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R (on the application of Waljee) v Secretary of State for the Home Department
(Tier 1; Directors Loan)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Heard at: Birmingham

Heard on: 15 August 2024
Promulgated on: 22 November 2024

Before:

UPPER TRIBUNAL JUDGE MANDALIA

- -

Between:

THE KING
on the application of
MOHAMMED ANVERALI WALJEE

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr M Symes
(instructed by Victorimax Solicitors) for the applicant

Mr M Biggs
(instructed by the Government Legal Department) for the respondent

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J U D G M E N T

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The requirement in paragraph 45(d)(iii) of Appendix A to the immigration rules for specified evidence of investment in the form of a director's loan, imposes a requirement that the loan agreement itself sets out the four factors identified in the rule, including the requirement that the loan is unsecured and subordinated to other creditors' loans to the business.

JUDGE MANDALIA

1. This claim concerns a requirement in Appendix A of the Immigration Rules relating to applications for leave to remain as a Tier 1 (Entrepreneur) Migrant to score 75 points for attributes. The Entrepreneur route requires applicants to make a qualifying investment into their business. There is a requirement for specified evidence of investment, and where the investment is in the form of a director's loan, the applicant is required to provide a legal agreement between the applicant and the business showing, *inter alia*, that the loan is unsecured and subordinated to other creditors' loans to the business. It is that requirement that lies at the heart of this claim.

BACKGROUND

2. The applicant is a national of Kenya. On 25 August 2016 he made an application for entry clearance as a Tier 1 (Entrepreneur) Migrant. On 15 September 2016 he was granted entry clearance valid until 15 January 2020. The applicant was then granted further leave to remain as a Tier 1 (Entrepreneur) Migrant valid until 4 March 2022.

3. The applications for entry clearance and further leave to remain were made in reliance upon investment in a company known as Fametex Textile Recycling Ltd ("Fametex"). The applicant entered into a 'Directors Loan Agreement' with the company on 19 October 2016 for the sum of £220,000 for the 'purchase of assets and working capital'. The applicant was initially a co-director of that company with two others but following the death of one of the co-directors in October 2017 and the departure of the other in February 2018, the applicant became the sole Director.

4. The applicant applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant on 3 March 2022. The application was refused by the respondent on 6 May 2022. The respondent said:

> "We wrote to you on 21 April 2021 advising you that the directors loan you had provided did not meet the criteria as specified in Appendix A, Paragraph 45 of the immigration rules as the loan

makes no reference to being unsecured and subordinated to other creditors' loans to the business.

In response to this request for evidence of a directors loan that meets the criteria as specified in Appendix A, Paragraph 45 of the immigration rules, you resubmitted the same directors loan that had been provided with your application."

5. The applicant applied for Administrative Review of the respondent's decision. In summary, the applicant claimed the respondent erroneously characterized the applicant's director's loan to his company as being secured and overlooked evidence that established the loan is unsecured. The representations made on behalf of the applicant are elaborated upon in a letter to the respondent from the applicant's representatives dated 17 May 2022.

6. Having considered the matters relied upon by the applicant in support of the application for Administrative Review, the respondent made a decision to maintain the refusal of the application for the reasons set out in the decision dated 6 May 2022 following Administrative Review. Insofar as is material, in the decision issued on 5 June 2023 the respondent said:

"…Within your administrative review you state that the requirement within the immigration rules regarding a directors loan is that is must "show" that the criteria are met and that this is not the same as expressly addressing each requirement. You highlight that there is no specific term within the loan to demonstrate that it has been secured, therefore making the loan unsecured. In addition you state that the clauses 8 and 9 demonstrate what will happen in the event of default, which shows that the loan is subordinate.

On reviewing your application, I note that within your application you provided a copy of your loan agreement. On 21 April 2022 the decision maker exercised evidential flexibility and requested that you provide further evidence of the directors loan and employees payslips. In response to this request you provided a number of documents which included the directors loan agreement previously submitted.

Whilst you state that a secured loan will normally identify the security within the agreement. However, I am not satisfied that the absence of a named security sufficiently demonstrates that the loan is unsecured. In addition, the details of what would happen in the event of default that the applicant would become an 'ordinary shareholder' does not confirm that the shareholders interest would automatically become subordinate to other creditors. The agreement must make it sufficiently clear that the loan will be unsecured and subordinate in favour or others. Therefore, I am satisfied that the original decision maker was correct to refuse your application under Appendix A, Paragraph 45 of the immigration rules.

…”

7. Permission to claim Judicial Review was granted by Upper Tribunal Judge Sheridan on 5 March 2024. He said:

> “It is arguable that the respondent applied the wrong test. Arguably, the test is not whether the loan refers to the agreement being unsecured and subordinated, but rather is whether the terms of the agreement show that the loan is unsecured and subordinated. This is because the wording in para. 45 of Appendix A is that the applicant must provide an agreement showing the loan is unsecured and subordinated. Arguably, the terms of the loan agreement show that the loan is unsecured and subordinated.”

THE GROUNDS FOR REVIEW

8. The terms “unsecured” and “subordinated” are not defined in the immigration rules. The applicant claims:

a. The respondent has misconstrued the rules as requiring a loan agreement to state in terms that the loan is unsecured and is subordinated. Paragraph 45(d)(iii) of Appendix A of the Immigration Rules does not require the loan agreement to expressly “state” that the loan is unsecured and subordinated. It requires the agreement to “show” that the loan is unsecured and subordinated: *Ground 1*

b. The respondent failed to assess whether the terms of the applicant’s loan agreement do in fact “show” that the loan is unsecured and subordinated. The respondent’s enquiry went no further than observing that the terms “unsecured” and “subordinated” do not feature in the agreement: *Ground 2*

c. The respondent could not reasonably conclude that the loan agreement did not show that the loan was unsecured and subordinated: *Ground 3*

THE LEGAL FRAMEWORK

THE IMMIGRATION RULES

9. Where the investment relied upon in support of an application for leave to remain as a Tier 1 (Entrepreneur) Migrant is in the form of a directors loan, Paragraph 45 of Appendix A to the Immigration Rules provides:

"45. The applicant must provide their business accounts and accompanying evidence of their investment, which must meet the following requirements:

...

(d) if the applicant has made the investment in the form of a director's loan:

...

(iii) the applicant must provide a legal agreement, between the applicant (in the name that appears on their application) and the business, showing:

(1) the terms of the loan,

(2) any interest that is payable,

(3) the period of the loan, and

(4) that the loan is unsecured and subordinated to other creditors' loans to the business;"

THE RESPONDENT'S GUIDANCE

10. The respondent has issued guidance to caseworkers about the Tier 1 (Entrepreneur) route. An extract of the guidance (version 27.0, 6 October 2021) is included in the bundle of authorities and as far as relevant states:

"Director's loan

This only applies to migrants who become directors of a company. A director's loan to the company will be considered for the award of points as long as it is unsecured and subordinated in favour of third-party creditors. This means that the loan agreement states that any loans to third parties are to be repaid before the director's loan is repaid.

For the purposes of this guidance an unsecured loan is where the applicant has loaned money to the business that is not secured by property or assets that become subject to seizure on default. Third-party creditors are those individuals or companies that the business owes money to, not including the applicant.

...

Evidence for Invested Funds

...

Directors Loan

If the applicant has made the investment in the form of a director's loan, it must be shown in the relevant set of financial accounts provided. Investments made on or after 19 November 2015 must also be shown through readily identifiable transactions in the applicant's business bank statements, which must clearly show the transfer of this money from the applicant to the business. They

must also provide a legal agreement, between them (in the name that appears on their application) and the company. This agreement must show:

- the terms of the loan
- any interest payable
- the period of the loan
- evidence to show the loan is unsecured and subordinated in favour of third party creditors

If the information provided does not clearly show the loan is unsecured and subordinated in favour of third-party creditors, you cannot accept the loan for the award of points. Subordinated loans rank after other debts, should a company fall into liquidation or bankruptcy."

THE AUTHORITIES

11. The principles for the interpretation of the Immigration Rules were referred to by Lord Briggs (with whom Lord Kitchin, Lord Burrows, Lady Rose and Sir Declan Morgan agreed) in *R (Wang) v Secretary of State for the Home Department* [2023] UKSC 21. He said:

> "29. It was common ground between counsel that the leading authority on the general principles to be applied in interpreting the Immigration Rules is *Mahad v Entry Clearance Officer* [2010] 1WLR 48 and, in particular, the following two passages in the judgment of Lord Brown of Eaton-under-Heywood JSC. The first is his citation at para 10 from Lord Hoffmann's judgment in *MO (Nigeria) v Secretary of State for the Home Department* [2009] 1WLR 1230, para 4:
>
> > "Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."
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> 30. The second is Lord Brown JSC's own contribution, later in para 10:
>
> > "Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

12. In *R. (Sajjad) v Secretary of State for the Home Department* [2019] EWCA Civ 720, the Court of Appeal confirmed that the phrase "director's loan" in the Immigration Rules Appendix A para.46-SD(a)(iii) had no specialist meaning. It simply meant a loan made

by a director to their company, and it covered any transaction whereby a director paid money to or for the benefit of the company on the basis that it would one day be repaid. Males LJ said:

> "45. … The requirement that the loan be unsecured ensures that in the event of the company's insolvency, secured creditors will have priority over the debt payable to the director. The requirement for subordination ensures that other unsecured creditors will have such priority. In the absence of such a provision, the loan to the director would rank equally with debts to other unsecured creditors and, if the amount of the loan represents a substantial proportion of the company's debts, could mean that the director takes the greater part of whatever assets there are. Accordingly the requirement for subordination puts an applicant who chooses to invest in his company by making a loan in the same position, in the event of the company's insolvency, as one who makes an equity investment."

13. Mr Symes also refers to the judgment of Jackson LJ, at [43] in *Pokhriyal v Secretary of State for Home Department* [2013] EWCA Civ 1568, in which he said that the Secretary of State could not rely upon extraneous material in order to persuade a court to construe the Rules more harshly or to resolve an ambiguity in the Government's favour.

THE DIRECTOR'S LOAN AGREEMENT

14. Mr Symes refers to the Directors Loan Agreement. The Lender is the applicant and the Borrower is Fametex. Insofar as is material, the Loan Agreement provides:

> "2.1 The Lender has agreed to lend to the Borrower the amount set out in the Schedule ('the Loan'), and this agreement contains the terms of the Loan. It includes details of the interest to be paid, and explains what the Lender can do if the Borrower does not repay the Loan. It also explains what happens if the Loan is not repaid and is instead converted into shares in the Borrower.
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> …
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> 5. Repayment
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> 5.1 The Borrower must repay the Loan, and all interest that has built up, on or before the date specified in the Schedule (unless the Lender chooses to convert the Loan into shares in the Borrower prior to that date as per Clause 9).
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> …
>
> 8. Events of Default
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> 8. 8.1 The following are Events of Default;
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> …

8.2 If an Event of Default happens, then what it says in clause 9 below will apply

9. Conversion of the Loan into Shares

9.1 If: (i) The Lender gives written notice to the Borrower that it wishes to convert part or all of the loan into shares in the Borrower or; (ii) the loan and the due interest is not repaid in full by the date set out in the Schedule, or (iii) if there is an event of Default, then the Loan (to the extent it has not been repaid) provided by the Lender (set out in the Schedule) will automatically be converted into shares in the Borrower on the basis of a shareholder agreement.

9.2 The conversion of the Loan into shares will fulfil the Borrowers responsibility to repay the Loan and any due interest, and the Lender agrees that if the loan is converted into shares in the Borrower in this way then the Borrower will no longer have any legal responsibility to repay any part of the Loan and/or any interest to the Lender. The Lender cannot change its mind about this agreement.

10. General

10.1 The Lender may assign, transfer, charge or sub-contract its rights and obligations under this agreement to somebody else but the Borrower may not do so.

10.2 No one who is not a signatory to this agreement may have any rights under it.

10.3 Changes to this agreement are only binding if the Lender and the Borrower agree them in writing, sign them and give each other a copy.

…"

15. In summary, Mr Symes submits there are three grounds, albeit overlapping, that demonstrate the respondent's decision is vitiated by public law error. First, the respondent erred in construing the rules as requiring an express statement that the loan is unsecured and subordinated to other creditors' loans, rather than reaching a decision based upon an informed analysis of the Directors Loan agreement. Second, the respondent failed to undertake the informed analysis required, and third, reasonably construed, the loan agreement demonstrates that the loan was unsecured and subordinated to other creditors.

16. Mr Symes submits the natural and ordinary meaning of the Rules is straightforward. The word "showing" does not mandate one of the higher forms of demonstrative intensity that might be implied from words such as "specifying" or "stating". A document may 'show' something, Mr Symes submits, when it is read and sensibly construed. The relevant rule is designed to encourage the extension of stay for legitimate businesspeople, including company directors, so long as the promised investment monies have generally been invested in the business compatibly with the policy

of the Rules. With the level of fee payable, decision makers administering the scheme must reasonably be expected to know something of the field in which they operate, particularly the meaning of terms which must recur in most applications they address. Mr Symes submits the objective of achieving simplicity cannot confine the interpretation of a document more narrowly than the Rules, properly construed, provide. Here, the Directors Loan was unsecured because there is no reference to any security being offered. Failure by Fametex to deliver particulars in respect of any charge to Companies House will mean that the charge is void against any liquidator, administrator or any creditor of the company: *Companies Act 2006, s. 859H*. Mr Symes submits that absent a challenge to the applicant's honesty, the only reasonable response to the loan agreement was to accept that the loan was unsecured.

17. Mr Symes submits the loan is also subordinated to other creditors' loans because Fametex was not to enter into any other loan agreement and in the event of default, the loan would convert into shares. Shareholders are last in the queue in the event of insolvency. Mr Symes submits the respondent made no attempt to engage with or interpret the loan agreement relied upon by the applicant and instead, simply searched for the phrases such as 'unsecured' and 'subordinated' and refused the application because those phrases do not appear.

Analysis and Decision

18. It is uncontroversial that the Directors Loan Agreement is evidence of a loan that creates a debt owed by the company to the applicant. Where, as here, the investment made by the applicant is in the form of a director's loan, paragraph 45 of Appendix A to the immigration rules requires an applicant to provide a legal agreement between the applicant and the business, showing, inter alia, that the loan is unsecured and subordinated to other creditors' loans to the business.

19. As to the proper approach to the immigration rules and the points based system, in *R. (Wang) v Secretary of State for the Home Department* [2023] UKSC 21, the respondent appealed against a decision of the Court of Appeal that the Tier 1 (Investor) Migrant (Wang) had the requisite degree of control over money loaned to her under an investment scheme for the purposes of the Immigration Rules. The issue in *Wang*, was whether it is legitimate to look at a scheme in the round to see whether two particular "tick-box" conditions have been satisfied in fact.

20. Wang had borrowed £1 million from a UK financially regulated institution which was invested directly in a company, under a scheme designed to secure qualification for leave to remain in the UK. As to the interpretation of the immigration rules, Lord Briggs (with whom Lord Kitchin, Lord Burrows, Lady Rose and Sir Declan Morgan agreed) endorsed, at [31], the encouragement of Lord Brown in *Mahad v Entry Clearance Officer* to apply sensibly rather than strictly, the natural and ordinary meaning of the words, keeping in mind the context and purpose of the Immigration Rules. That is not, he said, inconsistent with a requirement of a purposive approach to construction and a realistic and unblinkered approach to the application of the relevant provisions to the facts.

21. In *Wang*, it was said on behalf of *Wang* that the approach to the interpretation of this PBS for Tier 1 (Investor) Migrants should be one that prioritised simplicity and predictability over sophistication so that, for example, it would be illegitimate to look at a scheme in the round, if steps in the scheme appeared on their face, viewed individually, to comply with the required elements in the "tick-box" scoring system. That approach was said on behalf of *Wang* to be consistent with what has previously been said by the Court of Appeal in cases such as *Mudiyanselage v SSHD* [2018] 4 W.L.R 55, at [52] to [56], that occasional harsh outcomes were the price that had to be paid for the perceived advantages of the points-based system process. Lord Briggs said:

> "33. As those cases demonstrate, the PBS does deliberately sacrifice discretion and (occasionally) perfect fairness or equity in the pursuit of a migration regime which is efficient, transparent and predictable, and as far as possible capable of being operated reasonably quickly and reliably by quite junior officials. But none of those aims comes near to displacing the need to take an unblinkered and realistic view of the facts to which the PBS regime is to be applied, for the purpose of deciding whether the requirements for achieving the specified scores are met. And where those facts include the use of a pre-ordained multi-step scheme, like the Maxwell Scheme, nothing in the Immigration Rules or in those cases requires the adjudicator (or the court on appeal or application for judicial review) to blinker itself to the reality revealed by appraising such a scheme in the round.
>
> 34. I do not by that mean that where an applicant does tick all the relevant boxes under this or any PBS regime, the adjudicator or the court may nonetheless decide that the applicant fails to qualify because for other reasons he or she, or the scheme to which they have subscribed, appears to fall outside the general suitability for migration which the Secretary of State might be supposed to have intended. Just as the hard- edged elements in a PBS regime may fail to achieve perfect fairness and thereby exclude apparently deserving applicants (for example because of failure to comply with some time limit which there is no discretion to extend), so also it

> may qualify some applicants whose credentials, viewed in the round, may be far removed from that which the Immigration Rules were intended to admit. Notwithstanding their frequent amendment the Immigration Rules are far from being perfect, and both applicants and the Secretary of State, who makes the Immigration Rules, have to take the rough with the smooth in their operation: see per Jackson LJ in *Pokhriyal v Secretary of State for the Home Department [2013] EWCA Civ 1568 [2014] Imm AR 711, para 43* .
>
> 35. But the present question is whether it is legitimate to look at this scheme in the round to see whether two particular "tick-box" conditions have been satisfied in fact. The condition principally in issue is whether Ms Wang had the MAM loan money under her control. A positive answer to that question cannot sensibly be garnered from looking at one aspect of the Maxwell Scheme in isolation from the rest. Nor can Ms Wang rely on a perception that her strict legal rights under the written terms of agreements constituting the scheme might appear to give her that control if the practical reality, as between her, the companies involved and their owners DK and NK was that the MAM loan moneys were under their exclusive control throughout, rather than under hers."

22. The facts in *Wang* are quite different, and where it is necessary to have regard to the type of scheme entered into, the need to take an unblinkered and realistic view of the facts to which the PBS regime is to be applied, for the purpose of deciding whether the requirements for achieving the specified scores are met, is all too apparent.

23. Here however, the requirement set out in the rules is unambiguous. It is, as the respondent submits, the legal agreement, that must show that the loan is unsecured and subordinated to other creditors' loans to the business. The loan agreement must 'show'; (i) the loan is unsecured, and (ii) the loan is subordinated to other creditors' loans.

24. I reject the claim that the respondent has misconstrued the rules as requiring a loan agreement to state in terms that the loan is unsecured and is subordinated. In *Sajjad v SSHD*, Holroyde LJ, accepted the investment made was a 'Directors Loan' for the purposes of the immigration rules. He said:

> "32. … In order to operate the PBS fairly and efficiently, the respondent must be able to ascertain quickly, from the information provided by an applicant, the precise nature and legal status of the investment made in order to confirm that it attracts an award of points under the terms of the scheme. That can effectively be done if the phrase is interpreted as covering any transaction in which a director pays money to or for the benefit of his company on the basis that it will one day be repaid. It cannot effectively be done if the respondent is to be required, on an application-by-application

> basis, to make an analysis of whether a particular transaction by which money passed from a director to a company amounted to a director's loan."

25. Having accepted the investment made was a 'Directors Loan' Holroyde LJ said the applicant was required to provide, as a specified document, a legal agreement showing the four important details. He said the applicant had failed to do so and that itself was sufficient to defeat the first ground of claim. Males LJ agreed with Holroyde LJ but went on to explain why, despite the investment made, the fact that *Sajjad* did not qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points based system was not a mere technicality.

26. Males LJ rejected the claim made on behalf of *Sajjad* that the investment made was a loan which, although made by a director, was not a director's loan. He said:

> "That being so, the appellant was required to provide a legal agreement between himself and the company showing: "(1) the terms of the loan, (2) the interest that is payable, (3) the period of the loan, and (4) that the loan is unsecured and subordinated in favour of third-party creditors". As paragraph 46 makes clear by its insistence on documentary evidence and its mandatory terms ("must be provided in all cases"), <u>the requirement is for a written agreement setting out these matters.</u>" *(my emphasis)*

27. In considering the fourth requirement that the loan is unsecured and subordinated in favour of third-party creditors, Males LJ said:

> "45. The fourth matter is important. The requirement that the loan be unsecured ensures that in the event of the company's insolvency, secured creditors will have priority over the debt payable to the director. The requirement for subordination ensures that other unsecured creditors will have such priority. In the absence of such a provision, the loan to the director would rank equally with debts to other unsecured creditors and, if the amount of the loan represents a substantial proportion of the company's debts, could mean that the director takes the greater part of whatever assets there are. Accordingly the requirement for subordination puts an applicant who chooses to invest in his company by making a loan in the same position, in the event of the company's insolvency, as one who makes an equity investment."

28. Adopting the analysis by Males LJ it is clear that the word "showing" in paragraph 45(d)(iii) of Appendix A to the immigration rules, properly construed, imposes a requirement that the loan agreement sets out the four factors identified in the rule. That is; (i)the terms of the loan, (ii) any interest that is payable, (iii) the period of the loan, and (iv) that the loan is unsecured and

subordinated to other creditors' loans to the business. The fourth of those factors ensures that it is clear and there can be no doubt that secured and unsecured creditors will have priority over the debt payable to the director. That construction of the requirement is in context, consistent with a purposive approach to construction of the relevant provision of the rules.

29. It follows that in my judgment, albeit harsh in circumstances where the applicant had made a substantial investment, there is no public law error in the decision of the respondent. The applicant was provided an opportunity prior to the respondent's decision of 6 May 2022 to provide evidence of a Director's Loan that meets the requirements of the rules but resubmitted the same document. The loan agreement does not comply with the requirements and it was open to the respondent to refuse the application because the loan agreement relied upon makes no reference to the loan being unsecured and unsubordinated to other creditors' loans to the business. The remaining grounds for review relied upon by the applicant proceed upon the premise, which I have rejected, that the respondent erred in construing the rules as requiring an express statement that the loan is unsecured and subordinated to other creditors' loans, rather than reaching a decision based upon an informed analysis of the Directors Loan agreement.

30. The difficulty with an informed analysis of the loan agreement is that the terms of the agreement are far from clear. For example, section 8 of the loan agreement defines "Events of Default". They each refer to acts of 'the borrower'. Clause 9.1 of the agreement provides for the conversion of the loan into shares if the 'lender gives notice to the borrower that it wishes to convert part or all of the loan into shares in the borrower, or in an ''Event of Default', 'on the basis of a shareholder agreement'. The terms of any shareholder agreement are not apparent and neither is the fact that the loan is unsecured and subordinated in favour of third-party creditors. Furthermore, paragraph 10.1 of the loan agreement provides that the lender may assign, transfer, charge or sub-contract [his] rights and obligations under the agreement to somebody else. The clause is vague, but on one reading permits the lender to charge his rights under the agreement, albeit, it seems, to somebody else. The loan agreement lacks sufficient clarity to establish that on any view, the loan is unsecured and subordinated to other creditors' loans

31. It follows that the respondent was entitled to refuse the application for the reasons given in the decision of 6 May 2022 and to maintain that decision following Administrative Review for the reasons set out in the respondent's decision of 5 June 2023.

32. I therefore dismiss the claim for Judicial Review.

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