Neutral Citation Number: [2022] EWHC 2940 (Admin)

Case No: CO/374/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2022

Before :

MR JUSTICE MOSTYN

- -

Between :

THE KING **(on the application of WALES & WEST UTILITIES LIMITED)**	**Claimant**
- and –	
COMPETITION AND MARKETS AUTHORITY	**Defendant**
- and-	
(1) GAS AND ELECTRICITY MARKETS AUTHORITY **(2) CADENT GAS LIMITED** **(3) NATIONAL GRID ELECTRICITY TRANSMISSION PLC** **(4) NATIONAL GRID GAS PLC** **(5) NORTHERN GAS NETWORKS LIMITED** **(6) SCOTTISH HYDRO ELECTRIC TRANSMISSION PLC** **(7) SOUTHERN GAS NETWORKS PLC** **(8) SCOTLAND GAS NETWORKS PLC** **(9) SP TRANSMISSION PLC** **(10) BRITISH GAS TRADING LIMITED** **(11) CITIZENS ADVICE** **(12) WATER SERVICES REGULATION AUTHORITY** **(13) ELECTRICITY NORTH WEST LIMITED**	**Interested Parties**

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Rhodri Thompson KC, Sarah Hannett KC and Katy Sheridan (instructed by **Gowling WLG LLP**) for the **Claimant**
Tom Hickman KC and Christopher Brown (instructed by CMA) for the **Defendant**
Daniel Cashman and Natasha Simonsen (instructed by GEMA) for the **First Interested Party**
The second to thirteenth Interested Parties were not represented

Approved Judgment for publication

Note: the redacted information in [17] and [18] is the subject of an order for confidentiality, and must not be disclosed publicly. All persons, including representatives of the media, must strictly comply with this condition.

Mr Justice Mostyn:

1. This is my judgment on a renewed application for permission to apply for judicial review. Permission was refused on all five grounds by Henshaw J on 30 June 2022 in detailed reasons spanning three pages. I naturally pay great respect to these reasons. However, unlike Henshaw J, I have had the benefit of extensive oral argument from Leading Counsel for the Claimant and the Defendant and counsel for the First Interested Party over the better part of a day. Given the scale of the written material (the bundles contained 2,381 pages) and the high quality of the written and oral submissions, I consider that I am in a position to give a fully reasoned judgment on the application.

2. The claimant, Wales and West Utilities Ltd, seeks to challenge by way of judicial review certain aspects of a decision, and a consequential order, made by the defendant, the Competition and Markets Authority. That decision, given on 28 October 2021, determined an appeal by the Claimant and the second to ninth Interested Parties[1] under ss 23B – 23G of the Gas Act 1986[2] against a decision about the price of gas distribution by the First Interested Party made on 3 February 2021

3. The High Court has never before considered such a challenge.

4. In this judgment I shall use the following abbreviations:

Wales and West Utilities Ltd:	WWU
The Competition and Markets Authority:	CMA
The Gas and Electricity Markets Authority:	GEMA
The CMA's decision of 28 October 2021:	the Decision
GEMA's determination of 3 February 2021:	the Determination

5. WWU is a gas distribution network operator supplying gas to 2.5 million customers in Wales and the south-west of England. GEMA is the gas and electricity markets regulator. It grants a licence to WWU to convey gas through pipes. The conditions of the licence include restricting the amounts that WWU can charge for the distribution of that gas. Among other functions, the CMA hears appeals against decisions made by GEMA.

6. About 15 years ago WWU used derivatives to fix the interest rate it paid on about 90% of its debt for up to 30 years. While that fixed rate was lower than average interest rates WWU of course benefitted from this arrangement. However, once interest rates fell substantially below 2007 levels, WWU's debt structuring arrangement became unfavourable when set against the return allowed by GEMA on debt when making its price control decision.

[1] The 10th and 11th Interested Parties were given permission to intervene, and the 12th and 13th Interested Parties were given permission to submit evidence, in the appeal by the CMA.
[2] The CMA also had before it appeals by certain of the Interested Parties under ss 11C – 11H of the Electricity Act 1989.

The challenge

7. The five grounds of challenge are:

   i) Ground 1: the CMA erred in the standard it applied in determining the appeal, and in particular failed to properly construe or apply sections 23D(2) and 4(a) and (b) of the Gas Act 1986.

   ii) Ground 2: the CMA misdirected itself in respect of the financing duty in section 4AA(2)(b) of the Gas Act 1986.

   iii) Ground 3: the CMA erred in its approach to WWU's cost of debt appeal.

   iv) Ground 4: the CMA erred in its approach to WWU's tax clawback appeal.

   v) Ground 5: the CMA erred in its approach to the licence modification process.

8. WWU's judicial review challenge predominantly relates to the way in which the costs of its debt have been treated by GEMA's price control decision, and the extent to which those costs can be passed on to consumers.

9. In GEMA's calculus there are a number of allowances which combine to produce the amount that the licensees can pass on to consumers in their energy bills. This case is principally about the cost-of-debt allowance, although Ground 4 concerns the tax allowance.

10. The cost-of-debt allowance received by all licensees in the price control decision is set by GEMA to reflect that of a hypothetical "reasonably efficient operator". The allowance has historically been calculated by GEMA by reference to an external debt interest index, averaged over a medium term.

11. The external debt interest index used by GEMA in the Determination is the iBoxx GBP 10yr+ Utilities Index. iBoxx indices are independent bond indices which track bond markets.

12. The first step in calculating a licensee's cost-of-debt allowance is to identify the applicable averaged index, as follows:

P	1	2	3	4	5
X	10	11	12	13	14
where P is the year in the control period and X is the averaged index over the stated number of years So, in year 3 a licensee will use the averaged index for the last 12 years					

13. Using this primary methodology, which is of course a standardised one-size-fits-all function, GEMA set WWU's allowed core debt rate at 1.57%.

14. Next, GEMA allowed a further 0.25% for additional costs of borrowing such as transaction costs, credit facility costs, the costs of carry and index-linked debt costs. GEMA does not allow interest payments on inter-company loans and derivatives in its calculations. It noted that its modelling suggested that if both these factors were included in the expected costs for the sectorial Gas Distribution and Transmission companies, the 10 to 14-year index average plus 0.25% would be expected to be sufficient to cover such company debt and derivative costs.

15. Finally, GEMA made a further addition of 0.06% in favour of WWU and two other networks for "exceptional company circumstances" to reflect their lower asset value, and the lesser amount and periodicity of their borrowing, in comparison to the big networks.

16. These two minor adjustments totalled 0.31%. WWU's overall allowed debt rate was thus set at 1.88%. WWU's actual debt rate is about 3.21% .

17. The Finance Director of WWU explained in a witness statement:

> "39. In light of this, WWU continued to take remediation actions in its capital structure throughout the second half of [the previous control period] GD1, including, a commitment to lower leverage by March 2021. Credit rating agencies have acknowledged mitigating steps taken by WWU on capital structure throughout GD1, and expect continued flexibility on shareholder distributions for [the current control period] GD2.
>
> 40. New debt raised in GD1, together with the other remediation measures taken, should lead to a lower overall cost of debt over the RIIO-GD2 (2021-2026), assuming inflation at rates adopted by GEMA in its Price Control Financial Model issued on 3 February 2021.
>
> 41. However, there will continue to be a shortfall, which the company has estimated at £[redacted] million per annum, in the allowance for the cost of debt during GD2. This is because GEMA's methodology which was upheld by the CMA on appeal - does not fully compensate for efficiently-raised debt and derivatives on a company-specific basis".

18. £[redacted] million is about [redacted] of WWU's annual profits.

19. WWU maintains that it is not only seriously unfair, but unlawful, for its actual, derivative-based, debt profile to be ignored in the calculation of its allowed rate. It submits that the CMA made an error of law when upholding GEMA's rejection of WWU's case on these points.

20. WWU makes the additional point that the data which calibrates the index (which I have explained is the primary driver in the allowance calculation) overwhelmingly derives from two vast groups - National Grid and Cadent - which together contribute 70% of its value. Quite apart from its individual debt profile argument, WWU maintains that it

is quite inapt for it to be subjected to standardised treatment conditioned by the economic fortunes of such very different businesses.

21. That, in simple terms, is the background. I now turn to the specific grounds.

Ground 1: construction of ss. 23D(2) and (4)(a) and (b) of the Gas Act 1986

22. Ground 1 is a pure point of statutory interpretation. WWU claims that the CMA failed correctly to construe or apply ss. 23D(2) and (4)(a) and (b) of the Gas Act 1986.

The terms of the statute

23. Section 23D(2) provides (so far as is material, replacing the words "the Authority" with "GEMA" throughout, and with emphasis added by me):

> "In determining an appeal the CMA must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard:
>
> (a) in the carrying out of its principal objective under section 4AA;
>
> (b) in the performance of its duties under that section; …."

I then go to section 4AA(1) where the principal objective is defined thus:

> "**The principal objective of** the Secretary of State and **GEMA** in carrying out their respective functions under this Part **is to protect the interests of existing and future consumers in relation to gas** conveyed through pipes."

I then go to sub-section (1B) which states:

> "(1B) The Secretary of State and GEMA shall carry out their respective functions under this Part in the manner which the Secretary of State or GEMA (as the case may be) considers is best calculated to further the principal objective, wherever appropriate **by promoting effective competition between persons engaged in, or in commercial activities connected with, the shipping, transportation or supply of gas conveyed through pipes.**"

I then go to sub-section (2), which states:

> "(2) In performing the duties under subsections (1B) and (1C), the Secretary of State or GEMA shall have regard to:
>
> (a) the need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met;

> **(b) the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by or under this Part,** the Utilities Act 2000, Part 5 of the Energy Act 2008 or section 4, Part 2, or sections 26 to 29 of the Energy Act 2010;
>
> (c) the need to contribute to the achievement of sustainable development."

24. Conflating these provisions what s. 23D(2) says (for the purposes of this case) is this:

> "In determining an appeal the CMA must have regard to **GEMA's duty to exercise its functions in a manner which is best calculated to further the interests of existing and future consumers by, among other things, having regard to the need to secure that licence holders are able to finance the activities which are the subject of imposed obligations."**

25. I then go to s. 23D(4) which states:

> (4) The CMA may allow the appeal only to the extent that it is satisfied that the decision appealed against was **wrong** on one or more of the following grounds:
>
> (a) **that GEMA failed properly to have regard to any matter mentioned in subsection (2**);
>
> (b) that GEMA failed to give the appropriate weight to any matter mentioned in subsection (2);
>
> (c) that the decision was based, wholly or partly, on an error of fact;
>
> (d) that the modifications fail to achieve, in whole or in part, the effect stated by the Authority by virtue of section 23(7) (b);
>
> (e) that the decision was wrong in law.

The nature of the appeal system

26. By ss. 23B – 23G of the Gas Act 1986 Parliament created a customised statutory appeal system. Under this system an appeal is more in the nature of a rehearing than a review. I hear appeals from the Family Court by way of "review" in the Family Division (see FPR 30.12(1)). I hear medical disciplinary appeals by way of "rehearing" in the Administrative Court (see CPR PD 52E para 19.1(2)). Yet there is no real difference in the way these appeals are heard, as I pointed out in *Kirschner v The General Dental Council* [2015] EWHC 1377 (Admin) at [8]. An appeal to the High Court which proceeds formally as a "rehearing" does not involve a reconsideration of the merits *de novo* (as would be the case on an appeal from the Magistrates to the Crown Court in a criminal case). Equivalently, in my judgment, the CMA was right to state at 3.31 of the Decision that an appeal under ss. 23B – 23G does not involve a *de novo* reconsideration of the merits.

27. The appeal in this case was heard by the CMA over about three weeks and much oral expert evidence was given. But although it had the hallmarks of a rehearing it was not a *de novo* reconsideration of the merits.

28. When creating this appeal system Parliament cast the permissible appeal grounds wider than it chose to do when it later created the procedure for appeals from the First-Tier Tribunal to the Upper Tribunal. Under s. 11(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 the right of appeal is confined to a point of law, for which permission is needed under s. 11(3).

29. In contrast, for an appeal under ss. 23B – 23G of the Gas Act 1986 Parliament has chosen in s.23D(4) to grant a wider menu of appeal grounds. These include errors of law (ground (e)), errors of fact (ground (c)), errors of evaluation (ground (a)), and mis-exercises of discretion (ground (b)). Schedule 4A to the Act gives the CMA familiar powers in respect of the attendance and examination of witnesses, and the production and inspection of documents.

30. In this case the appeal by WWU to the CMA was under ground (a) alone. WWU specifically eschewed an appeal on ground (b). Therefore, after navigating through the statute, it can be seen that the CMA was presented with a ground of appeal which said:

> "In reaching its decision GEMA failed properly **to have regard** to its duty to exercise its functions in a manner which is best calculated to further the interests of existing and future consumers by, among other things, **having regard** to the need to secure that licence holders are able to finance the activities which are the subject of imposed obligations."

31. Or to put it shortly: GEMA failed properly **to have regard** to its duty **to have regard** *inter alia* to the need to secure that licence holders are able to finance their imposed activities. This double "have regard" is clumsy and awkward but the underlying meaning is clear enough, as I will explain.

The appellate standard

32. As explained above (but which I repeat for ease of reference), an appeal against a decision by GEMA on ground (a) will succeed if it can be shown that GEMA was wrong because it:

> "failed properly to have regard to its duty to exercise its functions in a manner which is best calculated to further the interests of existing and future consumers by, among other things, having regard to the need to secure that licence holders are able to finance their business activities".

Therefore, it must be shown that in its decision GEMA did not **properly** pay attention to the goal of furthering the interests of consumers in the stipulated manner. "Properly" means conscientiously and thoroughly. Antonyms are casually and sloppily. I have noted the CMA's view in para 8.278 of the Decision (which I cite at [35] below) that:

> "…the word 'properly' in section 23D(4)(a) merely confirms that the CMA must assess whether GEMA has taken sufficient steps to comply with that duty, correctly understood".

It may be thought that 'properly' and 'sufficiently' are not exactly synonymous, although nothing turns on what is merely a degree of nuance.

33. In the Decision at 3.31 the CMA stated:

> 'In line with the CMA's position outlined in the ED1 Determinations, we reject WWU's submission that we should "re-consider the case as if [we] were the primary decision-maker' and agree with GEMA's submission that the standard of review falls short of a full rehearing. We are required to consider the merits of the Decision but only through the prism of the specific errors alleged by the appellants. The appeals do not entitle the CMA to proceed with a re-run of the original investigation or have a de novo re-hearing of all the evidence. The key question is whether GEMA made a decision that was wrong (on one of the prescribed statutory grounds). Only to that extent must the merits of the Decision be taken into account and we have done so in the present appeals.'

34. I fully agree with this.

35. But at 8.278 the CMA stated:

> "We reject WWU's attempt to distinguish *Pharmaceutical Services Negotiating Committee*. In our view, it is squarely on point, in that it provides a clear exposition of the nature of a `have regard to' duty, which is precisely the kind of duty at issue here. The question of whether GEMA has erred in the exercise of [the duty in s. 4AA(1B)] must be assessed with reference to the nature and content of the duty, properly understood. We do not consider that the existence of an appeal on the grounds specified in section 23D(4) changes or heightens what is required to comply with that duty. In our view, the word 'properly' in section 23D(4)(a) merely confirms that the CMA must assess whether GEMA has taken sufficient steps to comply with that duty, correctly understood. We emphasise that section 23D(4)(b) provides for a distinct right of appeal on the ground that GEMA failed to give the appropriate weight to any matter mentioned in subsection (2). An appeal on the latter basis raises the question of the weight given to a particular matter, as distinct from the question of whether GEMA had regard to the matter in question as it was required to. In our view, the existence of this distinct right of appeal confirms that an appeal under section 23D(4)(a) does not have the wider scope that WWU submitted."

36. In this passage (and in a passage at 8.284 to similar effect) the language used by the CMA comes close to adopting a *Wednesbury*-type standard for an appeal mounted

under ground (a). Among countless authorities, such a standard was typically well explained by Lightman J in *R v DG of Telecommunications ex parte Cellcom* [1999] ECC 314 at [27] and [28]:

> "27. The court may interfere with a decision if satisfied that the Director has made a relevant mistake of fact or law. But a mistake is not established by showing that on the material before the Director the court would reach a different conclusion. The resolution of disputed questions of fact is for the decision-maker, and the court can only interfere if his decision is perverse, e.g. if his reasoning is logically unsound, … The court may interfere if the Director has taken into account an irrelevant consideration or has failed to take into account a relevant consideration. But so long as the Director takes a relevant consideration into account, the weight to be given to that consideration and indeed whether any weight at all should be given to that consideration is a matter for the Director alone, so long as his decision is not perverse.
>
> 28. A party can in judicial review proceedings adduce evidence to show what material was before the decision-maker, but not fresh material not available to the decision-maker designed to persuade the court that the decision-maker's decision was wrong."

37. Section 23D(4) lays down a single appellate criterion of wrongness. Ground (a) allows wrongness to be demonstrated by showing that the evaluation of the relevant facts and matters went awry. Ground (b) allows wrongness to be demonstrated by showing that an exercise of discretion miscarried. It is therefore dangerous to rely on *Wednesbury* jurisprudence as providing some sort of analogue. This is because the very point of the *Wednesbury* jurisprudence is not to demonstrate the mere wrongness of a decision but rather that it is unlawful, for one reason or another. In fairness, Mr Hickman KC did not seriously argue otherwise. Indeed, his submission on behalf of the CMA was that section 23D incorporated a *sui generis* form of appellate procedure and that analogies with other appellate processes were positively unhelpful.

38. If there is a need to reach out for judicial guidance by way of analogy then I would recommend looking first at (and usually no further than) the decision of the Supreme Court in *Re B (a Child)* [2013] UKSC 33, [2013] 1 WLR 1911. This sets out simply and clearly the standards to be applied where the ground of appeal is an error of fact (i.e. ground (c) under s. 23D(4)), or a faulty evaluation of the relevant facts and matters (i.e. ground (a)), or a miscarried exercise of discretion (i.e. ground (b)).

39. An appeal against a finding of primary fact can only succeed where the finding had no evidence to support it; or was based on a misunderstanding of the evidence; or was one no reasonable judge could have reached: see Lord Neuberger PSC at [53].

40. The primary facts in question can be either concrete or abstract (i.e. the state of mind of a party or other relevant actor). However, proof of a state of mind is not capable of objective verification in the same way as a concrete fact. It involves subjective judgment by the fact-finder. The process is more akin to the evaluation of primary facts, to which I next turn.

41. An appeal against an evaluation of primary facts as found or undisputed can succeed only for the same reasons although applied perhaps with "somewhat less force": Lord Neuberger at [57] – [58], citing Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1, at [54]. A "degree of reticence" on whether to interfere with the evaluation is warranted: Lord Kerr JSC at [110].

42. An appeal against an exercise of discretion will succeed if the decision-maker has failed to take into account relevant matters; or had regard to irrelevant factors; or reached a decision that is plainly irrational. Otherwise, the review by an appellate court is "at its most benign". Even if the appeal court disagrees with the discretionary decision it cannot interfere: Lord Kerr JSC at [112].

43. Thus, there is a high degree of equivalence between an appeal against an exercise of discretion and a *Wednesbury* challenge to a regulatory decision. Generally speaking, whatever the form of challenge, a high degree of deference will be afforded to an expert regulator's findings and judgments: *R (London & Continental Stations Ltd) v The Office of Rail Regulator* [2003] EWHC 2607 (Admin), per Moses J, at [27]-[34].

44. To summarise, on an appeal under ss. 23B – 23G of the Gas Act 1986:

    i) An appeal is a review where the sole appellate criterion is wrongness. An appeal does not involve a hearing of the merits of GEMA's decision *de novo*.

    ii) If the ground of appeal is that the decision was based on an error of law, the standard is wrongness, and only wrongness. The decision is either right in law or it is wrong.

    iii) If the ground of appeal is that the decision was based on an error of concrete primary fact, it can only succeed if the finding had no evidence to support it; or was based on a misunderstanding of the evidence; or was one no reasonable regulator could have reached.

    iv) If the ground of appeal is that the decision was based on an erroneous finding about an abstract fact, or that it failed properly to evaluate the relevant facts and matters, then the same test applies, although perhaps "less forcefully".

    v) If the ground of appeal is that the decision was based on a mis-exercise of discretion then it will succeed if the regulator has failed to take into account relevant matters; or had regard to irrelevant factors; or reached a decision that is plainly irrational. Otherwise, a high degree of deference will be paid to the regulator's margin of appreciation when making a discretionary decision. Mere disagreement with the decision of the regulator does not entitle the appeal court to interfere.

45. These standards were in my judgment correctly mirrored by the direction given by the CMA to itself at 3.76 and 3.77:

> "In line with *E.ON and BT v Ofcom*, we find that where the exercise of regulatory judgement is involved, GEMA will have a margin of appreciation. GEMA's margin of appreciation will be at its greatest where all that is impugned is an overall value

> judgement based upon competing considerations in the context of a public policy decision. We will apply appropriate restraint and, in principle, not question issues of judgement on unchallenged primary findings and inferences determined by GEMA unless we are satisfied that GEMA's decision is wrong.
>
> Similarly, where GEMA has exercised regulatory judgement in selecting amongst various alternative solutions to a regulatory problem, we will not substitute GEMA's assessment or weighting of the evidence or reasoning with our own unless we are satisfied that GEMA's approach was wrong."

46. In my judgment WWU has not demonstrated any arguable grounds as to why the CMA made an error in law in its interpretation of ss. 23D(2) and (4)(a) and (b) of the Gas Act 1986. On the contrary, apart from sailing close to the rocks of *Wednesbury* in the two passages mentioned above, I am convinced that the various statements by the CMA as to the meaning of these provisions are unassailable. It did not cross the line and impermissibly transplant the *Wednesbury* jurisprudence into the s. 23D(4) appeal regime. It did not make any error of law in explaining the nature of the appeal regime or the appellate standard.

47. I therefore agree with Henshaw J that Ground 1 is unarguable. I also agree with him that WWU has not identified any specific instance where the alleged error in the interpretation of these provisions was material to any point the CMA decided against WWU. It is a basic rule that save in exceptional circumstances the court does not decide academic issues. The Administrative Court is there to decide issues where it is alleged that by virtue of abuse of power or illegality a claimant has suffered harm. It is not there to give a law lecture.

48. For these reasons, Ground 1 is not arguable.

Ground 2: GEMA's duty under s. 4AA(2)(b)

49. Ground 2 is, again, a pure point of statutory interpretation. WWU says that CMA misconstrued and therefore misdirected itself in respect of the financing duty in s. 4AA(2)(b) of the Gas Act 1986, which I have set out above at [23].

50. Under s. 4AA(2)(b) GEMA is fixed with a principal objective, namely to further the interests of existing and future consumers. In seeking to achieve that goal it must have in mind, among other things, that licensees should be able to finance their business activities. In my opinion that factor is not a subsidiary objective but is a consideration in the decision making process. Giving regard to that factor does not mean that the ultimate decision must positively boost the licensee's ability to finance its business activities. It means that the consideration must be borne in mind when reaching the decision, no more, no less.

51. There is no dispute that the reference to licensees in s. 4AA(2)(b) is to actual licensees and not to hypothetical ones.

52. In their skeleton argument counsel for WWU say:

> "The Claimant contends that the express terms of the statute impose a duty on GEMA and the CMA (i) to have regard to an outcome (i.e. that licence-holders be able to finance their activities), and (ii) to apply an individuated approach, in each case based on efficiency. However, given GEMA's sectoral/average rather than individuated focus, neither GEMA nor the CMA made any findings about the efficiency or otherwise of the Claimant's treasury strategy – on the contrary, they expressly declined to do so. …
>
> The purpose of the section 4AA(2)(b) duty confirms the need for an individuated approach. There is an obvious and powerful public interest in individual licence holders actually rather than theoretically being able to provide their services to users on an efficient and financially sustainable basis."

53. The real issue under this Ground is whether it is implicit in s. 4AA(2)(b) that when exercising its powers, GEMA has to apply an individuated rather than a standardised approach.

54. The approach of GEMA, endorsed by the CMA, was that regard was properly paid to the need to secure that licence holders are able to finance their business activities by adopting a formula of "average with suitable adjustments" when setting the allowed rate. In the Decision at 14.154 – 155 the CMA said:

> "We agreed with GEMA that to avoid unfair skew in the data and/or the potential for unlawful discrimination, it is important to consider factors that are outside of the management's control and adjust allowances accordingly. We considered that GEMA has provided sufficient evidence that it considered and made adjustments for structural factors outside of the control of management, such as RAV profile in the case of SSEN-T and size in the case of WWU, SGN Scotland and NGN. Rather than WWU's assessment that suggests this approach shows that the average is not appropriate, we viewed adopting an 'average with suitable adjustments' to be clearly within GEMA's discretion as regulator.
>
> We specifically questioned whether WWU's higher costs were the result of structural or unavoidable factors. WWU confirmed that its treasury approach was the choice of WWU's management and owners and was not subject to factors outside of the company's control. As a result, we agreed with GEMA's assessment that WWU's higher costs are the result of its decisions and not the result of skew in GEMA's analysis or unlawful discrimination. We agreed with GEMA that financing strategy, and the associated risks and rewards, should continue to sit with companies and not be transferred to regulators and consumers."

55. I remind myself that under Ground 2 WWU has to demonstrate that this approach is clearly at odds with the terms of the statute and is therefore unlawful.

56. Section 4AA(2)(b) has to be read alongside s.4AA(1B) and s. 4AA(5)(a). I have set out s.4AA(1B) above but I repeat it here (adapted to refer solely to GEMA):

> "GEMA shall carry out its functions under this Part in the manner which it considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the shipping, transportation or supply of gas conveyed through pipes"

s. 4AA(5)(a) provides:

> "GEMA shall carry out its functions under this Part in the manner which it considers is best calculated:
>
> (a) to promote efficiency and economy on the part of persons authorised by licences or exemptions to carry on any activity, and the efficient use of gas conveyed through pipes…"

57. Henshaw J was of the view that:

> "it was not arguably wrong for the CMA to have regard to the costs incurred by a reasonably efficient operator, particularly when one also bears in mind the duty in s.4AA(5)(a) relating to the promotion of efficiency and economy on the part of licensees."

58. I fully agree. I remind myself that the primary duty of the Regulator is to protect the interests of existing and future consumers in relation to gas. I cannot see how the natural meaning of the requirement in s.4AA(2)(b) disqualifies the use of this long-standing technique. Equally, I cannot see how the natural meaning of the requirement mandates that only an individual bespoke decision for each separate network is permissible.

59. Nor do I think that a purposive interpretation leads to such a conclusion. I firmly disagree with the submission that "the purpose of the section 4AA(2)(b) duty confirms the need for an individuated approach". On the contrary, I consider that the purpose of this provision has to be deduced in its statutory context where the principal objective (which I think is both overriding and paramount) is the protection of the interests of the consumer. The words of s. 4AA(2)(b) cannot and should not be construed in isolation. As Mr Thompson KC rightly stated, citing Lord Steyn's famous apophthegm in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [28], "in law context is everything".

60. The context here in my opinion leads to a construction which not merely allows, but implicitly favours, a standardised approach to the treatment of debt. Only such an approach can fairly and appropriately balance the need of licence holders to finance their business activities (s.4AA(2)(b)) against the overriding and paramount need to protect the interests of consumers (s.4AA(1)). If it were otherwise, consumers around

Great Britain could find themselves paying very different prices for gas depending on the borrowing decisions taken decades earlier by their supplier. Gas prices would become a regional lottery. That would not be in the interests of consumers.

61. In my judgment, the approach of the CMA to the matters in s. 4AA(2)(b) was correct and lawful.

62. For these reasons, Ground 2 is not arguable.

Ground 3: the CMA's approach to WWU's cost of debt appeal

63. Ground 3 is the second limb of the attack on GEMA's methodology for setting the cost-of-debt allowance. The first limb, contained in Ground 2, has been rejected by me. The second limb is that it was irrational and discriminatory of GEMA to adopt the standardised model, not merely because it was arbitrary, but because it specifically excluded interest on derivatives where that form of borrowing had been made by the licensee. WWU therefore attacks the machinery of the scheme (Ground 2) as well as what is allowed to be fed into it (Ground 3).

64. Henshaw J rejected this ground stating:

> "It was not arguably irrational for GEMA to take the approach (nor an error of law for the CMA to uphold that approach) of using a cost of debt allowance based on a sector average cost, adjusted to take account of individual circumstances beyond a licensee's control. Decision §§ 14.142 to 14.200 set out a very full and careful examination of this issue, giving detailed reasons for rejecting C's contentions that that approach was irrational and/or amounted to discrimination without objective justification. As the CMA pointed out, an approach under which the risks inherent in licensees' particular financing strategies fell on consumers would tend to undermine the duty to promote efficiency and economy, and the overall duty to protect the interests of consumers (s.4AA(1) and (5)(a), Decision §§ 14.145, 14.147, 14.149 and 14.155).
>
> Further, for the reasons set out in Decision §§ 14.219 - 14.220, 14.226 - 14.228 and 14.248 - 14.260, it was not arguably irrational for GEMA to adopt the approach it did to derivatives, nor arguably an error of law for the CMA to accept it. Whilst it might be reasonable to take some account of derivatives, especially those which are used simply to replicate debt instruments such as index-linked debt (§ 14.219 and 14.250), the CMA found that to do so would not be expected to increase the appropriate cost of debt allowance. It was not arguably irrational to decline to take account of derivatives, such as those entered into by C, that went beyond replicating index-linked debt and sought to fix real interest rates for a very long period (with the potential advantages and risk that that entailed)."

65. I have set out above my conclusion how it is impossible to construe the words of s. 4AA(2)(b) as prohibiting, as a matter of law, a Regulator from devising a model for determining the cost-of-debt allowance on a standardised and formulaic basis but with departures to reflect some of the licensee's individual circumstances. My conclusion as to the correct construction was the direct opposite to WWU's contention.

66. In my judgment, that conclusion applies *a fortiori* when considering whether the decision to devise and to apply the standardised model is irrational, discriminatory or perverse within the *Wednesbury* jurisprudence.

67. In their skeleton argument, counsel for WWU say:

> "It is clearly arguably both irrational and discriminatory to subject a very small group of companies, with very different characteristics, to price regulation based on the mean arithmetical average of those companies' costs. Just as it would be discriminatory and irrational to prescribe a uniform medicine dosage for each member of a family of five on the basis of their average height or weight, it is irrational and discriminatory to adopt an equivalent average basis to setting the cost of debt, given the small number of affected firms and their very different characteristics and circumstances."

68. I do not agree with this analogy. Society's representatives in Parliament issue measure after measure imposing standardised treatment on the citizenry with only modest scope for departure to reflect individual circumstances. Consider the tax system, the benefits system, the child support system, the access of children to primary and secondary education, the cost of public transport, the cost of prescriptions, the television licence fee. The list is endless. As Anatole France, the French poet and novelist, mordantly put it:

> "La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain." [3]

69. The standardised treatment devised by the independent Regulator in this case is neither irrational nor discriminatory. On the contrary, it is in my opinion completely compliant with the duty of the Regulator to satisfy the principal objective. I reiterate that the Regulator does so by following the statutory instruction that the objective is best furthered by promoting (i) effective competition between persons engaged in the industry; (ii) efficiency and economy on the part of licensees; and (iii) the efficient use of gas conveyed through pipes. These instructions vest a very wide discretion ("margin of appreciation") in the Regulator. I cannot see that the flexible standardised model devised by the Regulator is anything other than fully compliant with those instructions.

70. Even if a more critical view were to be taken, it is hard to see how the exercise of discretion which led to the formulation of the model could successfully be challenged on appeal, having regard to the benignity of a review of a discretionary decision. This

[3] The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

stringent standard applies *a fortiori* in a judicial review of the endorsement of that formulation by the appellate body.

71. The failure to provide a ground of departure to reflect the interest costs payable under a form of borrowing voluntarily assumed by an individual licensee, namely the cost of derivatives, is likewise neither discriminatory nor irrational. Why should the cost of that financial decision, which turned out to be disadvantageous, be passed onto the consumer? In my judgment it would have been irrational and discriminatory in favour of WWU had that been allowed for the reasons given in the Decision at 14.155:

> "We specifically questioned whether WWU's higher costs were the result of structural or unavoidable factors. WWU confirmed that its treasury approach was the choice of WWU's management and owners and was not subject to factors outside of the company's control. As a result, we agreed with GEMA's assessment that WWU's higher costs are the result of its decisions and not the result of skew in GEMA's analysis or unlawful discrimination. We agreed with GEMA that financing strategy, and the associated risks and rewards, should continue to sit with companies and not be transferred to regulators and consumers."

72. For these reasons, Ground 3 is not arguable.

Ground 4: the CMA's approach to WWU's tax clawback appeal

73. Under this ground WWU claims that the CMA is playing with a "double-headed coin".

74. As mentioned above, in addition to the cost-of-debt allowance the licensees receive a separate allowance to cover tax. Corporation tax is payable on profits which are calculated after deduction of interest payments on debt. However, the allowance is standardised, being set at a level which reflects a reasonable level of borrowing by a reasonable hypothetical company ("the notional level"). If the actual company has high levels of debt, and therefore high levels of interest, then the company's tax bill will likely be well below the notional level. If there were no adjustment, such a company would receive revenue by passing on a tax allowance to customers in respect of tax they are not in fact paying. Such a state of affairs obviously could not be tolerated.

75. Therefore, the Regulator has devised a tax clawback policy to recover such revenue for the benefit of consumers. The policy seeks to calculate what the individual firm is actually paying in corporation tax. So, for the purposes of this calculation the actual interest costs of derivatives are taken into account because they are deducted in the computation of corporation tax.

76. WWU says that inconsistent, discriminatory, treatment is thereby meted out to it. It is heads-I-win-tails-you-lose in that the actual interest rate on derivatives is left out of account when calculating the cost-of-debt allowance, to its disadvantage; while it is brought into account fully when calculating the tax allowance, again to its disadvantage.

77. In the Decision at 16.79 et seq the CMA explained that the tax clawback has to be based on the individual licence holder's tax costs (including those related to derivative

instruments) because its purposes are (a) to claw back for the consumer what would otherwise be an allowance for tax which the licence holder is not in fact paying and (b) to avoid creating an incentive to increase debt exposure.

78. Mr Hickman KC and Mr Cashman submit, rightly in my judgment, that WWU is not comparing apples with apples. In my opinion, they are comparing apples with sausages. These two allowances are completely different. GEMA was rightly entitled, indeed arguably obliged, having regard to its primary duty to consumers, to take the view that the price control settlement should not permit or incentivise companies to increase revenues intended to offset tax liabilities, by increasing their debts.

79. I agree with Henshaw J that because there is a clawback of the tax allowance referable to the deduction for tax purposes of the interest payable on derivatives it does not follow that the cost-of-debt allowance should also take account of individual licence holders' derivative instruments. It is a non sequitur.

80. For these reasons, Ground 4 is not arguable.

Ground 5: the CMA's approach to the licence modification

81. The proceedings before the CMA included appeals by parties other than WWU on certain points concerning the modification of licences by GEMA. WWU did not merely decline to appeal the points in question but positively disavowed them in the proceedings before the CMA.

82. Those appeals were largely dismissed. The unsuccessful appellants have not sought to challenge the decision of the CMA dismissing those appeals in judicial review proceedings.

83. However, under Ground 5 WWU is seeking in these judicial review proceedings to challenge by proxy the decisions by the CMA dismissing those appeals.

84. Unsurprisingly, both the CMA and GEMA strenuously maintain that WWU does not have the *locus standi* to mount a judicial review challenge to decisions of which it was not a party. Further, as Mr Hickman KC points out, a quashing order if made would be of no benefit to WWU.

85. I agree. In my judgment, inasmuch as WWU seeks to challenge decisions of the CMA to which it was not a party, it does not have standing to do so.

86. In an excellent oral submission, Mr Cashman explained that in some respects the appeals by the other parties were allowed. GEMA's licence modifications were found not to have satisfied the statutory requirements concerning the specification of time, manner and circumstances. The CMA quashed certain conditions within the modified licences and remitted them back to GEMA. GEMA therefore re-modified certain licences including the licence held by WWU. WWU had a right of appeal if it wished to challenge those re-modifications. It chose not to exercise it and is now out of time. Mr Thompson KC told me that WWU did not exercise the right of appeal because it knew what the answer would be from the CMA.

87. It seems to me that in addition to the formidable obstacles facing WWU under this ground it also has the difficult problem that there was an alternative remedy which it did not take.

88. An element of WWU's appeal to the CMA challenged the inclusion of obligations in what are known as 'Associated Documents'. I accept that Ground 5 legitimately covers this element and that WWU has standing to raise it. This particular complaint was comprehensively addressed by the CMA at 8.279 of the Decision. There it convincingly explained that GEMA specifically consulted on its proposed approach to the use of Associated Documents; it considered the representations of WWU and others; and thus did not fail properly to have regard to the matters to which it was required to have regard under s.4AA(2)(b) and (5A).

89. Henshaw J agreed with these submissions, as do I.

90. For these reasons, Ground 5 is not arguable.

Conclusion

91. The application for permission to apply for judicial review is therefore dismissed. I will receive submissions in writing on costs if they cannot be agreed.