Case No: C1/2014/2726

Neutral Citation Number: [2016] EWCA Civ 453
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM
MR JUSTICE HICKINBOTTOM
[2014] EWHC 2089 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2016

Before :

LORD JUSTICE TOMLINSON
LORD JUSTICE TREACY
and
LORD JUSTICE FLOYD

- -

Between :

THE QUEEN **(on the application of)** **(1) SKY BLUE SPORTS & LEISURE LIMITED** **(2) ARVO MASTER FUND LIMITED**	**Appellants/ Claimants**
- and -	
COVENTRY CITY COUNCIL	**Respondent/ Defendant**
- and -	
(1) ARENA COVENTRY LIMITED **(2) TRUSTEES OF THE ALAN EDWARD HIGGS CHARITY**	**Interested Parties**

- -
- -

Rhodri Thompson QC and Nicholas Gibson (instructed by **Brown Rudnick LLP**) for the **Appellants/Claimants**
James Goudie QC and Ronnie Dennis (instructed by **the Solicitor, Coventry City Council**) for the **Respondent/Defendant**

Hearing dates : 3 and 4 February 2016

- -

Judgment

Lord Justice Tomlinson :

1. This is an appeal in judicial review proceedings. The circumstances in which the challenge to the underlying decision of Coventry City Council has been brought are complex and are set out in the comprehensive judgment of Hickinbottom J below, available on the Bailii website at [2014] EWHC 2089 (Admin). No purpose whatever would be served by my reproducing here his exegesis, whether in his words or my own. For the detailed background resort may therefore be had to that judgment. Insofar as it is suggested that the judge reached conclusions of fact inconsistent with the contemporary documentary evidence, or drew inferences unsupported by that primary evidence, I shall discuss those criticisms, but subject thereto the judge's account of the history is largely uncontroversial. What follows is intended as only the barest outline by way of laying the ground for discussion of the challenges made to the judge's judgment.

2. On 15 January 2013 Coventry City Council, ("CCC" or "the Council"), resolved to make a loan of £14.4 million to Arena Coventry Limited, ("ACL"), the operating company of The Ricoh Arena, ("the Arena"), a substantial multi-purpose arena in the north eastern part of the city. The Arena comprises a significant sports stadium, of sufficient quality to have been successfully used as a venue during the 2012 Olympic Games, capable also of being used for other events such as concerts by performers of international renown, combined with an exhibition hall, conference suite, a hotel, casino and health spa. As planned, it was at its inception the home of Coventry City Football Club, ("CCFC"), a founder member of the Premiership in 1992 although sadly in 2001 relegated to the Championship, the second flight of English football. CCC was at the material time, January 2013, a 50% shareholder in ACL, through its wholly owned company North Coventry Holdings Limited. The building of the Arena on the site of a former gas works was an important regenerative project in which both civic pride and public funds were invested. CCC is and was at all material times the freeholder of the Arena site.

3. In December 2003 CCC let the site to Coventry North Regeneration Limited ("CNR") for a term of 50 years in order that CNR could build the Arena. At the same time CCC lent £21 million to CNR for this purpose. CNR is 100% owned by North Coventry Holdings Limited. In January 2006 CNR sub-let the site to ACL for a term of 50 years (less 3 days) calculated from 19 December 2003. In January 2013 therefore the sub-lease had about 41 years to run. The sub-lease gave to ACL the option of paying a rental of £1.9 million per annum or a premium of £21 million.

4. In February 2006 ACL secured from Clydesdale Bank plc, trading as Yorkshire Bank ("the Bank"), a loan of £22 million repayable over 23 years, which was drawn down in 2006. Initially ACL's repayments to the Bank were approximately £1.8 million per year, but by 2012 they had dropped to about £1.6 million per year. The loan was used to pay a premium of £21 million to CNR in respect of the sub-lease. CNR used that money to repay its loan from CCC. CNR assigned its leasehold interest to Arena Coventry (2006) Limited, a wholly-owned subsidiary of ACL.

5. On 29 March 2006 ACL granted to CCFC a licence to use the ground and a sub-lease of the offices etc at the stadium for a term of 25 years at a rental plus licence fee of approximately £1 million per annum. This rent and licence fee was subject to annual review and variation in accordance with inflation but did not reduce upon the Club

being relegated to play its football in a lower division. The agreement was to expire in August 2030. CCFC in fact played its home games at the Arena from the start of the 2005/2006 season.

6. Unhappily the fortunes of CCFC did not prosper. In the Championship it incurred financial losses of the order of £4-6 million per year. By the spring of 2012 the club was doomed to relegation to the third flight of English football, Football League Division One, with effect from the start of the 2012/2013 season. Relegation meant significantly reduced television revenue, with income reducing to about £5 million per annum, about half of what it had previously been.

7. As from 2008 CCFC had been in the ownership of the Appellants, companies in the SISU group of companies, ("SISU"). SISU manages hedge funds and private equity funds.

8. By the spring of 2012 the financial situation of CCFC was parlous. As at April 2012 it owed rent arrears to ACL of about £89,000. As from that date CCFC declined to pay further rent to ACL. In reality it could not do so unless funded by SISU. SISU had already invested about £40 million in an unprofitable venture. SISU was of course under no obligation to fund rental payments. SISU made clear that it would do so only pursuant to a fundamental restructuring of the business of both CCFC and ACL.

9. Non-receipt of rent from CCFC caused ACL to default on its obligations to the Bank. On 21 December 2012 the Bank served notice of default under the loan agreement. The Bank had extensive security and step-in rights pursuant to which the operating sub-lease of the Arena was at risk. It was in these circumstances that CCC made the loan to ACL to which I referred at paragraph 2 above. The loan was of £14.4 million, for a similar term to the lease (nearly 41 years, the final repayment date being 16 December 2053), at a rate of 5% per annum for the first five years of the facility, and thereafter at the discretion of the Council but no less than 5% nor more than 2% above PWLB rate (the PWLB rate being, in effect, the rate at which the Council could borrow money). The annual repayments amounted to approximately £0.8 million compared with the £1.6 million which ACL had been paying and the £1.3 million which ACL would have paid under a restructuring proposal put forward by the Bank on 3 December 2012, which ACL had rejected both because it regarded it as unaffordable but also because, under the proposal, half of the debt would remain in place at the term of the loan because it would have been serviced on an interest only basis. The loan from CCC enabled ACL to pay off the Bank at a discount, safeguarded the operating sub-lease of the Arena and, in the view of the Council, protected the Council's interests and the value of its shareholding in ACL. CCC was at the material time controlled by the Labour group of councillors, but the decision of the Council was unanimous, with cross-party support.

10. The Council had before it when making its decision a report prepared by its Assistant Director of Financial Management, Mr Barry Hastie. Included in his report is the following passage:

> "As part of its due diligence the Council has current valuations of the income stream received by ACL for commercial activities at the Arena which acts as a valuation of the Arena buildings and grounds. The Council

has the latest business plan for ACL to demonstrate how it will grow and develop the business over the next 3 years and maintain payment of the loan and all its other outgoings.

Under EU legislation the public sector cannot support commercial organisations, such action would be seen as disadvantaging EU competitors and is referred to as state aid. In 2003 when the Council approved the delivery of the Arena by its 100% owned company, Coventry North Regeneration Limited, the structure of the Companies involved in the Arena was carefully put in place to ensure compliance with EU legislation.

The structure of the companies remain [sic] in place and the only difference is that the Council will become the mortgagee of the Arena company in place of the Clydesdale Bank. This change does not affect the status of the advice taken in 2003 that the company structure and involvement of the Council did not contravene state aid under EU legislation.

The new loan from the Council to ACL is not at an abnormally low rate because of the company relationship. It is at a commercial rate and the loan will be fully secured against the assets of ACL. The Council's position is secured because it is the landlord of the freehold reversionary interest so it cannot lose control of the asset should ACL default on the loan repayments.

The Council will put in place a cross guarantee in the Council's favour between ACL and ACL 2006, a first ranking legal charge from ACL over the lease between the Council and ACL 2006, a first ranking debenture to the Council from ACL and a first ranking debenture from ACL 2006 as security for the loan.

There is a small risk that will exist for 2 years from the date of the loan from the Council in the unlikely event that ACL goes into insolvency. This is due to ACL and the Council being "connected parties" and an administrator or other insolvency practitioner that was appointed by ACL's creditors may challenge the basis on which the loan was made. It would be for the Council to satisfy any court that the provision of the loan was made on a commercial basis and this report and its proposals is on the basis that the loan is commercial.

External legal advice has been sought on the legalities and structure of the proposals before the Council."

The external legal advice considered by the Council has not been disclosed, but it may fairly be inferred that the Council considered, on advice from these two sources, that in making the loan it was acting lawfully.

11. The question which Hickinbottom J had to resolve, in the context of an application by SISU for judicial review and quashing of the decision by the Council to make the loan, is whether the loan approved by the Council on 15 January 2013 was state aid in terms of Article 107 of the Treaty on the Functioning of the European Union ("TFEU") which, by reason of Article 108(3), is incapable of lawful implementation without notification to the Commission. The making of the loan was not notified to

the Commission, and accordingly the Council acted unlawfully if the loan constituted state aid. Hickinbottom J directed himself, correctly, to the effect that the local authority is, pursuant to the European learning, afforded a wide margin of judgment when making an entrepreneurial investment decision. He "firmly concluded" that the loan fell clearly within the permitted ambit and that it was not state aid - [130] and [132].

12. The exercise conducted by the judge consisted in the main in an evaluation of the primary facts or inferences which were themselves collected from the documentary material before him. Insofar as the judge made findings or drew inferences from the documents, we are as well-placed as was he to examine the material, and I would accept that insofar as he derived factual conclusions or inferences which are demonstrably wrong, that may affect the reliability of his overall evaluation of the legality of the loan, and we may revisit both the factual conclusions or inferences and the judge's overall evaluation. However insofar as his conclusions "involve an assessment of a number of different factors which have to be weighed against each other" and where such assessment or evaluation is "a matter of degree upon which different judges can legitimately differ", we should I believe proceed with great caution and only interfere with the judge's evaluation if it falls outside the bounds of reasonable decision-making – see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577 at pages 579-583 per Clarke LJ and *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325 at pages 1347-1349 per Lord Mance. Thus I do not agree with the submission of Mr Rhodri Thompson QC, for SISU, that the question for this court is whether Hickinbottom J was wrong, either on the law or on the facts or both. Of course we are concerned with the question whether the judge was wrong on the law, but his self-direction on that score is so far as relevant largely accepted to have been accurate. As to the facts, our approach must be more nuanced and is to some extent a hybrid of the extremes discussed in the authorities to which I have referred above.

13. It follows that, in my judgment, 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.

14. Articles 107 and 108 of the TFEU provide, so far as is material:

> "Article 107 (Ex Article 87 TEC)
>
> 1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.
>
> . . .
>
> Article 108 (Ex Article 88 TEC)
>
> . . .

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

15. It is common ground that CCC is for present purposes a manifestation of the Member State. Despite my reservations on the point the parties were also agreed that the proceedings are properly constituted without the involvement of the UK or any branch of central government. The Appellants assert that CCC breached the EU standstill obligation. Left to my own devices my instinctive reaction is that, assuming that the loan constituted state aid, the action of CCC resulted in the UK being in breach of the standstill obligation. The Appellants submit however that it is unnecessary to involve the UK or any branch of central government in the process for recovery of any unlawful advantage resulting from the loan. They point out that it is clear as a matter of EU law that it is for the national courts and administrative authorities to make effective provision for the recovery of such aid under their own national procedures. They point to the Commission's 2007 *Notice on recovery of unlawful and incompatible State aid* ("the Recovery Notice"), which at paragraph 46 records the findings of an Enforcement Study of various EU Member States that, while it is a matter of national procedure for each Member State, "a principle common to all countries reviewed is that recovery must be effected by the authority that granted the aid." The Appellants also submit that there are numerous cases in the UK courts where subsidies unlawfully granted under EU aid schemes have been the subject of recovery action, notably under the Common Agricultural Policy, by the relevant body responsible for administration of the relevant EU scheme within the United Kingdom: see e.g. *Wood v Intervention Board Agricultural Produce* [2001] EWCA Civ 1569. The unspoken assertion is that this holds good for an autonomous local authority such as CCC. In summary, the submission is that while the United Kingdom must have effective procedures for the recovery of unlawful state aid, there is no reason for HM Treasury or any other arm of central government to be involved in such procedures unless they are themselves implicated in the breach of EU law. That is not the case here. CCC agreed with the Appellants that it is not necessary for the UK Government to be a party to these proceedings. Since both parties are agreed on the point, and since in the light of my conclusions on the state aid issue the point is in any event academic, I need not explore my reservations further.

16. The judge recorded the following principles which he derived from the authorities and other materials as uncontroversial:

"88. . . .

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, ECLI:EU:T:2012:415:

> "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 Jacobs' 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."

17. At paragraph [89] the judge said:

> "89. Mr Quigley submitted that the loan transaction in this case was not State aid because it did not favour ACL, nor did it affect trade between Member States. However, the main ground of contention between Mr Thompson for the Claimants and Mr Goudie for the Council (fully supported by Mr Quigley) was whether the transaction distorted or threatened to distort competition. I shall deal with that issue first."

18. Mr Thompson submitted that paragraphs [88(iv)] and [89] of the judgment reflect some confusion on the part of the judge, and I agree that that is so. However I do not think that this confusion in the event deflected the judge from his task.

19. We were shown the EU Commission decision letter to The Netherlands re: initiation of Art. 108(2) procedure in respect of public funding of certain Dutch professional football clubs (incl. PSV) (C(2013)1152 final) in which at paragraph 38 the Commission said this:

> "Assessment under Article 107(1) TFEU

38. For a measure to constitute State aid in the meaning of Article 107(1) TFEU, the following cumulative conditions needs (sic) to be fulfilled:

- There needs to be a selective advantage in favour of certain undertakings or the production of certain goods;
- There needs to be a use of State resources for this;
- The aid must distort or threaten to distort competition;
- The aid must affect trade between Member States."

20. Further guidance as to what is meant by "selective advantage" is to be found in the EU Commission's draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU issued on 17 January 2014. Although the consultation has apparently closed the final Notice is not yet published. At paragraph 67 the Commission said:

"4. **ADVANTAGE**

4.1 **The notion of advantage in general**

4.1.1 *General principles*

67. An advantage within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention. Section 4.2 of this Communication provides detailed guidance on the question of whether a benefit can be considered to be obtained under normal market conditions."

Section 4.2 continues:

"**4.2 The market economy operator (MEO) test**.

4.2.1 *Introduction*

76. The Union legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form, they are subject to the Union State aid rules.

77. Economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions. This principle has been developed with regard to different economic transactions. The Union Courts have developed the 'market economy investor principle' to identify the presence of State aid in cases of public investment (in particular, capital injections): to determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar

circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question. Similarly, the Union Courts have developed the 'private creditor test' to examine whether debt renegotiations by public creditors involve State aid, comparing the behaviour of a public creditor to that of hypothetical private creditors that find themselves in a similar situation. Finally, the Union Courts have developed the 'private vendor test' to assess whether a sale carried out by a public body involves State aid, considering whether a private vendor, under normal market conditions, could have obtained the same or a better price.

78. These principles or tests are variations of the same basic concept that the behaviour of public authorities or undertakings should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such authorities or undertakings grant an advantage to their counterparts. In this Communication, the Commission will therefore refer, in general terms, to the 'market economy operator' ("MEO") test as the relevant method to assess whether a range of economic transactions carried out by public authorities, public bodies or public undertakings take place under normal market conditions and, therefore, whether they involve the granting of an advantage (which would not have occurred in normal market conditions) to the undertakings concerned. The general principles and the relevant criteria for applying the MEO test are detailed below.

4.2.2 *General principles*

79. The purpose of the MEO test is to assess whether the State has granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. In that respect, it is not relevant whether the intervention constitutes a rational means for the public authorities in order to pursue public policy (e.g. employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public authorities acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favourable position to that of its competitors."

21. It follows from this authoritative guidance that the judge was wrong at [88(iv)] to confuse the distinct issues (1) whether the Council had acted like a market economy operator and (2) whether the loan distorted or threatened to distort competition. These are separate enquiries, and moreover, notwithstanding what the judge said at [89], the main ground of contention at the hearing before the judge was the first issue, not the second, as indeed the judge seemingly recognised in the next paragraph, [90], where

he summarises Mr Thompson's submissions on the respects in which the Council's loan failed to meet the criteria imposed by the market economy operator principle. The judge then dealt with those submissions at [91] – [132]. At [136] and [137] he dealt very briefly with the second issue, which he recognised that, in the light of his decision on the first issue he did not need to decide, and provisionally concluded that had the loan distorted or threatened to distort competition, which he recognised was likely to be the case, then it would have affected trade as between Member States.

22. In the event therefore I do not consider that the judge's confusion in exposition was carried through into his essential analysis, indeed I do not think that Mr Thompson suggested that it had been.

23. At paragraph 77 of the draft Guidance cited above the Commission describes the essential exercise as being "to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could (my emphasis) have been prompted to make the investment in question." That, as I see it, is exactly the assessment which the judge conducted, reflected in the manner in which he expressed his conclusion:

> "132. Whilst I accept that the Council were put to some hard decision-making over this commercial enterprise in 2012, in all of the circumstances and given the wide margin properly allowed in such matters, I simply cannot say that the loan extended by the Council to ACL would not have been entered into, on the terms in fact agreed, by any rational private market operator in the circumstances of the case. In my judgment, the transaction fell within the wide ambit extended to public authorities in this area; and clearly so. It was not State aid."

The only question on this appeal is whether that assessment was vitiated by demonstrably wrong findings of primary fact or, if not, whether it in turn fell outside the generous ambit of reasonable decision-making.

24. In that regard I would make three preliminary observations.

25. First, the learning recognises that the analysis of risk involved in the application of the market economy investor principle requires public undertakings, like private undertakings, to exercise entrepreneurial skills which, by the very nature of the problem, implies a wide margin of judgment on the part of the investor – see the EU Commission's Communication on the 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 (OJ C 307/3) at paragraph 27. That paragraph continues:

> "27. Only where there are no objective grounds to reasonably expect that an investment will give an adequate rate of return that would be acceptable to a private investor in a comparable private undertaking operating under normal market conditions, is State aid involved even when this is financed wholly or partially by public funds."

The guidance given by the Commission continues:

> "28. There is no question of the Commission using the benefit of hindsight to state that the provision of public funds constituted State aid on the sole basis that the out-turn rate of return was not adequate. Only projects where the Commission considers that there were no objective or bona fide grounds to reasonably expect an adequate rate of return in a comparable private undertaking at the moment the investment/financing decision is made can be treated as State aid. It is only in such cases that funds are being provided more cheaply than would be available to a private undertaking, i.e. a subsidy is involved. It is obvious that, because of the inherent risks involved in any investment, not all projects will be successful and certain investments may produce a sub-normal rate of return or even be a complete failure. This is also the case for private investors whose investment can result in sub-normal rates of return or failures. Moreover such an approach makes no discrimination between projects which have short or long-term pay-back periods, as long as the risks are adequately and objectively assessed and discounted at the time the decision to invest is made, in the way that a private inventor would.
>
> 29. This communication, by making clearer how the Commission applies the market economy investor principle and the criteria used to determine when aid is involved, will reduce uncertainty in this field. It is not the Commission's intention to apply the principles in this communication (in what is necessarily a complex field) in a dogmatic or doctrinaire fashion. It understands that a wide margin of judgment must come into entrepreneurial investment decisions. <u>The principles have however to be applied when it is beyond reasonable doubt that there is no other plausible explanation for the provision of public funds other than considering them as State aid.</u>" (My emphasis)

26. As the judge noted, [88(x)], the same approach is inherent in the guidance given by the European Court of Justice in Case C-256/97 Proceedings concerning *Déménagements-Manutention Transport SA (DMT)* at paragraph 30 as follows:

> "Consequently, the answer to the first question must be that payment facilities in respect of social security contributions granted in a discretionary manner to an undertaking by the body responsible for collecting such contributions constitute State aid for the purposes of Article 92(1) of the Treaty if, having regard to the size of the economic advantage so conferred, the undertaking would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation vis à vis that undertaking as the collecting body."

27. The language of "manifest" unavailability of the facilities and "no other plausible explanation" makes clear that it is not enough for this purpose to conduct an economic analysis which appears to indicate that the terms of the transaction in question are out of line with what ordinarily would be expected to be available in the market. Many prudent investors are moved to trade risk for reward, and it cannot be the touchstone that a prudent investor would not ordinarily be expected to have entered into the

transaction. The test is rather whether he could have been prompted to do it, because it is only when such conduct can be entirely ruled out as inconceivable that the only remaining plausible explanation for the provision of the [public] funds is that it must be regarded as State aid.

28. Second, in the present case it is of the utmost importance to bear in mind that the notional comparator private investor here is (a) the freeholder of the Arena, (b) has invested admittedly unspecified sums in the development of that Arena and (c) has a 50% shareholding in ACL which, even if without value as at January 2013, was not without reasonable prospect of acquiring value and delivering a return in the future, although I recognise of course that the Appellants say that this last point is not made out on the evidence. For the reasons already given, that prospect is not to be analysed without reference to permissible optimism, nor to the exclusion of calculated risk-taking, unless the risk is one which no prudent investor would conceivably countenance. To this extent the present case is factually very different from that considered by the European Court of Justice in *Neue Maxhütte Stahlwerke GmbH v Commission* [1999] ECR II-17, from the judgment of the court in which case these general considerations emerge. Moreover, leaving aside all impermissible considerations relating to the benefits to be derived from the transaction by the Council in its essentially public capacity, such as regeneration and the preservation of a civic amenity, it might be enough to justify the loan that there was available to the Council no viable alternative strategy which would have both protected its shareholding and safeguarded its future profits from the letting of the Arena. However, it is unnecessary in the present case to go so far, as the Appellants cannot in my judgment satisfy the rigorous criteria implied by the language of "manifest unavailability" and "no other plausible explanation".

29. Thirdly, the judge in my view in one respect imposed upon CCC a burden which it did not in fact bear. The judge concluded that the transaction "fell within the wide ambit extended to public authorities in this area; and clearly so." [132] (my emphasis). In the light of that, the judge's formulation at [88(vi)] concerning the necessity to show that the decision was taken on the basis of economic evaluations comparable with those which a rational market investor would have carried out in the same circumstances is in my view too dogmatically stated. Paragraph 82 of the Commission's draft Notice, to which the judge refers at [88(vi)], refers only to the necessity to provide such evidence where there is doubt whether the transaction is, as argued by the Member State, in line with the MEO test. That reflects the ruling of the European Court of Justice in Case C-124/10P *Commission v EdF and France* [2012] 3 CMLR 17 at paragraph 84 to the effect that "it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have carried out, before making the investment, in order to determine its future profitability." I would also draw attention to footnote 129 to paragraph 82 of the draft Commission Notice which, whilst it emphasises that such "ex-ante" assessments should normally be carried out by experts with appropriate skill and experience, also points out that "the level of sophistication of such ex-ante assessment may vary depending on the complexity of the transaction concerned and the value of the assets, goods or services involved." The footnote goes on to emphasise that "such evaluations should always be based on objective criteria and should not be affected by policy considerations." The footnote concludes:

"Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment." To the extent that it sought to undermine the objective criteria which underlay the evaluations upon which CCC relied the exercise conducted by the Appellants was entirely legitimate, but it is to my mind clear that it is not enough for the Appellants' purposes to show that appropriately qualified and experienced persons could equally have given different advice. At paragraph 27 of the Commission's Communication on the 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 (OJ C 307/3) of 13 November 1993 the Commission emphasises that it is not its aim "to replace the investor's judgment". To admit as relevant mere differences of opinion as between appropriately qualified and experienced persons would amount to just that, since it would involve an examination of the Member State's, or here the Council's, judgment in choosing the source from which it took advice.

30. In this regard I am not sure that sufficient emphasis was placed at the hearing, at any rate by me, on the significance of the Witness Statement prepared for these proceedings on 13 January 2014 by Mr Barry Hastie, to whom I referred at paragraph 10 above. In that statement Mr Hastie sets out in considerable detail the manner in which he evaluated the proposal which he put before and recommended to the Council. In particular he discusses the Business Plan provided to CCC by ACL in December 2012/January 2013. It is said by the Appellants, although I am not sure that the assertion is made good in the evidence, that Mr Hastie was himself involved in the preparation of this plan, under the direction of Mr West, CCC's Director of Finance and Legal Services. The gravamen of the criticism seems to be that Mr Hastie did not mention this point in his witness statement, not that there was anything inappropriate in Mr Hastie being involved in the preparation of the plan, if he was. In his witness statement Mr Hastie explained how he relied upon the cash flow forecast in ACL's Business Plan in order to assess ACL's ability to service the proposed loan from CCC. He also explains that he regarded the revised set of financial assumptions on which ACL's Business Plan was based as prudent. The Business Plan demonstrated that over the ensuing 3 year period ACL could meet the proposed loan repayments irrespective of whether it received any rent either from CCFC or from any other anchor tenant of the stadium.

31. In April 2012 ACL formed a new Joint Venture subsidiary, IECE Limited, with Compass Catering as a minority shareholder. Compass made a £4 million investment to buy its shares in IECE Limited, and those funds were invested in improving and providing additional facilities at the Arena including, for example, more hotel rooms. As Mr Hastie records at paragraph 99 of his witness statement, this arrangement also provided an opportunity to derive significantly increased revenues from the catering and hospitality areas of ACL's business. The Business Plan assumed that ACL's income projections through its Joint Venture arrangement with Compass would be achieved and that one indoor and two outdoor concerts would be held every year. The Business Plan assumed that ACL would make savings to its running costs, including a significant staff saving, prominent in which was a saving of £180,000 per annum through non-replacement of the Chief Executive Officer. The Business Plan also assumed the maintenance of naming rights and sponsorship revenues at current levels and that office rental streams were maintained.

32. In extremely detailed submissions Mr Thompson has submitted that no MEO would have accepted these "very optimistic and unwarranted assumptions" as "providing assurance adequate to support making a £14.4 million loan in January 2013." I cannot believe that the European learning to which I have referred above justifies the minute analysis to which this Business Plan was subjected at the hearing before us. Of course it is legitimate to attempt to show that the Plan is demonstrably flawed, and I shall attempt to deal with Mr Thompson's main points. It is however important not to lose sight of a point stressed by the judge, that whether the loan amounts to State aid is a question which must be considered in the round. If the assumptions underlying an evaluation such as the Business Plan are demonstrably flawed, that may well assist in showing that there is no other plausible explanation for the provision of public funds other than considering them as State aid. But if the reasonableness of the assumptions is a matter on which views may legitimately differ, or which is dependent on the degree of optimism which it is considered appropriate to attribute to the hypothetical market economic operator, it is plain that it does not advance the Appellants' case to demonstrate that a different view could have been taken. Mr Hastie's evidence is that in considering whether the proposed arrangement was one that a private investor would have entered into he considered ACL's ability to service a loan, the value of ACL and the Council's potential security for the loan, the interest rate which could be applied and the likely return on the Council's investment. Mr Hastie is not accused of bad faith, nor is there attributed to him the "subjective animosity" towards SISU of which the Appellants accuse his political masters. In all these circumstances the advice of Mr Hastie is plainly something to which the Council was entitled, if not bound, to pay careful regard.

33. I am prepared to accept that the assumptions in the Business Plan which I have summarised above are optimistic, although I do not accept that optimism has no place in the assessment of risk by prudent businessmen. Nor do I accept that any one of the assumptions should be looked at in isolation. The assumption that CCFC would be lost as an anchor tenant and not replaced over the life of the loan was an extremely pessimistic assumption which the judge regarded as unrealistic. The assumption concerning the extension of naming rights was obviously in part dependent upon the attraction of the Arena as a venue for a relatively high profile team in a popular sport. However I cannot conclude, on the strength of mere assertion, that no MEO could have considered it reasonable to assess the future profitability of ACL on the basis set out in the Business Plan and adopted by Mr Hastie. That basis was to assume a complete absence of the core revenue stream, rent, but not to carry through that unrealistic assumption to its logical conclusion, a complete absence of use of the sports stadium and therefore a complete absence of revenue streams associated therewith. I cannot conclude without more that this method of giving effect to the obvious uncertainties is simply one that could not have been countenanced by a MEO having the necessary hypothetical attributes. Similar considerations apply to revenues dependent upon the sale of food and beverages. As to the assumptions concerning reductions in overheads, including employment costs, I have no doubt that the targets set, implicit in the assumptions made, which are openly itemised in the Business Plan, were challenging. As a 50% shareholder the Council was of course well placed to see that they were implemented, and they could expect support from the other 50% shareholder, the Trustees of the Higgs Charity, who were critical of the conduct of the business in 2012. In recent times of austerity many companies faced with new and more challenging trading conditions have adopted rigorous and

extensive measures to reduce overheads which, on their announcement, have been condemned by one or other interest groups as unrealistic or unachievable. Successful management often confounds expectations, albeit often at the expense of cuts to the workforce.

34. Mr Thompson helpfully summarised his main criticisms of the Council's loan to ACL in a document handed in at the hearing which I reproduce below:

> "**MISAPPLICATION OF THE MARKET ECONOMIC OPERATOR ("MEO") PRINCIPLE**
>
> 1. No MEO would have made a new loan to a company on the brink of insolvency where that new loan was significantly greater than the total value of that company.
>
> 2. Given that an event of default for want of security had just been declared in respect of an existing commercial loan, no MEO would have made a new loan to such a company, in order to enable the company to discharge that existing loan, without obtaining additional security for the loan.
>
> 3. No MEO considering such a new loan would have relied on the terms that had been offered by an existing commercial creditor to restructure the existing loan to address the company's inability to service, or to provide adequate security for, that existing loan.
>
> 4. No MEO would have made such a new loan to the operating company of a sports arena when:
>
>   a. the company was in dispute with its anchor sub-tenant and had issued a statutory demand for non-payment of rent; and
>
>   b. that sub-tenant was unable to pay the existing rent and had publicly declared that it was prepared to relocate to another venue if the dispute was not resolved.
>
> 5. No MEO that was a freeholder of the sports arena would have made such a new loan to an insolvent tenant company that was paying no ongoing rent for occupation of the property (the effect of the new loan being to discharge a commercial debt incurred to fund the up-front rental premium paid by the tenant company to the MEO) rather than acquiring or foreclosing on the head lease and re-letting the property at a profit.
>
> 6. No MEO that was a 50% shareholder in the tenant company would have made such a new loan where:
>
>   a. there was no realistic prospect of positive equity value or other shareholder benefits resulting from the loan;

and (even if there had been any realistic prospect of any such benefits resulting from the loan)

b. 50% of any such shareholder benefits would accrue equally to the MEO's fellow 50% shareholder without that fellow shareholder making any material contribution to the transaction or compensating payment to the MEO.

7. In determining whether or not to make the new loan and, if so, on what terms, no MEO, considering the matter objectively and by reference to its own commercial interests, would have made such a new loan:

a. without independent advice; and

b. on the basis of a business plan significantly amended by the company (i) under the direction of the MEO (ii) after the offer to make the loan had already been made and (iii) with obvious and fundamental defects and uncertainties in the cash forecasts within the plan; and

c. on the basis of issues of public policy and subjective animosity of its political masters.

8. If, contrary to 1-7 above, it is nonetheless considered that an MEO ***might*** have made such a new loan, no MEO making such a loan would have:

a. extended the outstanding term of the loan from 15 to 42 years, the full term of the only significant and depreciating asset owned by the company, the lease of the sports arena; or

b. accepted a lower interest rate than that paid under the existing commercial loan that had been made to the company at a time when:

i. the company was solvent;

ii. the original loan was secured by guaranteed independent valuations of the sports arena at values substantially in excess of the existing loan;

iii. the term of the original loan was 20 years, less than ½ of the outstanding term of the lease of the sports arena."

35. These submissions are essentially the same as those addressed and rejected by the judge at [90] to [132] of his judgment. In my judgment both the judge and Mr James Goudie QC for the Council gave convincing rebuttals of these points, the latter in a

responsive document dated 4 February 2016 which was handed in on the second day of the hearing.

36. A first and central point relates to the value of the company. Mr Thompson is critical of the judge's finding that it was not less than £10.8 million but less than £14.4 million, the amount of the loan – [105] to [106]. The valuation was derived from a CBRE valuation and sensitivity analysis carried out in 2011 in which the variable was the assumed annual rent from the anchor tenant, then CCFC. A value of £10.8 million presupposes an annual rental of £400,000. As the judge records, SISU had on 11 December 2012 on behalf of CCFC offered to pay a rent of £400,000 per annum for the rest of the lease period, a level which the Council plainly thought was achievable since in formulating its own proposal to the Bank three days later it relied upon this offer, in part, as justifying its proposal to buy out ACL's indebtedness to the Bank for £12 million. The judge found that the Council reasonably considered that, by solving the problem of loan repayments to the Bank, that would remove the impasse in the rent negotiations between ACL and SISU/CCFC. I am not sure that Mr Thompson has challenged that finding. Even if the finding is wrong, or if it simply turned out not to be the case, the Council was plainly entitled to take the view that, even if a deal was not ultimately struck with SISU/CCFC, it was reasonable to believe that, over the balance of the lease, another anchor tenant could be found who would be willing to pay a rental of that order.

37. The judge also noted that the CBRE valuation of March 2011, the foundation for the £10.8 million figure, did not take into account, unsurprisingly, the ability of ACL both to increase revenue and to decrease expenditure in the manner contemplated by ACL's Business Plan. Since 2011 revenue from non-football related activities had increased, largely as a result of the Joint Venture with Compass to which I have referred above. These revenues are reflected in a comparison of the cash available to the ACL Group as a whole and that available to ACL alone. As at 31 December 2012 cash available to ACL was £1.0 million but that available to the Group £2.1 million.

38. The judge sounded a note of caution that creditors other than the Bank were shown as nearly £1.7 million whilst debtors at £1.25 million must have included the CCFC arrears of rent, not all of which might be recovered. Nonetheless, there was here significant value.

39. Furthermore the judge was in my view right, and certainly not obviously wrong, to observe that a private investor in the position of the Council would not focus exclusively on the loan to value ratio. The judge accepted that a new investor would not have made a £14.4 million loan to ACL on the terms that the Council did, but that is not the enquiry. As stated by the European Court of Justice in *Neue Maxhütte*, above, at paragraph 133:

> "A private shareholder may reasonably subscribe the funds necessary to secure the survival of an undertaking which is experiencing temporary difficulties but would be capable of becoming profitable again, possibly after a reorganisation."

40. A MEO would also have regard to the rate of return on the proposed loan. It is accepted by the Appellants that the interest rate charged by the Council was both commercial in nature and that it satisfied the relevant Commission guidelines.

41. It is convenient at this stage to deal with Mr Thompson's other principal criticisms of the assumptions underlying the ACL Business Plan. As the judge pointed out at [109] the significance of the ACL Business Plan is that it indicated that, on the basis of the adopted assumptions, which included the extremely pessimistic assumption that ACL received no rent from the Arena over the term of the loan, ACL could service the loan interest and repayments.

42. The Appellants are obviously correct to say that the forecast of available funds in the later months of the cash flow is dependent upon a positive starting position in January 2013. It is also true that (a) the starting figure includes the cash injection of £400,000 which is itself part of the impugned loan and that (b) without that proposed injection of working capital, the anticipated available funds would become negative from the start of FY13. However I do not understand on what basis it is asserted that "a MEO considering whether to make such a loan would be concerned to ensure that the business could generate sufficient cash *by itself* to service its debts, so would clearly have considered the position *absent* this cash injection." The cash injection is, in the overall scheme of things, a relatively modest sum, however it prevented the forecast available funds from becoming negative and produced a situation in which, after losing money in financial years 13, 14 and 15, but remaining cash positive, ACL would return to profitability in FY16. With the funds available forecast to be only £28,000 at the end of FY15, the injection of working capital was plainly carefully judged. Since it was an integral part of the proposed overall loan, it seems to me entirely in accordance with prudent business practice for the putative 50% shareholder MEO to assess the revenue generating potential of the business with the benefit of the whole of the proposed facility. Indeed, since the necessity for the exercise had been brought about by the inability of ACL *by itself* to generate sufficient cash to service its existing debts, the approach advocated by the Appellants makes little sense.

43. The judge was alive to the circumstance that the £3.4m debtors and cash shown in the ACL balance sheet as at 31 December 2012 included CCFC arrears of rent, not all of which might be recovered, although I would note in this regard that I do not think that the Appellants are assisted by referring to the circumstance that ACL had already received £780,000 from the escrow account and from matchday payments. As the judge noted at paragraphs [24(ii)] and [33], these payments were not payments of rent and neither eliminated nor diminished CCFC's liability to pay the amount outstanding. As I have noted above, the cash available to the ACL Group was of the order of £2.1 million, and the fortunes of ACL were tied to achieving its income projections through the Joint Venture arrangement with Compass.

44. For all these reasons therefore Mr Thompson's first proposition above is thus too broadly stated and not here made out on the facts.

45. The security for the lease is as the judge observed closely linked to the value of ACL, albeit the Council acquired the benefit of two personal guarantees worth in aggregate £0.5 million. I see little significance in the circumstance that the Bank had declared an event of default in the light of a perceived shortfall in security. The Bank was bound to protect its own position, but it was also prepared to restructure the loan without requiring additional security, as recorded by the judge at [110]. I agree with the judge that the Council's status as a freeholder did not of itself enhance its security for the loan to ACL. But it was surely highly relevant to the decision to make the loan that in the event that ACL failed, the lease would revert to the Council, rather

than to a third party, and that the Council would with the benefit of its freehold be able simply to re-let the Arena. I therefore reject Mr Thompson's second submission.

46. Mr Thompson's third proposition is not a fair characterisation. The Council did not rely upon the restructuring terms offered by the Bank. The judge, rightly in my view, considered that in assessing whether the Council had acted in accordance with the MEO principle, it was at least relevant to note that the Bank's contemporary assessment appeared to be that ACL was capable of servicing a larger loan over a shorter period with an annual repayment of £1.3 million, rather than the £0.8 million payable to the Council under the proposed facility, amortising £8 million over 20 years whilst leaving £7.5 million to be serviced on an interest only basis as at 20 years. The judge regarded this as "noteworthy" at [110] whilst at [128] he noted that both Deloitte and the Bank were confident that, with restructuring steps, ACL would be able to service a loan at £1.3 million repayments per year for at least 20 years. It is true and indeed obvious that the Bank's proposal was made in a situation in which it was itself exposed. I do not understand however why that should be thought to deprive it of all relevance, particularly when its assessment was shared with Deloitte. I think it unlikely that even an exposed bank routinely puts forward loan restructuring terms with which it believes its customer will be unable to comply. It would make no business sense so to do. In my judgment the judge gave this factor appropriate weight.

47. I have already dealt with Mr Thompson's fourth proposition. The Council's assessment was that ACL could pay a commercial rate of interest on the proposed loan even if it received no income from letting the Arena. The judge regarded that latter hypothesis as an unrealistic basis upon which to proceed – [106] – and I am not sure that Mr Thompson expressly challenged that assessment. The Council was entitled to take the view that it was likely that CCFC would agree to a reduced rent of £400,000 or, that if it did not, another anchor tenant would in due course be found.

48. Mr Thompson made little or nothing in oral argument of his fifth proposition, which I do not entirely understand. It was not in the Council's power unilaterally to acquire, or to foreclose on, ACL's lease.

49. As to proposition 6(a), if it was reasonable to believe that ACL could both increase revenue, particularly from its non-football related sources, and decrease costs, then there was obviously a realistic prospect of the shareholding in ACL acquiring value. I have already dealt with those points.

50. Paragraph 6(b) of Mr Thompson's propositions is literally true but it overlooks that CCC acquired benefits other than as shareholder. First it received the interest payments, expected to be worth about £500,000 per annum for the first 3-5 years of the life of the loan – see Mr Hastie's witness statement at paragraphs 110-112. Secondly, the Council was to receive a very significant benefit in the shape of the transfer to it by ACL of ACL's leasehold interest in Car Park C. Mr Hastie's report to the Council set out his recommendation in relation to Car Park C as follows:

> "3.5.1 The Plan at Appendix 1 shows the entirety of the Car Park marked as plots A, B and C. Two plots (A and B) are already within the Council's ownership and the remaining element (marked C) is leased to ACL 2006 under the same lease as the stadium . . . It is

intended . . . to accept a transfer back at nil consideration to the Council of area C which will complete land owned by the Council outside of the main Arena facility.

3.5.1.1 It has always been the aspiration of the Council and ACL to facilitate hotel and other complimentary (sic) development on the car park site, which would require the assembly of the entire site and may have required the Council to pay ACL to relinquish the lease or to share in premiums achieved from a hotel development. Acquisition of the remaining part of the car park means the Council will then be in a position to market and develop required elements of the entire site as financing/the market allows with resultant business rate growth, having not paid any cash consideration to ACL. The value of the site is estimated at £1.5 million. Any direct benefits arising from the site will accrue to the Council solely, rather than to ACL in which AEHC have an interest . . ."

It was I thought a surprising feature of Mr Thompson's submissions that he consistently failed to recognise the obvious strategic importance of this aspect of the transaction. As Mr Hastie also observed at paragraph 117 of his witness statement:

> "Any hotel development from the car park site would also have other financial benefits for ACL, for example it would "support growth in the currently under utilised ACL conference business" (Hastie report paragraph 5.1.6.3)."

51. Furthermore I do not accept the relevance of the observation that 50% of any shareholder benefits would accrue equally to the Higgs Charity, without contribution from that shareholder over and above its agreement to relinquish its interest in Car Park C at nil consideration. Before the judge, although not before us, the Appellants conceded that:

> "These concerns only arise where a shareholder loan is being made otherwise than on commercial terms. If one shareholder is offering the loan on commercial terms, the other shareholder is no more advantaged than if the company took a loan from an arm's length commercial lender, and the shareholder making the loan should be compensated by the commercial terms of any such loan . . ."

52. Thus if the loan was on commercial terms it is nothing to the point that the Higgs Charity made no, or no greater, contribution.

53. Proposition 7 is highly tendentious. I have already pointed out at paragraph 29 above that the European learning does not support the notion that independent advice must be sought in order to satisfy the MEO principle, although it may provide corroboration of the credibility of the assessment. In any event, as pointed out by Mr Goudie, it is the function of the Council's professional officers such as the Director and Assistant Director of Finance to provide independent advice to the elected members of the Council, as they did. Furthermore, as noted by the judge, PWC were jointly instructed by the Council, the Trustees of the Higgs Charity and ACL to

provide an analysis of ACL's financial position and the options available to the Bank. As noted by Mr Hastie at paragraph 3.4.5.1 of his report, the PWC report provided the Council with an independent view on the sensitivity of ACL's business to risks post refinancing. It also appears from paragraph 5.1.4 of the Hastie report that the Council discussed with Grant Thornton the details of the proposed transaction, the financial implications for the Council and the accounting treatment, although I do not believe that any report from Grant Thornton was deployed in evidence. I shall revert briefly to the assumptions in the Business Plan, but the suggestion that the Council proceeded without taking appropriate advice is unsustainable. It does not advance the Appellants' case simply to demonstrate that other advisers might have given different advice.

54. The Business Plan was considered by the Council when it made its decision to make the loan on 15 January 2013. I am not sure that the evidence makes good the assertion that the Business Plan was amended at the direction of the Council, but even if it was the question is simply whether the plan considered by the Council was demonstrably flawed.

55. Proposition 8 is an optimistic assertion, given that the premise is that an MEO might have made a loan, presumably in the amount of £14.4 million, to ACL. The extension of the term of the loan to the full term of the borrower's sub-lease of the Arena might be thought to be a logical step to be taken by a 50% shareholder looking to a longer-term view of profitability. Extending the term of the loan increased the revenue to the Council in the shape of interest payments. As to the interest rate, the only question is whether it was a commercial rate, which it is conceded it was. The comparison with the terms upon which the loan was originally made seems to me meaningless bearing in mind that it was the substantial change of circumstances including the inability to service that loan which had brought about the need for refinancing.

56. Before the judge Mr Thompson's submission was that the Council's decision to make the loan was to a substantial extent based on policy objectives. Indeed at paragraph [122] the judge records a submission that the documents showed that the only reasons motivating the Council to make an offer to the Bank to purchase the loan for the amount that it did were political in nature. Before us the submission was that CCC's approach to the purchase of the bank debt was driven "primarily" by policy rather than commercial considerations. Furthermore, it was submitted that the willingness of CCC to bid a sum to acquire the bank debt "that was out of all proportion to the value of ACL" was clearly motivated not only by issues of policy, as CCC repeatedly stated, but also by subjective hostility to SISU as owner of CCFC on the part of CCC's representatives, and in particular of its leader and the ruling Labour Group.

57. Mr Thompson also submitted that, contrary to the understanding of the judge, SISU pursued a consistent and rational strategy intended to lead to the purchase of the bank debt at a substantial discount (to be written off, leaving ACL debt-free and thus able to agree a normal market rent for CCFC). Mr Thompson submitted that SISU's strategy sought to resolve the underlying commercial weakness of both ACL and CCFC, and in particular the inability of CCFC to continue to pay a rent of almost £1.3 million per year without access to any of the matchday revenues associated with its occupation of the Arena (and in the light of its relegation to League 1 and the introduction of "Financial Fair Play" regulation of professional football).

58. However that may be, the judge found that by September 2012 SISU's plan to buy the Higgs Charity share in ACL and its plan to buy out the bank debt at a substantial discount had irretrievably run aground. I did not understand Mr Thompson to challenge this conclusion. In those circumstances the fact that some councillors may have been delighted that the plan adopted in January 2013 excluded SISU from the possibility of sharing in the ownership of ACL or its assets is really nothing to the point. It was for this reason that I found merely distracting the Appellants' emphasis upon the apparent animosity towards SISU manifested by some in the controlling group on the Council. I found equally irrelevant the Council's apparent belief, or at any rate the belief of some of the Council, that SISU had behaved in an unacceptable or predatory manner. It is hardly surprising that SISU acted in what it perceived to be the best interests of its investors. The judge found that some of the Council's concerns about SISU's aims and motives were reasonably held at the time although with the benefit of hindsight they could be seen to have been unwarranted – [78(vii) – (ix)].

59. The circumstance that by September 2012 SISU's plan to buy out the bank debt had irretrievably run aground perhaps demonstrates that there was no viable alternative to the CCC plan, other than perhaps allowing ACL to go into insolvent liquidation, an alternative which the judge convincingly found the Council was entitled to reject - [128] and [129].

60. However even if one accepts that some councillors wanted nothing to do with SISU, and puts on one side the fact that the decision of the Council was in fact unanimous, still the focus of the enquiry is whether the transaction was one that could have been entered into by a MEO. It would only be if the Appellants could show that the transaction is simply inexplicable unless solely motivated by subjective animosity for SISU that this line of argument could advance the Appellants' case.

61. The judge regarded as misconceived the Appellants' criticism of the Council for being influenced by policy considerations. At paragraphs [120] – [123] he said:

> "120. This criticism is, at root, misconceived. The Council is responsible for the local government of its area and those who live in it, to which it owes substantial duties. For any decision it makes, it is likely to begin with its political objectives and aspirations. The Council adopted the Arena as part of its policy for the regeneration of North-East Coventry. It is entitled – if not bound – to have continuing regard to its policies in that regard. Even when, in pursuing its objectives, it considers entering the commercial arena, it is fully entitled to take into account its political agenda.
>
> 121. Of course, in determining a course of action, it is subject to the constraints of both EU law and domestic law – it cannot, for example, grant State aid. However, the Council is perfectly entitled to consider what transaction it wishes to enter into as a political matter, and then consider whether it would be constrained by EU law on State aid not to proceed with the course it wishes to follow. Only in considering whether a transaction is State aid, must the Council leave out of account matters of policy.

122. Mr Thompson submitted that the documents showed that the only reasons that the Council made an offer to the Bank to purchase the loan for the amount that it did were political in nature. For example, he referred to Mr West's note of the 6 November 2012 meeting with the Bank, which was in these terms:

> "I stressed that we were in no way considering increasing our offer [of £6m] on the basis of the numbers available, and that the offer was at this size not on the basis of pure commercials, but because of the Council's policy desire to protect the jobs and business base of the Arena, and to use its continued survival as a stimulus for further regeneration in the North East of the City…".

123. However, this note was of a discussion with the Bank in which the Council was trying to persuade the Bank to sell the ACL loan cheaply: it is not an admission by the Council that the only reason it purchased the loan at over £6m was because of political considerations. The other documents – including the commercial justification of the loan in, e.g. the Hastie Report – belie that. These make clear that, from April 2012, the major driver for the Council was the protection of its commercial interest in ACL."

62. I agree with the judge. In my view there was ample material upon the basis of which he could properly conclude:

> "131. . . .
>
> ii) In fact, as we now know, restructuring the Bank loan and the SISU plan were not viable options. Undoubtedly, even if the Council pursued them more than they did (as Mr Thompson suggested they ought to have done), they would have not borne fruit. The Council's options were to buy out the loan on the terms that they did – because there is no evidence that the Bank would have accepted any lesser terms, and plenty of evidence that they would not – or to wind up ACL.
>
> iii) Winding up ACL would have meant that, although the lease may have ultimately reverted to the Council as freeholder, the Council's investment in ACL would have failed. Although the worth of ACL on paper was, as at January 2013, nil, I consider a rational private market economic operator, with a view to longer-term returns, may have considered (as the Council in fact considered) that the failure of the company was temporary, brought on by the refusal of CCFC to pay any rent; and restructuring involving both the refinancing of the ACL debt by the investor himself and steps to improve ACL's cashflow – in terms of cutting costs and increasing revenue – would result in a realistic prospect and reasonable likelihood of future profits."

63. The Appellants have not in my view come close to demonstrating that the judge reached an impermissible conclusion. I would dismiss the appeal. In doing so I would pay tribute to the judge's impressive judgment. My reasons are simply those which the judge developed in much greater detail with a sure eye to the principles by which his decision-making should be informed.

Lord Justice Treacy :

64. I agree.

Lord Justice Floyd :

65. I also agree.