading v Secretary of State for Energy Security and Net Zero (Bulb Energy)* [2025] EWCA Civ 209.

174. The Appellant has impermissibly sought to gloss the statutory wording of s.3(2) of the Act in an attempt to minimise the margin of judgement or appreciation afforded to the Respondent in applying the CMO principle.

175. Financial assistance is not to be treated as conferring an economic advance to an enterprise unless the criteria set out in s.3(2) of the Act are met.

176. If the terms are not more favourable than the terms that might reasonably have been expected to have been available on the market to the enterprise, the process by which the terms in question were adopted is not relevant to determining whether there is a subsidy.

177. In the event of any dispute, the question of whether the terms are more favourable than the terms that might reasonably have been expected to have been available on the market to the enterprise is a matter of objective factual assessment. The Act does not impose any additional duty on a public authority providing financial assistance to carry out any separate form of assessment or inquiry (although nothing precludes a public authority from doing so if it so wishes).

178. This interpretation is consistent with the approach adopted in the English courts under both the EU State aid regime which, so far as the UK is concerned[8], came to an end at 11pm on 31 December 2020 (see the Court of Appeal in *Sky Blue Sports*) and the interim subsidy control regime in place from that date until the entry into force of the Act on 4 January 2023 (see the Court of Appeal in *Bulb Energy*). There is nothing in the Act which provides or indicates that a new interpretation is to be adopted.

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

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

181. The scope of the 2022 Regulations is set out in Regulation 3. The 2022 Regulations do not on their face apply to the exercise of judgement or appreciation under s.3(2) of the Act.

182. The interpretation of s.3(2) is clear on its face. Financial assistance is not to be treated as conferring an economic advance to an enterprise unless the criteria set out in s.3(2) are met.

[8] Save for trade in goods in Northern Ireland under Article 10 of the Windsor Framework to the EU-UK Withdrawal Agreement.

183. In short, there is no obligation on the Respondent to take a decision to the effect that the CMO principle applies. It is sufficient that on an objective factual assessment, affording the Respondent a wide margin of judgment, that it does.

The Tribunal's analysis

184. The Tribunal considers that this issue may be broken down as follows:

(a) The process followed.

(b) The background, terms and security for the 2024 Renaker Loans.

(c) Did the analysis in the IRSP fail to comply with the Guidance and the Reference Rate Communication?

(d) Would the 2024 Renaker Loans be approved by a commercial market operator and conclusion on s.3(2) of the Act.

(a) The Process Followed

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

2024 and the Credit Committee on 7 March 2024. The GMCA gave its approval on 22 March 2024 subject to due diligence and legal view and documentation. The Treasurer was given the authority to enter into the 2024 Renaker Loans at the end of that process, and he executed them on 22 November 2024.

186. The Appellant contends that it was in effect irregular for an officer to agree in principle indicative interest rates with Mr Whitaker at a meeting on 13 February 2024 prior to the GMCA Committee decision on 22 March 2024. It is entirely standard in the lending industry for indicative rates to be given prior to formal credit or other committee approval. Both sides will often wish to discuss the interest rates in mind at a relatively early stage in order to decide on whether or not it is worth proceeding further. Both sides would have appreciated that nothing was binding at that stage. That said, it would have been better to have spelt this out expressly in the email exchange setting out what had been agreed at the meeting on 13 February 2024.

187. As Director of Strategic Finance and Investment of the Respondent, Ms Blakey heads a team responsible for handling loan applications and loans under the GMHILF. The Transaction Manager, Mr Walmsley and those working alongside him would have been well aware of the need to make loans on commercial terms. They would have been aware of the lending and rates used by the GMHILF in its lending and did not work in a vacuum. There is no reason to believe that the relevant members of the Investment Team were in effect ignorant of rates commercially available. It was not necessary for a formal analysis to have been carried out on market rates prior to agreeing indicative rates.

(b) The background, terms and security for the 2024 Renaker Loans

188. Lenders have a variety of internal policies and practices in relation to the setting of rates for loans. Different lenders have different risk appetites and how risks may feed into lending rates. They will of course look to making a reasonable rate of return on cost of funds. The higher the perceived risk in terms of default

and possible shortfall once security is taken into account, the higher interest will be sought, if any lending is to be made in the first place.

189. Here the GMCA, through the GMHILF, has considerable and positive experience in its lending. It has been able to make it a profitable book with no defaults leading to shortfalls. It is in the GMCA's interests to make a profit which is ultimately shared with Central Government under the Facility Agreement. It therefore had both an interest and incentive in obtaining commercial terms out of its lending.

190. The Investment Team of the GMCA is not a small inexperienced outfit. At the relevant time in 2024, it consisted of 25 persons and collectively had a great deal of experience in providing and pricing loans to developers, including in relation to club loans, such as where for example where as noted below another co-lender had instructed Avison Young to analyse whether the lending was in light with the market and concluded that it had. The Investment Team would also have the benefit of market intelligence from other developers, who would share with the GMCA what other indicative rates are being offered by other lenders. This is the type of experience which gave the GMCA the insight as to where the market was in terms of commercial lending. The base rate may change over time, but that was factored into the GMCA's assessment. The amounts one adds on top of that is a judgmental one and the factors to be taken into account would not have fundamentally changed in the short to medium terms. It is the risks, security and conditions which should be the main drivers for where one may reasonably set the percentage over that to be charged. The IRSP reflects a careful consideration of the various factors to be taken into account, where one can see how when one looks at those matters the rate charged can be justified as being ones that are to be expected within the market being reasonable and available market terms.

191. In July 2021, the GMCA had recently provided funding for other Renaker schemes (Blade and Collier's Yard) which were part of a club loan with an independent co-lender who had undertaken its own analysis through Avison Young and found the agreed lending to be in line with the lending market. The

2024 Renaker Loans were therefore priced based on the previous market rate lending, but amended to factor in the differences in between the previous loans and these loans (namely that these were lower risk to the GMCA) and GMCA's perception of the market. The analysis and comparison with the previous lending is set out in the IRSP. The Appellant contends that the Maslow loan (Crown Street) would have been a better comparator or at least taken into account and this was at a higher rate of interest. It does not appear that this loan which was not with the GMCA was taken into account, but from the description of its terms, security and ratios as explained in Mr Whitaker's email dated 14 May 2025, it would not have been a particularly helpful comparator in any event.

192. Whilst the 2024 Renaker Loans were with two SPVs, it was legitimate to look at the wider Renaker Group under Mr Whitaker. A considerable number of flats had been built and sold, with all lending repaid or on course to be repaid in full and on time. A track record of successful development had been built up since 2015. Lenders making lending decisions quite legitimately and prudently look at reputation, track record and ability in completing successful projects not just of the actual SPV to whom the funds are lent, but also those behind it, including associated entities. There is no record of Mr Whitaker or entities in the Renaker Group of having ever defaulted on previous lending.

193. The essential terms of the 2024 Renaker Loans in terms of rates and security are as follows:

(1) As to the rates, these cannot be fairly categorised as low or obviously below market or commercial rates (bearing in mind the level of risk and security):

(a) On both loans there is an arrangement fee of **[✂]**% (an effective annualised rate of **[✂]**% on the two-year loans). This appears to the Tribunal to be a reasonable fee and certainly not low.

(b) Trinity loan: EU Base Rate 5.65% plus **[✂]**% (taking into account a **[✂]**% reduction from **[✂]**% on account of forward sale of the development, and **[✂]**% loan management fee). This gives a total annual rate of **[✂]**%, albeit the cost to the borrower is effectively **[✂]**% if the annualised arrangement fee is taken into account.

(c) Contour loan: EU Base Rate 5.65% plus **[✂]**% (taking into account **[✂]**% loan management fee). This gives a total annual rate of **[✂]**%, albeit the cost to the borrower is effectively **[✂]**% if the annualised arrangement fee is taken into account.

(d) It should be noted that at the time of the 2024 Renaker Loan Agreement (22.11.2024), the Bank of England Base Rate was 4.75%, some 0.9% lower than the EU Base Rate.

(e) The interest rates on both loans appear to the Tribunal to be reasonable and certainly not low.

(2) Both the LTV and LTC ratios are low which substantially reduces any risk of loss on default. The actual LTC ratio is **[✂]**% against the covenanted **[✂]**% according to the final version of the IRSP: see para 86 above and the table under the heading "Pricing decision". The LTV ratio is **[✂]**% (based upon RBV); both are well below the **[✂]**% that the GMHIF would normally consider for the purpose of lending to large city centre developments such as this.

(3) Covenants and conditions for drawdown substantially protected the Respondent from the risk of default or shortfall:

(a) On the Trinity loan, the development had already been the subject of a forward sale agreement by the time of the 2024 Renaker Loan. This substantially reduced the level of risk and justified the **[✂]**% reduction.

(b) It was a condition of drawdown that the borrower's equity was provided in funds, and that was on a subordinated basis, meaning the Respondent had priority on default to recover its lending. In effect if the SPVs were not creditworthy then there would have been no drawdown.

(c) Contour covenanted that the total facility amount for it would be covered by exchanged sales at the point of first drawdown.

(4) The security provided was substantial. This included:

(a) Debenture over the two SPVs, incorporating a first fixed charge over the development properties and bank accounts in which sales deposited would be held.

(b) Shareholder security agreements over the shares in the two SPVs.

(c) Subordination deed to subordinate lending to each SPV, alongside a subordinated creditor's security arrangement under which was assigned the benefit of that lending to the Respondent.

(d) Third party charges by way of legal mortgage over two additional properties in a sum equivalent to **[✂]**% of the estimated construction costs (£**[✂]** million).

(e) Step-in rights giving the Respondent the right to complete the schemes in order to recover the combined lending.

(5) There was no personal guarantee from Mr Whitaker or any debentures on other Renaker Group companies. This was relevant to pricing, but would not have justified any significant increase in rates in all the circumstances.

(6) The loans were substantial. On the basis of the final position of facilities totalling £120 million rather than initial proposal which had as an alternative £140 million, the amounts were £60.7 million for Trinity and £59.3 million for Contour.

194. Like the GMCA, a commercial lender would no doubt regard the 2024 Renaker Loans as relatively low risk where there was only a minimal risk of loss even in the event of a default. There were a number of risks inherent in such lending: the SPVs going out of business, lower than expected sales, increased costs beyond budget. However, even if such risks materialised, the structure of the 2024 Renaker Loans, including covenants and security, and the low LTV meant that in the event of a default, it was most probable that the Respondent would recover the full amount of the loans plus interest.

(c) Did the analysis in the IRSP fail to comply with the Guidance and the Reference Rate Communication?

195. The Part B Report which was before the GMCA Committee provides a clear summary of the proposed 2024 Renaker Loans, their background, the key terms, security, rates/pricing and relevant ratios. This would have been a sufficient basis on which the GMCA Committee approved the proposed 2024 Renaker Loans subject to due diligence/legal review and to authorise the Treasurer to enter into the 2024 Renaker Loans in due course. There was nothing in this paper to indicate that the lending was to be on anything other than proper commercial terms. The proposed arrangements had already been through the Gateway Panel and the Credit Committee where the proposals would have been reviewed by those with considerable lending experience.

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

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

197. The analysis of the State Aid reference rate under the 2022 Regulations gave what was correctly perceived to be a low rate of not less than 5.3% and hence it was not used as the basis for the pricing of the loans. It was considered that the rates ultimately adopted, being in excess of that calculation, was compliant with the 2022 Regulations. The mere fact that the rate may have been compliant with the 2022 Regulations is not in itself determinative of whether the rates adopted were market rates within the meaning of s.3(2) of the Act.

198. More significant is the analysis under the Reference Rate Communication. Whilst the Reference Rate Communication is an EU provision and the UK has long since left the EU, the Tribunal considers it to be a useful cross-check. The IRSP was right to consider this communication and was entitled to do so without being strictly bound to follow it blindly. The key contentious point is whether the GMCA should have added a minimum of 4% over the base rate for the fact that the lending was to SPVs. The relevant part of the Reference Rate

Communication provides for borrowers that do not have as credit history or a rating based on a balance sheet approach, such as with certain SPVs "the base rate should be increased by at least 400 basis points (depending on the available collateral) and the margin should never be lower than the one which would be available to the parent company". The Tribunal does not consider that under the Reference Rate Communication any time there is a SPV as a borrower there must be an automatic 4% margin over the base rate. There is a degree of flexibility inherent in the reference in brackets to "depending on available collateral". In the present case there is substantial collateral as well as protective conditions.

199. It is not suggested by either party that Mr Walmsley and the GMCA were unaware of this part of the Reference Rate Communication. Initially Mr Walmsley looked at the position of XQ Developments which had a net worth of £321 million and a very low risk rating of 5A1 from Dun & Bradstreet. By the time the 2024 Renaker Loans were entered into that company had gone into voluntary liquidation and its very substantial assets were to be transferred to Mr Whitaker as shareholder. It was a condition of drawdown that the equity contribution of Mr Whitaker must have been in place so if he did not make the contribution no lending would take place. Given the level of collateral, low LTVs and the substantial security, Mr Walmsley was entitled to take the view that it was not necessary or required for 4% to be added over the base rate as a minimum. The Tribunal considers that this is a reasonable approach and other lenders in the commercial field would have been entitled to take the same approach in assessing the impact on margin of the fact that the borrowers were both SPVs. Mr Whitaker evidently had access to very substantial amounts of funds as a result of the liquidation of XL Developments, that said it would have been better had the GMCA obtained a statement of his assets and liabilities prior to entering into the 2024 Renaker Loans. There was a residual although most probably unlikely risk that he had large liabilities which could have wiped out these funds, but as the equity had to be in place at the time of drawdown the GMCA had substantial protection against the consequences of such an eventuality.

200. As regards the contention that the GMCA should have taken into account the FVAs, this point goes nowhere. The FVAs were submitted to Manchester City Council to obtain a waiver of any requirement that 20% of the developments should be allocated for affordable housing on the basis that such a requirement would make the projects unviable. The waivers were given by Manchester City Council, as it was lawfully entitled to do so, which had the effect of improving profitability. FVAs were general and prepared for a different purpose. More specific and up to date information was relied upon for the purposes of the 2024 Renaker Loans. There were solid grounds to conclude that the developments were both viable and profitable, and this would have been reinforced by the Red Book reports.

201. The other main criticism of the lending was in relation to concentration of risk in that a substantial percentage of the GMHILF was being or had been advanced to entities within the Renaker Group (£615 million as at 22 November 2024). The significance of this point would depend to a large extent on what other prudent lending opportunities there were, the level of risk and default and shortfall, and how much would be outstanding at any one time from entities within the Renaker Group. There is no evidence to suggest that the lending to the Renaker Group squeezed out other prudent lending to other developers. We have already concluded that the 2024 Renaker Loans posed no more than a minimal or low level of risk. Here the concentration risk was limited by the existence of the cap on total monies that could be drawn down at any one time by the Renaker Group (£120 million). The Tribunal does not consider that the level of concentration (51% lending by value and 10% by number of schemes as at the time of entry of the 2024 Renaker Loans) renders the loans as uncommercial within the meaning of s.3(2) of the Act. The Renaker Group had a good track record and no history of default. The GMCA had in the past approved loans in excess of £30 million each to other developers.

202. The GMCA had a duty to have regard to the Guidance and to apply it unless there was good reason to depart from it. The Guidance sets out various ways in which a public authority may satisfy itself that any lending complies with the CMO principle. It suggests that this should be done by evidence-based

assessments such as using evidence that is specific to the financial assistance in question, obtaining the assistance of experts (including independent experts), benchmarking and profitability analysis. Here, the GMCA did not conduct any profitability or benchmarking analysis, nor did it obtain a third-party report. All these steps are envisaged as possible routes to a public authority to satisfying itself that any lending is compliant with CMO principles (paras.15.63 and 15.64). That said, it is evident that the GMCA did not have any doubt whether the lending infringed the CMO principles (para. 15.57). The GMCA could have chosen to commission a third-party expert, or conduct benchmarking or a profitability analysis, but even in the absence of these steps the Tribunal is satisfied that the GMCA could reasonably conclude that there was no subsidy. The GMCA itself had a great deal of experience in lending and understanding the lending market. Not only was there the Investment Team, but within the Gateway Panel and Credit Committee there were experts in the field on lending. As already noted, there was recent experience in lending on a club basis where there was an independent expert report that looked at the market. Taking into account the terms of the 2024 Renaker Loans, the security and conditions these loans posed a low risk of loss, and it was highly probable that in the event of a default, the GMCA would have been able to recover the sums outstanding, plus interest and costs. The actual margins applied above the base rate were not manifestly low or below the rates that can be expected to be available on the market.

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

204. Whilst the rates appear to be commercial rates that one would expect other funds on the market would be willing to offer the SPVs, the Tribunal does not consider that other justifications for the 2024 Renaker Loans in the papers before the

GMCA when it made its decision on 22 March 2024 in any way detracts from that (such as redeveloping brownfield sites, delivering a significant number of apartments, construction work for the area and employment opportunities for apprentices and others).

(d) Would the 2024 Renaker Loans be approved by a commercial market operator and conclusion on Section 3(2) of the Act?

205. In view of the matters set out above, the Tribunal considers that the GMCA was reasonably entitled to consider that in entering into the 2024 Renaker Loans they were on terms that other lenders would enter into in terms of rates. Neither party chose to serve any expert evidence on the actual rates available on the market in 2024 for developers like the Renaker Group. That said, the Tribunal is in a position to conclude that the terms did fall within the ambit provided by s.3(2) of the Act to take the 2024 Renaker Loans outside being subsidies. The Tribunal is able to use its expertise to understand both the steps taken by the GMCA and why the 2024 Renaker Loans were low risk justifying the rates adopted. It has closely scrutinised the lending in this case and the evidence presented. There is nothing striking or extraordinary in the rates adopted. The Tribunal particularly notes:

(1) The terms, security and conditions of the 2024 Renaker Loans.

(2) The awareness of the GMCA's need to ensure that its lending was on CMO terms and to fall within s.3(2) of the Act.

(3) The experience of the lending team, the Gateway Panel and Credit Committee. None of whom regarded the rates to be non-commercial or outside s.3(2) of the Act.

(4) The comparators referred to in the IRSP, including the club loan where independent expert evidence had been obtained on market rates.

(5) The actual rates in all the circumstances are within what the Tribunal would expect to be available on the market, where lenders would seek to make a rate of return giving it a margin over the base rate at a level which reflects the low-risk nature of this lending, given its terms, security and conditions.

Issue (3): In relation to the appeal has the Respondent breached its duty of candour and, if so, in what respects and what are the consequences?

The parties' submissions

Appellant

206. The meeting between Mr. Enevoldson and Mr Whitaker of 13 February 2024 (see para 75 above) has not been addressed in the five witness statements provided by Ms Blakey. This is deeply unsatisfactory in the context of a judicial review application where the Respondent has a duty of candour.

207. An email exchange between Mr. Enevoldson and Mr Whitaker has been disclosed by the Respondent to the Appellant. However, that goes nowhere near to discharging the duty of candour.

208. In addition, it is asserted that various parts of Ms Blakey's first and fifth witness statements are unsubstantiated and/or misleading and are such as to amount to breaches of the duty of candour.

Respondent

209. The Respondent submits that it has discharged its duty of candour before the Tribunal. It has set out the process for awarding loans under the GMHILF in Ms Blakey's first witness statement and explained the process for the approval of the 2024 Renaker Loans in Ms Blakey's second witness statement. That explanation has been further expanded upon in Ms Blakey fifth witness

statement. The passages in the statements criticised are not misleading or fail to comply with the duty of candour.

The Tribunal's analysis

210. As regards the meeting on 13 February 2024, it was the GMCA that disclosed its existence and produced the email exchange which recorded the thrust of what had been agreed in principle at the meeting. The GMCA does not have any written notes of the meeting and had it such notes, the Tribunal is confident that they would have been disclosed along with the many documents, including drafts it has disclosed. There has been no breach of the duty of candour in this regard.

211. At Annex 1 to this judgment is the table submitted by the parties in relation to the specific paragraphs of Ms Blakey's first and fifth witness statements challenged by the Appellant. The Tribunal has carefully considered each of the criticisms and the GMCA's response. The Tribunal accepts the points made by the GMCA. Thus, the Tribunal is satisfied that there has been no breach of the duty of candour. On a judicial review, the Tribunal will often consider witness evidence from a respondent to the extent admissible. Respondents are expected to fulfil their duty of candour. Here the GMCA has provided a considerable volume of documentation at the Appellant's request and pursuant to the Order of the Tribunal made on 30 October 2024 (as subsequently amended by consent). No application was made to cross-examine Ms Blakey and there is no reason to believe that her statements were made with any intention to mislead or be untruthful.

Amended Notice of Appeal Grounds

212. The Tribunal's analysis above is sufficient to dismiss this challenge. The formal Grounds of Appeal were not closely followed by the parties for the appeal and the points of challenge at the hearing and in written submissions were much more focused on Issues (1) to (3) considered above, which essentially cover the material points that need to be resolved to reach a conclusion. In those

circumstances only a short summary of the Tribunal's conclusions on each of the grounds in the ANoA is necessary.

Ground (1): The Respondent misdirected itself and has failed, whether at all or lawfully, to enquire into and/or consider what, if any, alternative sources of third-party finance were available to Renaker in respect of the funding sought

213. The Tribunal does not accept this ground. The GMCA was not required to make direct enquiries of potential lenders or market participants of what finance and their terms were available to the Renaker Group. Instead, it used its knowledge to price the loans at rates that one may reasonably conclude are in fact within the range of reasonable commercial rates that lenders would be prepared to lend.

Ground (2): The Respondent misdirected itself and/or failed, whether at all or lawfully, to enquire into and/or consider the rates of interest charged by third-party lenders in respect of the funding sought

214. This is not accepted by the Tribunal for the reasons under Ground (1). Further, the GMCA did consider previous lending to the Renaker Group including the previous club loan where independent expert advice had been taken and that loan was found to be in line with the lending market (see paras 191 and 192 above). The Tribunal considers that other lenders on the market would be willing to lend at the rates over the base rates at the sort of margin levels adopted by the GMCA.

Ground (3): The Respondent misdirected itself and/or failed, whether at all or lawfully to enquire into and/or consider whether Renaker could be charged a higher rate of interest of the loans sought

215. The Tribunal considers that the GMCA was seeking to obtain a profitable rate of interest in line with market terms. It could have asked for higher rates, but in all probability the Renaker Group would have preferred to go elsewhere. The Renaker Group and Mr Whitaker personally (upon the liquidation of XQ Developments where the dividend was some £350 million) had the ability to

fund themselves most of the sums needed to complete the projects. The lending was low risk and hence it would have had other options.

Ground (4): The Respondent misdirected itself and/or failed, whether at all or lawfully, to enquire into and/or consider the assessment of Renaker and/or its own constituent council (Manchester City Council) that the projects for which funding was sought were unviable and/or required exemption from affordable housing requirements

216. This is a point based on the FVAs presented to the MCC and not the GMCA itself. This ground is not valid for the reasons set out above (para 201 above). Not only did the Renaker Group provide substantial information and data which projected that the projects were viable, but as part of the due diligence process the GMCA obtained Red Book valuations by Knight Frank (RICS accredited surveyors) for each development. These detailed and extensive reports are independent and expert valuations, which review the properties, proposed developments, market state, market rate, incorporating a property risk analysis. These are far more helpful than the FVAs and the GMCA was not obliged to consider the FVAs.

Ground (5): The Respondent misdirected itself and/or failed, whether at all or lawfully, to enquire into and/or consider concentration risk arising from its lending to Renaker

217. This ground is covered above (para 201) and is not accepted for the reasons set out.

Ground (6): The Respondent misdirected itself and/or failed, whether at all or lawfully, to enquire into and/or consider: (i) the dissolution of the Renaker company that it had treated as the relevant Renaker corporate entity for the purpose of risk assessment, (ii) the financial circumstances of Mr Whitaker, and/or (iii) the financial status of each of the borrowing Renaker entities

218. The financial status of the SPVs was known. The dissolution of XQ Developments was taken into consideration and it was appreciated that a very substantial sum was to be paid by way of dividend to Mr Whitaker as sole shareholder. As noted above, it would have been better had the GMCA obtained a statement of assets and liabilities from Mr Whitaker prior to entering into the 2024 Renaker Loans, but this had no material impact (para 200 above). This ground is rejected.

Ground (7): The Respondent misdirected itself and/or failed, whether at all or lawfully, to enquire into and/or consider the interest rates which it had previously charged for lending to Renaker related entities

219. The GMCA and the Investment Team were aware of the rates previously charged by it to the Renaker Group. Previous lending and rates were specifically set out in the IRSP. These rates were considered.

220. Accordingly, each of the Grounds set out in the ANoA are dismissed.

E. CONCLUSION

221. Underlying the application is an allegation that because of a possible cosy relationship with Mr Whitaker, the Renaker Group was being provided with loans at unduly favourable rates. The Tribunal is satisfied that this is clearly not the case. The 2024 Renaker Loans went through a proper process and the terms and rates considered by persons with significant experience in development loans. The Tribunal has carefully scrutinised all the material and submissions and is satisfied that there was no subsidy in this case.

222. For the reasons given above the Appellant's application for review is dismissed.

223. This judgment is unanimous.

Hodge Malek KC Chair	Sir Iain McMillan CBE FRSE DL	Timothy Sawyer CBE

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 24 July 2025

ANNEX 1

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
The First Witness Statement of Ms Blakey					
Para 63	"Indicative interest rates for the loans are outlined by the Transaction Manager at the initial consideration stage once some initial information has been provided and then get shaped as the process continues. The rate is based on the strength of the security and the strength of the covenant. There is a range of interest rates that will be considered..."	Contemporaneous documents demonstrate that no such process of setting out or considering a range of possible interest rates occurred in respect of the 2024 Renaker Loans. Rather, the interest rates were simply agreed between Bill Enevoldson and Daren Whitaker at an unrecorded meeting on 13.02.	CB/74 and CB/1321	This is a breach of the duty of candour.	The 2024 Renaker Loans were not agreed between Bill Enevoldson and Daren Whitaker and the documents used by the Applicant to try and support this assertion do nothing more than show that a meeting took place where broad agreement between the Authority and Mr Whitaker was reached in principle regarding the terms that the Authority could offer subject to due diligence and the process being successfully completed. It is not uncommon for a representative of the GMCA, such as the transaction manager, and the proposed borrower to have an early discussion regarding terms. This is equally not uncommon in a typical commercial context. No borrower would want to go through what is a lengthy and costly process (as shown in Annex 1 to the Supplemental Skeleton) without knowing there was

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
					at least a possibility that the terms that the Authority would propose might be acceptable. The conversations between Mr Enevoldson and Mr Whitaker are entirely consistent with LB1. A more senior member of the team had the early meetings with Mr Whitaker for the 2024 Renaker Loans due to the size of the loans being considered. This is consistent with the statement in LB1. We also draw attention to the following which also support this point: - LB5, para 24 - MW1, para 13 See also Annex 1 to Supplemental Skeleton.
Para 64	*"It is common for the rate [of interest] to be discussed at the credit committee meeting"*	Contemporaneous documents demonstrate that no such process of discussion or consideration of interest rate by the Credit Committee occurred in respect of the 2024 Renaker Loans. Rather, the interest rates were simply agreed between	CB/746-747.	This is a breach of the duty of candour.	This is a misrepresentation of what the documents show. It is not uncommon for the minutes of a meeting only to record points of note (i.e. where a follow-up action is required or where there has been disagreement). In this case, there was no need for the

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
		Bill Enevoldson and Daren Whitaker at an unrecorded meeting on 13.02.			discussion of the interest rates to be minuted as the rates were approved. The loans were not considered to be high risk and, at this time, the GMCA had a favourable view of Renaker as a borrower due to its established track record. See para 28 and 29 of LB5 as to the rationale for why the loans were reasonably considered to be low risk. See also MW1 para 17 and 18
Para 65	*"GMCA does not tend to look formally at other loans available on the market but does have market intelligence on what other lenders are charging from various sources. One such source is borrowers: who will come to GMCA with an indication of the rate being offered."*	Contemporaneous documents demonstrate that there was no consideration of *"what other lenders are charging from various sources"* in respect of the 2024 Renaker Loans. Rather, the interest rates were simply agreed between Bill Enevoldson and Daren Whitaker at an unrecorded meeting on 13.02.	CB/95	This is a breach of the duty of candour	The Fund had extensive experience of pricing loans by 2024 (both in relation to Renaker loans but also other developers). This experience is also informed by borrowers who negotiate with the GMCA and indicate the rate offered by third party lenders. The GMCA therefore considers itself to be well informed as to the rates available in the Manchester property market. LB1 also said that the GMCA does not tend to formally look at other loans (i.e.

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
					commission a report). This was also true for the 2024 Renaker Loans. For the 2024 Renaker Loans, Mr Whitaker did not seek other funding before coming to the GMCA as this was considered to be a roll-over of previous financing which was being repaid. The pricing was therefore based on the GMCA's vast experience in the market and other loans provided to Renaker including recent comparable lending for the Blade and Collier's Yard where the GM Pension Fund (which is independent) commissioned its own analysis. See also para 30 of LB5 and para 47 of MW1.
Para 69	*"External input into the interest rate is being provided by the credit committee.*	Contemporaneous documents demonstrate that no input into the interest rate was provided by the Credit Committee occurred in respect of the 2024 Renaker Loans. Rather, the interest rates were simply agreed between Bill Enevoldson	CB/746-747.	This is a breach of the duty of candour.	As the evidence demonstrates, this is not the case. The credit committee had all the relevant evidence as to the terms of the loan and the interest rate (see agreed chronology) and the expertise to challenge rates that it did not regard as sufficiently commercial.

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
		and Daren Whitaker at an unrecorded meeting on 13.02.			The credit committee's purpose is to challenge terms if they are not on commercial terms and they would have done so in this case had there been concerns. See also para 26 of LB5 and MW1 para 18.
Para 75	"The 2024 Renaker Loans (if made) are intended to be made <u>on commercial terms. They have been through the interest rate setting process outlined above.</u>" (emphasis added)	This statement misleadingly implies that input on the interest rates was provided by the Credit Committee and that the interest rates were set with regard to what third party lenders were currently charging: see the paras of LB1 referred to in this table above. This is untrue. The interest rates were simply agreed between Bill Enevoldson and Daren Whitaker at an unrecorded meeting on 13.02.	See contemporaneous documents referred to above.	This is a very breach of the duty of candour. A submits that it significantly undermines the extent to which Ms Blakey's witness evidence can, or should, be relied on by the CAT.	See response at 4 above. The Authority refutes any suggestion that Ms Blakey's witness statement is misleading. As noted above, the very purpose of the credit committee is to ensure that loans proposed to be entered into by the Fund are on commercial terms. The suggestion that such an experienced committee would not have raised objections regarding the proposed terms of the loans if it had had any concerns is fanciful. Further see MW1 para 18.
Para 76	"*The rate which is currently envisaged for the 2024 Renaker Loans is informed by a previous club loan made to Renaker with*	Ms Blakey does not explain that the relevant loans were approved in December 2020 (c. 4 years ago) and that GMPF is a related party of GMCA.			As the highlighting shows Ms Blakey did disclose the fact the Pension Fund was the relevant entity for the club loan. The Pension Fund is an independent organisation run by

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
	respect to a similar project, which was given by GMHILF alongside the **[✂]***, which operates as a private entity with its own fund manager. The Pension Fund's independent manager commissioned analysis of the lending market and the rates being charged by the private sector: the current rate envisaged for the 2024 Renaker loans is in line with that analysis, adjusted for the specifics of these loans."*				its own fund manager and the analysis was carried out by Avison Young (a global commercial real estate services firm). See para 30 of LB5. The reasons why the club loans were considered to be a reasonable comparator are set out in MW1 para 47. In summary, there were a number of similarities between the loans such as the loan amount and LTV. The club loans were signed in 2021 and were priced on a similar basis of EU base rate plus margin. The comparison was used to contrast the pricing of the 2024 Renaker Loans (where there are some similarities) against the previous loans but also to reflect differences between the loans in the pricing. It was considered sufficiently recent to be relevant for the GMCA's assessment.
The fifth witness statement of Laura Blakey					
Para 15 exposure to	*"The GMCA did at all times consider its overall*	The contemporaneous documents demonstrate that	CB/95	This is a breach of the duty	It is not clear based on the comments provided why the Applicant takes

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
Renaker...”	*exposure to Renaker...”*	there was no consideration of concentration risk in setting the interest rates in respect of the 2024 Renaker Loans. Rather, the interest rates were simply agreed between Bill Enevoldson and Daren Whitaker at an unrecorded meeting on 13.02.		of candour.	issue with this paragraph. Ms Blakey does not say at para 15 that the concentration risk was considered for the purpose of setting the interest rates. If one looks at the entire paragraph Ms Blakey is clearly referring to the GMCA considering its overall exposure (in terms of total money out at any one time) to Renaker. We note that the cap was queried at the credit committee and MW discussed how this was to be managed to ensure the cap was not exceeded. See the following: - minutes at CB/747; and - Investment proposal at CB/22-33. We note that in LB1 the investment proposal is referred to as the 'gateway paper' as this is the internal terminology for that document. This is however the same document as the investment proposal which is reviewed by credit and gateway,

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
					namely CB/22-33. This should have been clear from LB5 to which the investment proposal is attached as the 'gateway paper'.
	"It is relevant to note that the loans were considered relatively low risk by the panels that reviewed them due to the following factors..."	The contemporaneous documents demonstrate that neither the Gateway Committee nor the Credit Committee expressed any view that the loans were "relatively low risk". To the contrary, insofar as the minutes evidence risk being discussed what they show is committee members raising potential points of concern and the officer team lead by Bill Enevoldson rejecting or opposing these points. This is an entirely impermissible attempt to attribute *ex post facto* reasoning of Ms Blakey to the relevant committees.	CB/743 and CB/746	This is a serious breach of the duty of candour. A submits that it significantly undermines the extent to which Ms Blakey's witness can, or should, be relied on by the CAT.	This is a serious and unsupported accusation against Ms Blakey. The documents do not demonstrate the serious allegation made by the Applicant. The fact that the minutes record no conversation regarding the applicable interest rates or risk of the transactions is not evidence that this was not discussed. Further see MW1 para 18. Given the wealth of expertise on these panels if they had had concerns about these loans they can and would have raised them at those meetings. As noted at LB5 para 25 "it is not unusual for the Credit Committee in particular to comment on the pricing if they viewed it should be altered". Ms Blakey attended both committees and is entitled to provide her sworn

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
					statement as to what was considered at those committees as evidence in these proceedings. Mr Barratt's table is an unwarranted attempt to suggest that matters that were not mentioned in the minutes represent a failure to consider the matters in question.
Para 24 and 25	*"The process for determining pricing starts at an early stage once initial information is received and is then shaped as more detail is received and following discussions with the Developer. The proposed pricing is documented in the Gateway Paper (see [LB5/201-212]) where it is considered by the Gateway Panel and Credit Committee. The Gateway Panel and Credit Committee include individuals with deep*	Ms Blakey misleadingly implies there was considering of the pricing of the loans by the Gateway and Credit Committees. The contemporaneous documents demonstrate this is not true.	CB/743 and CB/746	This is a serious breach of the	As already noted in this table at Row 8 this is not correct. See CB/29 (Investment Proposal) which went to both committees. It is clear that both committees (Gateway and Credit) had full information as to the pricing of the loans.

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
	sector experience who are able to credibly review the information provided and determine if the pricing proposed, based on the overall risk profile of the proposals, is appropriate. It is not unusual for the Credit Committee, in particular, to comment on the pricing if they viewed it should be altered."				
Para 27	"*In order to ensure a consistent approach to recording the key considerations that impact pricing, the Interest Rate Setting Paper is prepared. The Paper is not presented to any committees but documents the key elements that have been considered. The Paper is regularly updated as the loan diligence progresses and it is finalised in advance of the loans being*	Ms Blakey misleadingly states that the interest rate setting paper was prepared before the interest rates were negotiated and agreed and contemporaneous with the agreement. As the contemporaneous documents demonstrate this is not true. The interest rates were agreed by Bill Enevoldson and Daren Whitaker on 13.02. The first iteration of the interest rate setting paper was written by	C/95	This is a serious breach of the duty of candour. A submits that it significantly undermines the extent to which Ms Blakey's witness evidence can, or should, be relied on by the CAT.	It is important to note that Ms Blakey does not suggest that the IRSP was drafted before the preliminary interest rates are set. Any allegation that Ms Blakey is misleading the Tribunal should be dismissed. Ms Blakey's evidence does show that all the relevant factors for considering the interest rate to be on commercial terms and therefore not a subsidy were considered by the relevant panels (Gateway and Credit), see para 28 and 29 of LB5.

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
	completed. It is therefore a 'live' document throughout the process of considering and approving the loans."	Mr Walmsley on 19.04, c 1 month after the loans had already been approved by the GMCA Committee.			In addition, it is not Ms Blakey's role to draft the IRSP (and she did not do so in this case) and therefore her statement cannot comment on when this is drafted (and/or was drafted in this case). The IRSP has been extensively covered in MW1, para 25 to 51.
Para 28	*"As demonstrated in the Interest Rate Setting Paper [LB5/216-227] the following factors were considered when pricing the loans – for ease these have been cross referenced to…"*	The contemporaneous documents demonstrate that there was no consideration of these factors in the pricing of the loans. The pricing was simply negotiated and agreed by Bill Enevoldson and Daren Whitaker on 13.02. This is an entirely impermissible attempt to attribute *ex post facto* reasoning of Ms Blakey to the relevant decision-maker.	CB/95	This is a serious breach of the duty of candour. A submits that it significantly undermines the extent to which Ms Blakey's witness evidence can, or should, be relied on by the CAT.	This has already been addressed above, see Row 8. These factors were considered by both the Gateway and Credit committees and it is completely unjustified to allege that Ms Blakey (who attended these meetings) fabricated her evidence.
Para 29	"As demonstrated above, each of the points that informed pricing were considered by the Gateway Panel and Credit Committee as a	The contemporaneous documents demonstrate that neither the Gateway Committee nor the Credit Committee either considered the	CB/743 and CB/746	This is a serious breach of the duty of candour. A submits that it significantly undermin	This has already been addressed at Row 8.

	Ms Blakey's evidence	*Basis evidence should not be accepted*	*Bundle ref*	*Other comments*	***Authority's Response***
	reason why the loans were considered to be low risk."	pricing of the loans or expressed any view that the loans were "relatively low risk". This is an entirely impermissible attempt to attribute ex post facto reasoning of Ms Blakey to the relevant committees.		es the extent to which Ms Blakey's witness evidence can, or should, be relied on by the CAT.	