Neutral Citation Number: [2014] EWHC 2089 (Admin)

Case No: CO/4432/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham

Date: 30/06/14

Before :

MR JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN on the application of
(1) SKY BLUE SPORTS & LEISURE LIMITED
(2) ARVO MASTER FUND LIMITED
(3) COVENTRY CITY FOOTBALL CLUB (HOLDINGS) LIMITED

Claimants

- and -

COVENTRY CITY COUNCIL

Defendant

- and -

(1) ARENA COVENTRY LIMITED
(2) THE ALAN EDWARD HIGGS CHARITY

Interested Parties

- -

Rhodri Thompson QC, Christopher Brown and Nicholas Gibson (instructed by **Speechly Bircham LLP**) for the **Claimants**
James Goudie QC, Fenella Morris QC and Ronnie Dennis (instructed by **the Solicitor, Coventry City Council**) for the **Defendant**
Conor Quigley QC (instructed by **Wragge Lawrence Graham & Co LLP**) for the **First Interested Party**
The Second Interested Party not being represented or appearing

Hearing dates: 10-12 June 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HICKINBOTTOM

Mr Justice Hickinbottom :

Introduction

1. The Claimants are all members of the SISU group of companies. Between them, they own Coventry City Football Club, which, from 2005 to 2013, played its home games at the Ricoh Arena in Coventry ("the Arena") under a sublease and licence from the First Interested Party ("ACL"), the leaseholder of the ground. The Defendant ("the Council") owns the freehold of the Arena, and is the ultimate owner of 50% of ACL.

2. On 15 January 2013, the Council resolved to lend £14.4m to ACL. In this claim, the Claimants seek to challenge the legality of that decision, on the grounds that (i) contrary to European Union ("EU") law, the loan amounted to State aid which was not notified to the European Commission, and (ii) contrary to domestic law, the Council failed to take into account several material considerations and, in any event, the decision was irrational in the sense that no authority could reasonably have come to it.

3. The Claimants seek an order quashing the decision, and that the Council recovers the loan and commercial interest from ACL. The Claimants also claim damages.

4. Before me, Rhodri Thompson QC with Christopher Brown and Nicholas Gibson appeared for the Claimants; James Goudie QC with Fenella Morris QC and Ronnie Dennis for the Council; and Conor Quigley QC for ACL. At the outset, I thank them for their full and helpful submissions.

The Factual Background

5. Coventry City Football Club ("the Football Club") was founded in 1883. From 1899, its home ground was at Highfield Road, Coventry. In 1917, it became incorporated; and, two years later, it was elected to the Football League. Its most successful period on the pitch was from 1967, when it was in the top flight of English football, being a founder member of the Premiership in 1992. The Club won the FA Cup in 1987.

6. No doubt buoyed by this lengthy period of success, in the late 1990s the Football Club looked to move from Highfield Road to a new stadium. In 1999, it obtained planning permission to develop a brownfield site – a former gas works – in Foleshill, North East Coventry. In 2002, the Council decided to adopt the development as part of its regeneration plans for that area, and it purchased the freehold of the site. It was intended that there would be a joint venture between the Council and the Football Club, owned 50%/50%; and the Council would lease the ground to the joint venture which would then grant a licence to the Football Club to occupy it as its home ground. ACL was to be the corporate vehicle for the joint venture. It was proposed that the new stadium would be a multi-purpose arena that, in addition to being the home of the Football Club, would stage a range of sporting and other events including concerts, with facilities including an exhibition hall and conference suites, hotel, casino and health club. As owners of half of ACL, the Football Club would have the benefit of 50% of the revenues derived from the project, including its own licence fee.

7. The Football Club was owned by Coventry City Football Club Limited ("CCFC"), a wholly-owned subsidiary of the Third Defendant ("CCFCH"), which invested in ACL through its own wholly-owned subsidiary, Football Investors Limited ("FIL").

8. In 2001, the Club was relegated to the second flight of English football (the Championship) for the first time in 34 years. On 19 December 2003, following the resultant loss of football revenue coupled with the increasing development costs of the new stadium, CCFC sold its interest in FIL to a local charitable trust, the Second Interested Party ("the Higgs Charity"). The sale agreement had an option, under which CCFC could buy back the shares for an amount to be calculated under a formula based on the sale price and notional interest but with a minimum price of £6.5m. Any sale by the Higgs Charity of its shares in FIL (and, hence, its share in ACL) under the option agreement – or, indeed, otherwise – required the consent of the Council. The result of that sale to the Higgs Charity was that the Football Club had no direct interest in the new ground, because, with the sale of its shareholding, CCFC of course sold its right to Arena revenues; but there was the hope and expectation that the Football Club would repurchase the 50% share of ACL from the Charity when it was able to do so.

9. Nevertheless, despite the decline in fortunes on the pitch and the consequent adverse impact on the Football Club's financial position, the stadium development went ahead. It did so on the following basis:

   i) The Council invested in ACL through a wholly-owned company, North Coventry Holdings Limited.

   ii) On 19 December 2003 (the same day as it sold its interest in FIL to the Higgs Charity), CCFC entered into a development agreement which effectively committed it to enter into a lease, licence and rent deposit deed in respect of the new ground; and the Council leased the site to Coventry North Regeneration Limited ("CNR") (which was wholly owned by North Coventry Holdings Limited and thus ultimately owned by the Council) to enable that company to build the Arena. The Council provided a £21m short-term loan to CNR for this purpose, on commercial terms. In the lease, the Council had extensive protection in the event that a subsequent tenant failed, e.g. the right of re-entry if the tenant was put into administration or appeared unable to pay its debts (clause 4.1.4).

   iii) ACL took a 50 year sublease of the Arena from CNR, with the option of paying a £1.9m per annum rent or a premium of £21m. In addition, "super rent" was payable, based on ACL's net profit before tax, of 10% on profits over £3.75m rising to 50% of profits over £7.75m. In clause 3.18, CNR was essentially given a wide right of veto over assignments of the lease.

   iv) On 13 February 2004, CCFC and ACL entered into a rent deposit deed, requiring CCFC (upon completion of the licence to use the ground and the sublease to it of the offices etc at the stadium) to pay and keep £500,000 in an escrow account in ACL's name as security for both rent and licence fees (which, in this judgment, I will refer to together simply as "rent").

v) The Arena was practically completed on 19 August 2005, and the Football Club played its home games at the new ground from the start of the 2005-6 season.

vi) On 2 February 2006, ACL secured finance from Clydesdale Bank plc trading as Yorkshire Bank ("the Bank"), in fact drawn down in June 2006. The loan was of £22m, repayable over 20 years; and was secured by fixed and floating charges over all of the assets of ACL, the main asset being the leasehold interest in the Arena. As a condition of drawdown, clause 5.2 of the facility letter required a valuation report from C B Richard Ellis ("Richard Ellis") of current market value of £37m; and thereafter valuations at regular intervals on various bases, e.g. a valuation of £31m after 20 years, and of £26.9m after 5 years on the basis that the Football Club had ceased to trade. Clause 10 of the loan agreement gave the Bank power to demand repayment of all sums due on any defaulting event. Clause 12.3 allowed the Bank to revalue the security property every three years; and clause 12.5 provided:

> "If we [i.e. the Bank] reasonably conclude that the security which we hold for the Facility is no longer sufficient to cover our exposure in respect of the Facility we reserve the right on reasonable notice to require security and/or a reduction in the balance outstanding under the Facility."

The Bank also (a) had the right to transfer the debt, and to approve any arrangements under the sublease and licence with regard to (e.g.) rent and licence fee; and (b) obtained £250,000 guarantees from each of two directors of CCFC.

vii) The loan was used to pay a £21m premium to CNR in respect of the lease. CNR used that money to repay its loan from the Council. CNR assigned its leasehold interests to a new company, Arena Coventry (2006) Limited ("ACL 2006"), a wholly-owned subsidiary of ACL. (In this judgment, I shall use the term "ACL" to refer to ACL and ACL 2006, unless the distinction between the two companies is material.)

viii) The licence and sublease between ACL and CCFC were formally completed on 29 March 2006, and the payment into the escrow account was made.

ix) ACL's loan from the Bank of course had to be serviced. The rate was variable, namely the Bank's base rate plus 1.25%. In addition, in a separate agreement, ACL had hedged changes in interest rates. Initially, the repayments to the Bank were approximately £450,000 per quarter, or £1.8m per year. By 2012, they had dropped to about £1.6m per year. One of ACL's main sources of revenue was its rent from the Football Club, about £1.3m per year. That rent was fixed, and was not (for example) dependent upon the Club playing its football at any particular level.

x) ACL had five directors; two nominated by the Council (eventually, Mr Martin Reeves (the Council's Chief Executive) and Mr Chris West (its Director of Finance and Legal Services)), two nominated by the Higgs Charity (Mr Paul

Harris (a Trustee of the Higgs Charity) and Mr Peter Knatchbull-Hugessen (the Clerk to the Trustees)), and an independent Chairman.

10. The legal mortgage between ACL and the Bank included the following terms:

i) The Bank was entitled to transfer the benefit of the mortgage to any person at any time (clause 12).

ii) In the event of "Customer Obligations" (which included any sum of money: clause 1.1) becoming due and payable, then the Bank had step-in rights. It was entitled to appoint a receiver (clause 7.3.1) or exercise any of specified powers (clause 7.3.2), including assuming control of ACL's business and property (i.e. ACL's interest in the Arena), and taking possession of and even selling that property (clause 8.2).

Materially similar clauses appeared in the respective debentures with the Bank.

SISU's Involvement with the Football Club

11. By early 2007, the Football Club was in a poor and worsening financial state, and faced possible administration. It entered into negotiations with a number of potential investors including the SISU group of companies ("SISU"), which manages hedge and private equity funds. On 14 December 2007, the First Claimant, a SISU company, reached an agreement to purchase the entire share capital of CCFCH, which was completed in 2008. In 2011, the Second Claimant ("ARVO"), another SISU company, lent funds to the Football Club in return for security over the Club's assets and a minority shareholding. SISU, of course, bought the Football Club as a commercial investment.

12. At the time of the acquisition:

i) SISU were looking to obtain an interest in the Arena. Indeed, an early approach appears to have been to purchase a majority shareholding in ACL. Their primary plan to obtain an interest in the Arena was to acquire the Higgs Charity interest in ACL, but they were unable to do so that stage.

ii) As Mr Goudie put it, SISU bought into the Football Club with their eyes wide open: they were well aware of that company's legal obligations to ACL, notably in relation to rent, which were no doubt reflected in the purchase terms including price. SISU and ACL signed Cooperation Agreement Heads of Terms on 26 November 2007, which emphasised that, although, following the acquisition of the Football Club by SISU all agreements between the Football Club and ACL (except the Licence Agreement) would be reviewed, absent agreed changes, "the primacy of the existing agreements will remain".

13. I have indicated that, in 2006, Richard Ellis had valued the Arena at £37m. On 18 August 2011, it valued the Arena again, as at 31 March 2011, at £19.6m. At that time, in addition to the £1.3m rent from CCFC, the Arena generated the following annual revenues: £1.425m plus profit share from the catering and management services contractor, Compass Contract Service (UK) Limited ("Compass"), and £880,000 from naming rights. The casino was also due to bring in an income, rising

from nil in year 5 to £200,000 in year 10. ACL had made a profit in every financial year since the opening of the Arena: 2006-7, £0.87m, 2007-8 £0.1m, 2008-9 £3.22m, 2009-10 £0.55m, 2010-11 £0.47m and 2011-12 £1.09m. However, that valuation noted, under the heading "Threats":

> "…
>
> • A significant amount of the revenue is secured against [CCFC], a weak covenant with a history of financial difficulties;
>
> • The income from the Compass Agreement (particularly the profit share) is partly reliant on the performance of CCFC. A demotion to a lower league might reduce visitor numbers to the Arena, threatening revenues from catering and event management activities;
>
> …".

This report therefore noted the financial dependence of ACL on the performance of CCFC, including its continued willingness and ability to pay the contractual rent. On the basis of that valuation, Richard Ellis later performed a sensitivity analysis, which indicated that, if the anchor tenant rent was nil, the value of the lease would be only £6.4m; at £200,000 rent, £8.6m; and, at £400,000 rent, £10.8m.

14. For the Football Club, things continued to deteriorate. In the Championship, they made losses of £4m-6m per year. In the season 2011-12, the club incurred losses of £5m, expenditure being £15.4m (including £6.1m on players' wages) compared with revenue of only £10.4m. Furthermore, by the spring of 2012, relegation to the third flight (Football League Division One) with effect from the start of the 2012-13 season loomed, and was confirmed in April 2012. Relegation meant significantly reduced television revenue, with total income reducing to about £5m.

15. The Club's position was further worsened by the Football League's introduction of Financial Fair Play rules, in the form of a spending constraint framework known as the Salary Cost Management Protocol, which restricted wages to a percentage of turnover, for Division One 65% later reducing to 60%. "Turnover" is defined by the Football League as including match-day income, commercial income (such as sponsorship) and television revenue, and donations/equity injections by owners, but not loans to the club. The reduction in income as a result of relegation, coupled with the absence of any match-day revenues (because those had effectively been sold to the Higgs Charity in 2003) and the effect of the Financial Fair Play rules, meant that money available for paying players etc would, in any event, be very restricted.

16. The worsening performance of the Football Club – both on the pitch and financially – caused its owners to begin discussions for a fundamental restructure of the business of both the club and ACL from about October 2011. SISU were commercial investors, and were not prepared to put funds into the Football Club without a plan for a return on the substantial investment they had made, which they estimated to have been about £40m. There were a number of strands to their approach, as follows:

i) In pursuit of their wish to have some ownership of the Arena, SISU would purchase back the 50% share of ACL held by the Higgs Charity. SISU regarded obtaining an interest in the Arena, and hence the revenues from the Arena, as crucial.

ii) SISU would discharge the whole of the existing bank debt, by purchase and write off.

iii) SISU and the Council would together work as partners in ACL to place the businesses on a sound commercial footing, by (a) increasing usage of the Arena in cooperation with a venue management company, AEG; (b) agreeing commercially sustainable terms for rent and match-day revenues; and (c) the Council extending the lease to ACL to 125 years.

17. There were therefore a number of meetings between representatives of ACL (including Mr Reeves, Mr West and Mr Harris) and of SISU (including CCFC). At these, all parties fully appreciated that the arrangements in place could not continue: CCFC was simply unable to comply with its contractual obligations to ACL (notably the rental payments), and SISU were not minded further to bankroll its subsidiary. At the meeting on 29 March 2012, Ms Joy Seppala (the Chief Executive Officer of SISU Capital Limited, a SISU company which acted as investment manager for certain funds held within the SISU group) "confirmed that [SISU] cannot keep funding ad infinitum to the football club without a resolution with ACL", and she "added that if [the parties] cannot do a stadium deal, then SISU is finished funding the football club". At these meetings, for its part, ACL pressed for a credible and sustainable business plan for the Football Club, which it considered CCFC had not provided.

18. At 2 April 2012, there were rent arrears owed by CCFC to ACL of about £89,000. From that date, CCFC went on a rent strike, making it tolerably clear that they did not intend to pay any further rent unless and until a restructuring agreement to their (and SISU's) satisfaction was made. No further rent was in fact paid; although (i) from April 2012, ACL drew down moneys from the escrow account as and when rent fell due (see paragraph 24(ii) below), and (ii) from August 2012, CCFC agreed to pay ACL up to £10,000 per match in respect of match-day costs (which would have been covered by the rental payments, had they made them) without which ACL made clear they would not be allowed to open the ground for the match.

19. ACL were dependent upon the rental income from CCFC to enable it to make repayments of the Bank loan. Without the rent regularly being paid, as SISU well-knew, ACL would not be able to continue to make those repayments. In those circumstances (or if CCFC were to go into administration or, worse, liquidation, each of which SISU suggested they contemplated as possibilities), SISU and the Council, as well as ACL, knew that ACL would be at the mercy of the Bank or anyone who purchased the loan from the Bank.

20. CCFC's rent strike thus provoked a financial crisis within ACL which, as 2012 progressed, increased in intensity.

The Reaction to the Crisis

Introduction

21. ACL and the Council, appreciating how vulnerable ACL was as a result of CCFC's failure to meet its contractual commitments, adopted a two-pronged approach: ACL took formal steps to preserve its legal position, and enforce CCFC's legal obligations to pay the rent, whilst negotiations between the various parties continued.

22. These steps of course occurred over the same time period, and had considerable mutual impact. For example:

    i) The longer the rent strike went on, the more distressed ACL's commercial position became; and the Bank (whilst continuing negotiations in respect of both loan restructuring and loan buy out) began taking their own steps to enforce their security.

    ii) However, the worsening of ACL's financial position as a result of the rent not being paid by CCFC assisted in the negotiations to this extent; it provided an argument for use with the Bank to reduce the value of ACL and the loan debt, for the purposes of negotiating a loan buy-out.

    iii) The Council became increasingly concerned that SISU wished to obtain an interest in (if not control over) ACL and thus the Arena, cheaply and at the Council's expense, by purchasing the Higgs Charity share of ACL and/or the whole or part of the Bank debt; and that SISU were deliberately distressing ACL to drive down the value and price of that share and that debt.

23. However, although it must be borne in mind that they were happening at the same time and with interplay, the following strands of activity can helpfully be considered in turn:

    i) Formal steps taken by ACL to enforce CCFC's contractual obligation to pay rent, and by the Bank to enforce its security (see paragraphs 24-25 below).

    ii) The 2 August 2012 Heads of Agreement (paragraphs 26-36).

    iii) Negotiations with a view to SISU buying the Higgs Charity's share in ACL (paragraphs 37-45).

    iv) Negotiations with a view to the Bank loan being restructured or purchased (paragraphs 46-66).

    v) Negotiations in respect of the rent for the Arena (paragraphs 70-75).

Formal Enforcement Steps

24. So far as the formal steps taken by ACL were concerned:

    i) The rent strike started on 2 April 2012. On 10 April, ACL's solicitors wrote a pre-action letter to CCFC, demanding payment of the outstanding rent, then amounting to just over £112,000.

    ii) On 13 April, ACL withdrew the sum of the outstanding rent from the escrow account; and continued to do so as rent payments fell due, until, by August 2012, the escrow account was empty. These payments of course assisted ACL

with its cashflow, they were not "rent" and they did nothing to diminish CCFC's liability to pay rent which continued.

iii) On 9 May 2012, ACL filed a claim against CCFC in the High Court seeking payment of the rent arrears.

iv) On 13 August, ACL obtained judgment against CCFC for about £620,000. Enforcement was suspended for as long as CCFC restored the escrow account and kept it topped up; but, in the event, no further payment into that account was ever made.

v) On 5 December 2012, ACL served a statutory demand on CCFC requiring payment of £1.1m then owing in rent. The effect of that notice was that, if that sum was not paid within 21 days (i.e. by 26 December 2012) and SISU did not declare CCFC insolvent, ACL would be entitled to commence proceedings to wind up CCFC.

vi) Following the loan to ACL from the Council and the subsequent negotiations with SISU referred to below (paragraph 74), ACL applied to put CCFC into administration; and, in response, ARVO put CCFC into administration on 21 March 2013. The administrator sold the assets of the Football Club (including the "golden share" in the Football League, which entitles the holder to have a team in that league) to another SISU company, Otium Entertainment Group Limited. That company currently owns the Football Club. CCFC has now been put into liquidation, and CCFCH has been dissolved.

25. On 11 December 2012, the Bank served ACL with a reservation of rights letter under clause 12.5 of the facility letter (see paragraph 9(vi) above). As at that date, the outstanding balance on the loan was about £15.25m. The letter stated that, in the Bank's opinion, the security for the loan was insufficient, the Bank relying on ACL's own valuation of £7m-9m which was deployed at a meeting with the Bank on 20 September 2012 at which the Council was attempting to purchase the debt (see paragraph 55 below). In accordance with clause 12.5 of the facility letter, the Bank required ACL to provide additional security and/or reduce the balance of the debt to the Bank's satisfaction within 7 days, i.e. by 18 December 2012. On 21 December, no additional security or reduction in debt having been effected, the Bank served a default notice.

Negotiations: Heads of Terms

26. So far as negotiations were concerned, a document was prepared by Mr Reeves, headed "Areas of agreement", which was informed by the principles to which I have referred and which was discussed (and apparently agreed) at a meeting on 19 April 2012 between representatives of the Council, the Higgs Charity, CCFC and SISU. The note states that all parties acknowledged that "the Football Club has been extremely poorly managed in the recent past and… it remains a commercial nightmare". Given the £5m loss on turnover of £15m in 2011-12, the imminent relegation to League One, and the absence of any plan for a sustainable Football Club, that acknowledgment seems to have been fully justified, the £1.3m rent being only one of the many problems the Football Club faced and arguably not the worst. At that meeting, Mr Tim Fisher (the Chief Executive of CCFC) confirmed that CCFC was

balance sheet insolvent; and Ms Seppala confirmed that no more cash would be forthcoming from SISU, that liquidation of CCFC was "a viable option for ARVO", which was by now a creditor of CCFC. SISU proposed having discussions with the Bank with a view to the ACL debt being purchased, and there appears to have been consideration at that meeting as to who should in fact attend any discussions with the Bank. Relegation to League One was confirmed two days later. Mr West was still concerned that no business plan had been seen for either the following season in League One, or how SISU proposed to buy out the Higgs Charity.

27. Discussions continued over the summer. On 25 July 2012, there was a meeting of the various parties, including the Leader of the Council, Mr John Mutton, at which it was agreed that an Indicative Term Sheet would be finalised. Draft Heads of Terms were indeed signed by the Council and SISU, on 2 August 2012. Those more or less reiterated the principles of the SISU plan I have already outlined, i.e. (i) SISU would purchase the Higgs Charity's share of ACL, (ii) SISU would discharge and write off the Bank loan debt, in return for the lease to ACL being extended to 125 years, and (iii) rent was to be agreed between CCFC and ACL.

28. There are three matters of particular note about this document:

    i) There were a number of conditions precedent, set out in clause 6, including (a) agreement with the Bank on repayment of the bank loan, (b) "100% discharge of all outstanding rent payable for CCFC's use of the [Arena]", and (c) agreement on minimum rent payable by the Football Club for use of the Arena. Leaving aside the Council agreement with the Bank to purchase the ACL debt, none of these was in the event ever satisfied.

    ii) Other than the provision for confidentiality, the terms did not create any legally binding obligations, and the document expressly stated that there was no intention to do so.

    iii) There was no exclusivity clause, restraining any party from pursuing other commercial options.

29. Mr Thompson submitted that early August 2012 was a pivotal time. Until then, he said, the parties had been proceeding cooperatively with a view to a commercial compromise involving SISU discharging the Bank debt in return for the Council's consent to SISU buying into the Arena by purchasing the Higgs Charity's share of ACL. In particular, he relied upon the fact that the parties signed off the Heads of Terms on 2 August. However, from that time, he submitted, whilst SISU endeavoured in good faith to progress a compromise on the basis of the Heads of Terms, the Council pursued an alternative strategy, involving secret negotiations with the Bank with the intent of the Council purchasing the Bank's debt. This strategy of the Council (suggested Mr Thompson) not only involved conduct irrational and contrary to EU law relating to State aid, but it was also underhand and reprehensible. In the course of his submissions, he only just refrained from expressly describing the Council's actions as "dishonest".

30. The extent to which the history of the relations between the Council and SISU is relevant to the Council's 15 January 2013 decision now challenged is, in my view,

limited; but, given Mr Thompson's particular emphasis upon it, I should make clear that I do not consider the picture he paints is fair or accurate.

31. First, I do not accept that, prior to August 2012, the parties had been cooperating, intent only on a commercial solution for the benefit of all. Rather, whilst there had been discussions, each party (but particularly SISU) had, understandably, been intent on protecting its own commercial interests.

32. The background to the negotiations between (amongst others) SISU, ACL and the Council was that CCFC, which had fallen into a parlous state as a result of mismanagement, had unilaterally refused to pay the contractual rent it was legally obliged to pay to ACL; and SISU had made it clear that no on-going rent or arrears would be paid until a solution satisfactory to SISU had been agreed. SISU increased the pressure on ACL and the Council by making it clear that CCFC moving out of the Arena or even the liquidation of the CCFC (and, with it, the Football Club) were options SISU were willing to pursue. There can be no sensible doubt that cranking up the commercial pressure on ACL was quite deliberate on SISU's part, and was designed to put SISU into the optimal commercial position to broker a deal most advantageous to them.

33. That ACL were able to draw – and did draw – upon the escrow account is not to the point: although it assisted ACL's cash flow for a few months, CCFC was still legally obliged to pay the rent and to make good that draw down (both of which it refused to do); and, in any event, all parties were aware that the escrow account would run out in August 2012, prior to the 2012-13 season (as it did). Nor is it to the point that ACL and CCFC/SISU came to an agreement in August 2012 that CCFC would pay £10,000 per home match to cover ACL's costs of opening up the ground etc. There may be some dispute as to the level of costs actually incurred; but no one suggests that that sum was significant in terms of paying the Bank loan repayments which were running at over £100,000 per month. Nor is it to the point that all parties (including both SISU and the Council) used the absence of a rent agreement in discussions with the Bank, with a view to reducing the amount the Bank would accept to purchase the loan debt. As we shall shortly see, the negotiations over future rent had stalled, with the parties far apart; and, without resolution of the Bank loan issue, they were never going to fruit into an agreement. Indeed, as we now know, even when the Bank loan had been repaid, it proved impossible to agree rent going forward. Throughout, SISU were never in fact going to agree a deal over rent without the other pieces of their jigsaw in place, notably the purchase of the Higgs Charity's share in ACL which gained them access to the Arena revenues and payment off of the Bank loan. But, by the end of August 2012, there was no real prospect of SISU purchasing the Higgs Charity share in ACL (see paragraphs 37-45 below), and SISU's aspirations for paying off the Bank loan very cheaply were never realistic (see paragraphs 46 and following below) .

34. The rent strike by CCFC (and SISU's refusal to assist in payment of that rent, or any of it) made ACL (and thus the Council's share in ACL) weak and commercially vulnerable. There can be no real doubt but that it was SISU's intention that the non-payment of rent should have that consequence. SISU refused to consider a resolution that did not involve them having an interest in Arena revenues. That interest was to be obtained by SISU owning a share in ACL. The weaker ACL became, the cheaper a share in it would likely be. Furthermore, SISU were intent on buying the Bank debt,

in whole or part. SISU deny that they ever intended to purchase the debt other than as part of an arrangement following the Heads of Terms. However, the Council considered that, if SISU purchased the debt for themselves, that would greatly increase their commercial leverage over ACL, which risked being caught between a creditor which could not be paid without receipt of the Arena rent and with step-in powers in the event of loan default, and a non-paying lessee/licence holder, both owned by SISU. Again, the weaker ACL's financial position was, the cheaper the price of the Bank debt.

35. Second, the Council was fully entitled to engage in discussions with the Bank, unilaterally and without informing SISU: in English law, there is no general duty to conduct commercial negotiations in good faith, or to refrain from conducting negotiations with more than one counterparty at the same time without disclosure. The Heads of Terms did not impose any specific duty, e.g. as to exclusivity. They made clear that there was no intention to create legal obligations. The Council was here engaged in the commercial field, and (subject to its public duties) it was entitled to act in the way that it considered was best in protecting its own commercial interests, namely its share in ACL. If it considered that its commercial interests would best be served by having discussions with the Bank without SISU being aware of those discussions, or their content, the Council was fully entitled to have such discussions. It owed no duty to SISU. Criticism of the Council's actions is simply misplaced; particularly given that its commercial interests had been placed in jeopardy by SISU and its subsidiary, CCFC, failing to comply with its contractual obligations towards ACL.

36. Third, it soon became apparent that the SISU plan as set out in the Heads of Terms was doomed on virtually every front. It is to the elements of that plan that I now turn.

Negotiations for the Purchase of the Higgs Charity Share in ACL

37. It quickly became clear that SISU had unrealistic expectations for the terms on which they could purchase the Higgs Charity share in ACL; and that the Higgs Charity and they would not agree terms for the sale and purchase of that share, with negotiations between them to that end ceasing by mutual consent before the end of August 2012.

38. As I have indicated, from the outset SISU had been interested in obtaining an interest in the Arena, as a way (and, in reality, probably the only way) of obtaining a return on their investment in the Football Club. As the fortunes of the Football Club declined, from October 2011, particular discussions began. SISU needed to deal with both the Higgs Charity, and with the Council whose approval was needed for any transfer.

39. On 18 June 2012, SISU made an offer to the Higgs Charity for its share in ACL, set out in an Indicative Term Sheet, for £5.5m, in the form of £1.5m immediate cash and an additional £4m in future payments. However, there were a number of express conditions precedent, namely that completion would only take place after:

i) approval of the transaction's commercial terms, structure and legal framework by the Charity's trustees, on advice from its advisors;

ii) agreement between the Bank and SISU, as to the buy out of the ACL loan;

iii) approval of the Council, under the 2003 agreements; and

iv) approval of the Charity Commissioners.

40. In the event, these negotiations with the Higgs Charity were unsuccessful: and the Charity brought a claim in relation to the costs of the negotiations, heard by Leggatt J sitting in the Birmingham Mercantile Court. In his judgment (Marilyn Freda Knatchbull-Hugessen and Others as Trustees of the Alan Edward Higgs Charity v SISU Capital Limited [2014] EWHC 1195 (Comm) at [30]), he found that, before the end of August 2012:

> "The negotiations between SISU and the Higgs Charity had ceased by mutual consent or acquiescence as a result of a number of irreconcilable differences".

41. Leggatt J found (at [31]) that the Trustees did not wish to pursue the negotiations further, because they knew the Council was not prepared to consent to the sale of the shares to SISU, and was pursuing an alternative strategy which they (the Trustees) supported (a matter to which I shall return). However, he also found that the irreconcilable differences between the SISU and the Higgs Charity included:

i) Following due diligence, SISU did not wish to offer the price set out in the Indicative Term Sheet, being willing to offer only closer to £2m than £5.5m. This difference between the price SISU were prepared to offer and the price the Trustees were prepared to accept was (a) irreconcilable and (b) in itself, a showstopper.

ii) The Higgs Charity Trustees sought advice from Pricewaterhouse Coopers ("PwC"). That stressed the jeopardy ACL was in because of CCFC's inability to pay the rent, which would eventually lead to ACL breaching its banking covenants which would give the Bank a number of enforcement options including administration. PwC advised that there were two options open to the Charity, to agree an immediate sale or to retain the shareholding and agree to some form of restructuring. Neither course was risk-free. Although the Trustees considered that the valuation of ACL may have fallen to £5m-6m (see Minutes of Trustees' Meeting 17 July 2012, paragraph 3), the SISU offer, as it stood, did not protect the Charity's position (and was, therefore, in the Trustees' eyes, unacceptable) because the future payments by way of deferred consideration were only guaranteed against future income streams, which was regarded as a fatal flaw (see, also, paragraph 7.4 of the Statement of Marilyn Knatchbull-Hugessen dated 13 January 2014). The Trustees wished to have a "bulletproof guarantee", in essence probably only a fully cash transaction (see Leggatt J Judgment, at [18]). SISU were unwilling to offer any other security.

42. Nothing in the evidence before me causes me to doubt any of the findings of fact made by Leggatt J on the evidence before him. Indeed, the evidence I have seen merely confirms them. By the end of August 2012, SISU buying into ACL by purchasing Higgs Charity's share was simply not an option: SISU were unwilling to pay anywhere near the option price, or anywhere near the price the Trustees would have found acceptable, for the 50% share; nor were they willing to give security for future payments that the Trustees, on advice, would have been willing to accept.

43. As SISU (in the form of SISU Capital Limited) pleaded in their Defence in the litigation with the Higgs Charity (at paragraph 14.3):

> "… [T]here was no commercial rationale for reaching any terms with [the Bank] if, as occurred, [the Higgs Charity] and [SISU] could not reach agreement on the terms of a [Sale & Purchase Agreement for the Charity's share of ACL]."

44. Thus, SISU's inability to reach agreement with the Higgs Charity on the purchase of their share of ACL was fatal to SISU's whole plan. Without being able to purchase a share of ACL and hence the Arena, SISU were not interested in any deal: in the absence of a deal to purchase the Higgs Charity's share in ACL, SISU had no interest in either purchasing the Bank loan, or coming to a deal on rent for the Arena. That was so from 31 August 2012 at the latest, and it remained their view (as we shall see) until they withdrew from further negotiations with ACL and the Council in February 2013 (see paragraphs 74-75 below). Whatever their hopes might have been, from as early as the end of August 2012, SISU's plan of a consensual agreement on the principles set out in the 2 August 2012 Heads of Terms was never going to come off.

45. Given the showstopping nature of the failure to agree terms for the purchase of a share in ACL, it is strictly unnecessary to deal with the other aspects of SISU's plan; but I shall do so because, in any event, none proved practical.

Negotiations for the Restructuring or Purchase of the Bank Debt

46. As I have indicated, SISU were of the view that there was no commercial rationale for a deal with the Bank over purchase of the ACL debt, without agreement on the purchase of a share in ACL. However, SISU's aspirations for the debt purchase too were unrealistic.

47. SISU considered that the Bank debt could be purchased for £2m-5m. It was part of their plan that the debt be purchased – in whole, or at least as to 50%, by them – for that sum. They were not prepared to offer more. The Heads of Terms supposed that, the debt having been purchased, it would be entirely written off; although the Council was sensible to the possibility that SISU might purchase the debt from the Bank (which had no constraints on the person to whom the loan and mortgage might be transferred) and use their position as creditor to put further pressure on ACL and thus the Council.

48. So far as the Heads of Terms were concerned, shortly after 2 August 2012, it became clear there was another showstopper to the overall plan: given its fears, the Council was not prepared to agree to SISU buying out 50% or more of the Bank loan, whilst SISU were not prepared to allow the Council to buy out more than 50% of the loan. The Council had no confidence in CCFC's ability to put forward and implement a sustainable plan for the Football Club, and became increasingly concerned that SISU intended to purchase the Bank loan with a view to taking over ACL. Thus, the Council were only prepared to consider the SISU plan on the basis that all of the other elements were in place, before SISU bought and discharged the loan.

49. That was a further cause of stalemate, which led Mr West to write to Mr Reeves on about 16 August 2012, suggesting that the Council (at least initially) purchase the

whole of the debt; although it should be said that, in addition to the loan balance, the hedging agreement required a payment of some £3.6m to buy it out, so that the full buy out price was £19m, something not appreciated at this early stage. That memorandum makes clear that who was to purchase the Bank debt was an irreconcilable difference between SISU and the Council; although, Mr West said:

> "It is also clear that there is very significant animosity in the [Labour Group of councillors] towards SISU that even if a working financial solution could be found, it will be very difficult to get consensus on that as a way forward."

50. In terms of pursuing the suggestion that the Council buy the debt, he said that:

> "We will need to paint a picture [i.e. to the Bank] of significant potential woe for the future of ACL. The lack of rent agreement and the Court judgment against the Football Club will of course be of significant help here."

51. However, Mr West had developed a model for showing the financial implications of the worst-case scenario of the Council refinancing the full £15.4m balance of debt outstanding and the Football Club going into liquidation or at least not paying rent in the future, each of which was considered to be a real possibility.

52. Mr West prepared a note for the ACL Board Meeting on 29 August 2012, which asked for the Board's approval for ACL, the Council and the Higgs Charity approaching the Bank with a view to buying out the loan, hopefully for £5m-9m, but saying that, even if at full value and even if SISU put the Football Club into liquidation, the model suggested that ACL would be sustainable. In the meantime, the Board were also asked for agreement to information being released to SISU, so that the original planned deal could also be pursued. However, the Board Minutes note that SISU had still not provided a business plan for the Football Club, nor any investment proposition for the purchase of the Higgs Charity share. The Board agreed to those proposals, and also that PwC be commissioned to provide a report.

53. On 3 September 2012, Mr Reeves gave a presentation to the Labour Group of councillors, who were a majority on the Council. The presentation set out why the parties had deadlocked, and the fact that, if CCFC failed to pay the judgment debt which ACL had by then obtained against them by 12 September, ACL would need to consider next steps. The Council's objective since August was stated to be: "Primarily to protect our investment in ACL". The SISU deal was set out in some detail; as was the fact that, "All aspects of the proposed deal on the rocks… SISU desperate to approach the Bank as this is where they create value for themselves… Lack of trust – would we ever agree to the deal?...". It was said that: "An alternative strategy to the SISU proposal is needed NOW". That alternative was for the Council to approach the Bank to buy out the loan, without SISU, which would, amongst other things, reduce "SISU's power and threats". The range to buy out the debt was said to be: "£6-9m?? [Worst case the full £15m]". It was stressed that the "rate must be commercial". The councillors were asked to give officers authority to open negotiations with the Bank to refinance the loan with Council funds – which they did.

54. PwC prepared a report dated 14 September 2012 for ACL, the Higgs Charity and the Council, for the purposes of buying out the debt ("the PwC Report"). The Claimants rely heavily on the figures given in the Report, which adopted the sensitivity analysis figures derived from the Richard Ellis report referred to above (paragraph 13), which valued the Arena with no CCFC rent at £6.4m, with a rental of £200,000 at £8.6m, and with a rental of £400,000 at £10.8m. The PwC Report said that a commercial loan would typically be 60-65% Loan to Value ("LTV"), at a rate of 5% above LIBOR, and an average of 7-10 years repayment period. At a LTV ratio of 65%, at £200,000 per annum rent, the maximum loan would be £5.6m. It noted that there had been a large number of non-cash (non-recurring) income items. It said that cash flow projections for ACL suggested that £4m-6m debt could be serviced, with a £6m loan at commercial rates over 25 years having an annual service cost of £426,000.

55. On 20 September, Mr West and Mr Harris met the Bank. With a view to achieving a good price for the debt, as planned, they did portray a tale of commercial woe, including not only the rent strike but also SISU's threat to liquidate CCFC. They used the Richard Ellis/PwC Report figures – notably the valuation of £6.4m with no rent – to stress that the company was valued at less than the outstanding loan and ACL simply could not service the Bank loan of £15m. They put forward an offer of £6m to purchase the debt.

56. The Bank formally rejected that offer on 28 September. It said that it would consider its position and options with regard to its £19m exposure, including obtaining a valuation. It appointed Deloitte to look at cash flow and consider future lending strategy towards ACL. The Council repeated its £6m offer at a further meeting with the Bank on 6 November, Mr West recording:

> "I stressed that we were in no way considering increasing our offer 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."

57. As part of their investigations, in November, Deloitte met SISU; so that, from then, SISU were aware that the Council was making its own attempt to purchase the Bank debt. Mr West gave the Council Cabinet an update on 14 November, and told them that it must be assumed, "SISU know all". There was a further Cabinet update on 20 November.

58. The Council were still meeting with SISU. On 28 November, Mr Reeves and Mr West met Ms Seppala, who said that Deloitte had said that the Bank had not written down the ACL loan at all, which surprised her; and she was of the view that Deloitte would eventually advise the Bank that the debt should be valued in the range £3m-5m. The Council was unimpressed by SISU's business plans for the Football Club, considering they were an attempt to exploit the Council and the Bank to propagate cash flows in CCFC. The Council continued to be suspicious that SISU's long term aim was to gain control of the Arena, on the cheap, and then sell it to recover the cash invested.

59. The Council's plan of persuading the Bank that ACL's cash flows meant that the Bank loan could not be serviced was strikingly unsuccessful. The Bank simply did not accept that ACL was in such a financial state as ACL had portrayed. On 3 December, the Bank wrote to ACL proposing a restructuring of the loan of £15.5m, so that £8m was amortised over 20 years, whilst £7.5m continued as interest-only. That would have reduced the yearly payments from £1.6m to just over £1.3m. On the basis of Deloitte's work (which had apparently calculated a figure of nearly £1.3m cash flow available to service debt), the Bank clearly considered that, with appropriate cost savings and an agreement on rent at a dramatically reduced rate, ACL could afford such repayments. The fact that the Bank were refusing a deal on purchasing the loan because they considered ACL was able to service it was reported to the Labour Group of councillors at a meeting the same day. It was also reported that SISU had not moved, and were themselves in discussion with the Bank. The risk of SISU purchasing the loan was still a real concern, expressed at the meeting.

60. ACL responded to the Bank's proposed restructuring on 6 December, indicating that it did not consider the repayments on that basis were sustainable, and expressing concern that, under the proposal, half the debt would remain in place because it would be serviced on an interest-only basis. That letter maintained ACL's stance with the Bank as to value, saying:

> "At rent levels of £200K, [Richard Ellis's] analysis indicated a value of £8.4m. That would mean that the current and proposed loans are well outside the LTV parameters of normal bank finance."

61. The previous day (5 December), of course, ACL served CCFC with a statutory notice (see paragraph 24(v) above); and ACL understood that SISU had made an offer to purchase the Bank debt, they thought with a view to seizing control of ACL. The Council Cabinet were informally briefed accordingly, that day.

62. ACL further responded to the Bank's offer by letter of 14 December, which offered £12m to purchase the debt, saying that this was "higher than any third party would be prepared to pay". The Bank rejected that offer on 17 December, saying:

> "The increased offer is noted but remains unacceptable to the Bank. If there is to be a refinancing, the Bank is unwilling to accept anything less than repayment in full.
>
> We are disappointed to note your comments in respect of [ACL's] cashflow forecasts. As you are aware we take the view that, with appropriate cost savings, a solvent debt restructuring could be agreed without any impairment of the Bank's debt.
>
> The Bank is concerned that [ACL's] directors appear to be focusing on achieving a discounted settlement of the Bank's facilities rather than making the operational savings required to support the level of [ACL's] debts…".

Therefore, despite the valuations of ACL's interest in the Arena, the Bank continued to have confidence in ACL's ability to service the full £15.5m loan on commercial terms, with repayments of £1.3m per year.

63. On 20 December, through PwC, ACL made a final offer to the Bank, that it would pay the December capital and interest payment (£0.4m), and a lump sum of £14m in full and final settlement of all sums owed to the Bank, including paying off the hedging arrangement. It was said that that offer had already been approved by the majority Labour Group on the Council, although full Council approval would be required. The offer was accepted by the Bank the following day.

64. Mr Reeves and Mr West made a further presentation to the Labour Group of councillors on about 7 January 2013. That indicated:

i) The arrangement with ACL was "commercial".

ii) The "game changer" was "lower loan, longer period, lower interest".

iii) Although in the short term (3-5 years) cash balances could be used to delay the need to borrow externally, the Council intended to borrow at lower rates than that agreed on the loan to ACL. It was estimated that there would be a surplus of £100,000 per year over the life of the loan. The loans would be balance sheet neutral: a loan in, and a loan out of similar amount.

iv) The loan would be secured against all of ACL's assets, including its lease on the Arena which "gives us significant protection".

65. The loan of £14.4m to ACL was approved by the ACL Board and the Higgs Charity Trustees on 14 January, the day on which Mr Reeves and Mr West also gave a presentation to the Conservative Group of councillors in similar terms to that earlier given to the Labour Group.

66. As the Council's Director of Finance and Legal Services (Mr West) was a director of ACL, Mr Barrie Hastie (the Council's Assistant Director (Financial Management) since 2008) had been advising the Council; and it was he who prepared a report for Cabinet and the full Council, in which he recommended approval of a loan of £14.4m by the Council to ACL to enable it to repay its commercial loan ("the Hastie Report"). The Council's Cabinet met on 15 January 2013, and approved the loan; and, later that same day, the full Council unanimously approved the recommendations in the Report. It is of course that decision of the Council that the Claimants challenge in this claim.

67. The loan facility letter was in similar form to the earlier Bank facility letter. However, it had no provision for valuations of ACL's assets (i.e. the lease of the Arena). The loan was of £14.4m, 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 £0.8m, compared with the £1.6m ACL had been paying and the £1.3m they would have paid under the Bank's restructuring proposal.

68. Although SISU were in discussions with the Bank, and the Council feared that they had made their own offer to purchase the debt and they were effectively in competition, there is little available evidence as to SISU's negotiations with the Bank. However, what is now clear is that SISU considered that they may have been able to purchase the ACL debt – for which the Bank was exposed to the tune of £19m – for perhaps as low as £2m, but no more than £5m. On the other hand, the Bank were satisfied that ACL could in fact service the entire debt albeit restructured, and were not prepared to accept any figure in that area. The Bank (which was aware of the relevant valuations) appears to have considered that ACL could service a restructured loan of at least £15m, and that the debt was worth more than £12m. The Bank had not made any provision for any of the debt. In the circumstances, it is inconceivable that the Bank would have accepted an offer to purchase the debt for £5m. In considering the Bank would (or might) accept an offer of £2m-5m for the debt, SISU had entirely unrealistic expectations. They were not prepared to offer more.

69. Thus, this element of SISU's plan, too, was doomed to fail.

Negotiations for the Arena Rent

70. CCFC was contractually obliged to pay ACL about £1.3m rent for its use of the Arena. However, all parties appreciated that that level of rent was not commercially sustainable, especially with the Football Club's relegation to Division One, unless SISU continued to subsidise the Club which it was unwilling to do. They also all appreciated that an absence of agreement going forward might assist in reducing the value of ACL and of the Bank debt.

71. However, they also knew that in practice an agreement on rent was unlikely without the issue of the Bank loan – and ACL's inability to continue to make repayments under that loan, without the full contractual rent for the Arena being paid – being resolved. We now know that, from the end of August 2012, that issue was never going to be resolved satisfactorily, because it was dependent upon SISU purchasing the Higgs Charity's share in ACL – and negotiations there had met with irreconcilable differences.

72. From the start of the rent strike in April 2012, there was therefore a general impasse with regard to agreement of rent going forward. As I have indicated, CCFC/SISU refused to pay any rent or arrears. ACL and the Council required payment of all arrears as a condition of any agreement.

73. Generally, at the impasse, the parties were left a long way apart on future rental figure, CCFC/SISU saying that they would not pay more than £200,000 (or even, at one stage, apparently £100,000) per year, and ACL insisting on £550,000-600,000. By December 2012, if there was to be a rent deal as part of a wider agreement, the figure of £400,000 appeared the most likely conclusion. That figure was discussed at a meeting between SISU and Deloitte for the Bank on 10 December 2012, but clearly not agreed; SISU wishing it to be a permanent future rent (albeit subject to a reduced allocation of rates and food and beverage revenues for CCFC), whilst the Bank (like ACL, at that time) considered that there should initially be a three year rental reduction to £400,000 from the contractual figures. The SISU proposal was calculated to be worth only about £180,000 per year to ACL. Therefore, until the

Bank loan issue had been resolved, the negotiations as to rent were immovably stuck. Payment of rent arrears was also still a bone of contention.

74. After the Council had purchased the Bank debt, thereby resolving that immediate sticking point, negotiations over rent continued between CCFC and ACL. On 29 January 2013, Heads of Terms were agreed, involving rent at £400,000 from 1 January 2013 with an agreement on arrears taking into account a reduced escrow account sum (which left arrears of about £0.5m to be paid) and an in-principle agreement for CCFC to benefit from match-day food and beverage revenues and ACL paying a larger share of the rates on the Arena. The Directors of CCFC and ACL representatives shook hands on that; but the deal was rejected on 4 February 2013 by Ms Seppala (who, as described by Mr Thompson, "sat at the top of the tree in terms of [SISU] decision making") on the basis that she was not prepared to accept any deal that excluded SISU from holding a stake in ACL.

75. From that point, although there were some discussions about CCFC using the Arena for three years while a new football stadium was built, CCFC were determined to leave the Arena. An agreement was eventually reached for the Football Club to share Sixfields Stadium in Northampton, with Northampton Town Football Club. That is where the Football Club currently plays its home matches.

ACL's Business Plan

76. It is true that, as at the date of the Council's decision to make the loan (15 January 2013), there were a number of uncertainties as to the future. However, it was a condition precedent of the loan from the Council to ACL that ACL provide a business plan (paragraph 5.2.2 of the facility letter). In December 2012/January 2013, ACL prepared a 5-year Business Plan ("the ACL Business Plan"), which it shared with the Council prior to the decision to make the loan.

77. Two initial points are of note.

   i) The ACL Business Plan showed that, since the PwC September 2012 Report, ACL had considered its position, and had made/planned substantial cost cuts, including employment cost reductions of about £0.6m (which included not replacing the Chief Executive Officer) and other overhead reductions of £0.25m.

   ii) Although both ACL and the Council had real hopes that the resolution of the Bank loan issue would give positive impetus to the rental negotiations – with £400,000 per year being the likely result – the Plan assumed no future rental income from CCFC or any other anchor tenant.

Summary

78. Whilst there were clearly some misunderstandings as between the various parties, I find the following in respect of the period from April 2012:

   i) The Football Club had been seriously mismanaged. By April 2012, it was in a truly parlous state. CCFC was balance sheet insolvent, incurring regular substantial annual losses, and a loss of £5m on the annual turnover of £10m in

2011-12. The contractual rent and licence fee for the Arena of £1.3m per year was significant, but less than 10% of total expenditure. Relegation to League Division One and the introduction of the Financial Fair Play rules compounded these difficulties.

ii) CCFC/SISU had no strategy for maintaining a sustainable football club, except one which involved (i) the purchase, at a knock down price, of at least a 50% share in ACL and thus the Arena, and (ii) the purchase from the Bank, at a knockdown price, of the ACL loan. SISU considered that there was no commercial rationale for purchasing the Bank loan without having a stake in the Arena revenues, by having a share in ACL. By the end of August 2012, that strategy had failed, because the negotiations for purchasing the Higgs Charity's share in ACL had broken down over differences between the parties that were irreconcilable. There was no plan B: CCFC/SISU had no alternative strategy for maintaining a sustainable football club at the Arena.

iii) SISU distressed the financial position of ACL by refusing to pay ACL any rent or licence fee. That made ACL commercially vulnerable, because it could not service its Bank loan. It also had the effect of reducing the value of the share in ACL that SISU coveted. SISU imposed more commercial pressure on ACL by indicating that they were prepared to see CCFC put into administration or liquidation, which (SISU believed) would have a cataclysmic effect on ACL because of ACL's inability to service its loan without revenue from the Football Club. SISU's strategy of distressing ACL's financial position in these ways was quite deliberate. They considered this strategy was necessary if they were to recover their investment in the Football Club.

iv) The Council was increasingly concerned to protect its interest in ACL. It considered that that interest had some long-term value. ACL had been profitable until the rent strike. The rent strike by CCFC inevitably resulted in ACL being unable to service its loan with the Bank, with the inevitable consequence that the Bank began taking enforcement procedures against ACL; which placed the Council's interest in ACL in jeopardy, notably that the Bank (or anyone else to whom the Bank transferred the loan) would use their step-in rights to take over the Arena lease.

v) ACL and the Council were concerned about SISU's long-term commitment to the Football Club. The Football Club had been badly managed. ACL (and, as 50% shareholder in ACL, the Council) was persistently looking for a plan from CCFC under which the Club could sustainably compete, first in the Championship and, following relegation in 2012, in Division One. Such a plan was not forthcoming.

vi) The Council was increasingly concerned that SISU wished to buy into ACL and thus the Arena, effectively at the expense of the long-term interests of ACL shareholders including the Council itself. The Council also considered that SISU may attempt to purchase the Bank loan for themselves, which would have put them (SISU) into a very strong position to purchase a share or the whole of ACL. SISU deny that this was ever their intention: but, given SISU's strategy in relation to ACL, the Council was understandably and reasonably concerned.

vii) Some of these concerns, at least, with the benefit of hindsight, were not warranted; because (i) SISU's attempt to buy the Higgs Charity share in ACL had failed by the end of August 2012, and (ii) SISU were not prepared to buy the Bank debt at a price anything like the price for which the Bank was prepared to sell it. The Bank considered that ACL could service the full £15.5m loan, restructured. However, at the time and without the benefit of hindsight, the Council's concerns about SISU were reasonable: the only way in which SISU were likely to obtain a return on their substantial investment was to obtain a share in the Arena, and cheaply. That was an essential part of their plan.

viii) The Council lacked faith in CCFC/SISU's ability to run the Football Club sustainably. The Council – and, notably, some particular councillors who made their views clear – did not trust SISU. SISU deny that they adopted an aggressive strategy for buying into the Arena cheaply: but it is undoubtedly the case that their strategy was dependent upon buying into the Arena cheaply. The Council's lack of faith and trust were at least reasonably held.

ix) The Council was driven by the need to protect its commercial interest in ACL. It saw that interest as long-term. It reasonably considered that SISU posed a commercial threat to that interest.

79. In making the loan to ACL, Mr Goudie submitted (and I agree) that the Council had a number of interrelated commercial objectives, identified in the Hastie Report as follows:

i) to remove the risk of the Bank (or anyone else, including SISU, who might purchase the debt and therefore obtain for themselves the Bank's rights) enforcing the debt by exercising step-in rights (Hastie Report, paragraphs 2.12.2 and 3.4.2);

ii) to remove the risk of the Bank putting ACL into administration (paragraph 2.13.3);

iii) to improve ACL's financial position and enhance the value of ACL (paragraph 3.4.2.1), which would in turn enhance the value of the Council's shareholding in ACL and improve its prospects for achieving other returns on its investment including by way of dividends and "Super rent";

iv) to provide the Council with a commercial rate of return over the lifetime of the loan (paragraph 3.4.4.3); and

v) to obtain the transfer of ACL's lease of Car Park C (which had development potential) back to the Council from ACL, for nil consideration (paragraph 3.5.1.1).

The Grounds of Challenge

80. In seeking to challenge the Council's decision of 15 January 2013 to loan ACL £14.4m on the terms I have briefly described, initially, the Claimants relied on four grounds:

Ground 1: A private investor in the shoes of the Council would not have entered into the transaction on the terms agreed by the Council (or, indeed, on any terms); and, consequently, the transaction was State aid within the meaning of article 107(1) of the Treaty on the Functioning of the EU ("TFEU"), not notified to the European Commission in advance as required by article 108(3). It was thus unlawful as contrary to EU law.

Ground 2: The decision to make the loan was unlawful as being made in bad faith and/or for an improper purpose, namely gaining control of the Club and forcing a sale to a preferred third party.

Ground 3: The decision to make the loan was outside the discretionary powers of local authorities in the conduct of their financial affairs.

Ground 4: The decision to make the loan was irrational in the Wednesbury sense), in that (a) the Council took into account an irrelevant consideration, namely "the partisan views of the… Council's own leader and senior officers, whose objective has been to oust the Claimants from the Club…" (Statement of Grounds, paragraph 65); and (b) more generally, in all the circumstances, the decision to make the loan was legally irrational or perverse, in the sense that there is simply no rational explanation for the Council's decision to make this loan on the terms that it did and no reasonable authority could have entered into such a transaction (paragraph 64).

81. Permission to proceed was refused on the papers by Males J on 31 July 2013. On 1 October 2013, Silber J refused an application by the Claimants for disclosure prior to the renewed application ([2013] EWHC 3366 (Admin)). On 29 November 2013, Thirlwall J granted permission on all four grounds. On 14 May 2014, I heard the Claimants' application for specific disclosure of documents in the Council's control, and also for an order permitting them to adduce further factual evidence and expert evidence, which I refused ([2014] EWHC 1747 (Admin)).

82. On 27 May 2014, the Claimants served their skeleton for this substantive hearing; and, in paragraph 26, abandoned old Grounds 2 and 3. Ground 1 (State aid) is maintained. Further, a new ground was advanced, ostensibly under the umbrella of old Ground 4 and Wednesbury irrationality, namely that, in coming to its decision to make the loan, the Council failed to take into account several identified material considerations because senior officers of the Council (particularly Mr Reeves and Mr West) failed to draw them to the attention of Council members. Given the abandonment of the other old grounds, in the rest of this judgment I shall refer to this new ground as simply "Ground 2". Insofar as it is maintained, I shall refer to the general irrationality ground (residual old Ground 4), as Ground 3.

83. At the beginning of the hearing, I rejected Mr Thompson's submission that new Ground 2 was merely a re-cast of old Ground 4. It is, in substance, a very different ground. The old ground was based upon the Council taking into account a specific irrelevant consideration (upon which reliance is no longer placed), and perversity in the general sense that no authority could have decided to make this loan on the terms it was made. The new ground is based upon seven specific material matters that were not brought to the attention of councillors by the relevant Council officers.

84. Mr Thompson was, however, ready to make a formal application to amend on the first day of the hearing, which he did. Mr Goudie and Mr Quigley, whilst complaining about lateness and delay, were fully prepared to deal with the substance of the new ground. New Ground 2 therefore went forward on the basis that I would consider it on a rolled-up basis, i.e. it would be fully argued and, in my judgment, I would consider the application for permission and, if granted, would deal with the substantive application.

85. I therefore have before me the substantive application on Ground 1 (State aid) and Ground 3 (irrationality), for which permission has been granted; and Ground 2 (failure to take into consideration material considerations) on a rolled-up basis.

Ground 1: State Aid

The Law

86. In support of the principle of a common market within the EU, article 107(1) TFEU (formerly article 92 of the European Economic Community Treaty ("the EEC Treaty")) provides that:

> "… [A]ny 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…shall, in so far as it affects trade between Member States, be incompatible with the internal market."

87. If an EU Member State (in any of its manifestations) wishes to grant State aid to a particular undertaking, then it must notify the Commission of its intention to do so. Article 108(3) TFEU (formerly article 93 of the EEC Treaty) states that:

> "The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid…. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

88. In applying this test, the following principles can be derived from the case law. They are uncontroversial.

i) A public authority such as the Council is elected to serve the overall public interest in the area it serves. In pursuit of that obligation it is required to act prudently with regard to public money.

ii) In exercising its functions, a public authority may undertake and invest in economic operations in the same way as private companies.

iii) However, when it does so, articles 107-109 TFEU prohibit the State engaging in "State aid". Whether action by the State amounts to State aid is a "global question" (R v Customs & Excise Commissioners ex parte Lunn Poly [1999] 350 at 360); but it has several well-recognised characteristics set out in cases such as R (Professional Contractors Group Limited) v Inland Revenue

Commissioners [2001] EWCA Civ 1945 at [28], and in guidance prepared by the European Commission (e.g. Commission Communication – Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the Commission Directive 80/723/EEC to Public Undertakings in the Manufacturing Sector (1993) (OJ C307/3) ("the 1993 Communication") and Draft Commission Notice on the Notion of State Aid pursuant to Article 107(1) TFEU (2014) ("the 2014 Draft Communication")), and by the Department for Business, Innovation and Skills ("BIS") (e.g. The State Aid Guide: Guidance for State Aid Practitioners (June 2011), especially at paragraphs 76 and following). The BIS guidance (at page 2) identifies the characteristics in these terms, namely that, so far as the aid is concerned:

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

b) it favours certain undertakings;

c) it distorts or threatens to distort competition; and

d) it affects trade between Member States.

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

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

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

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

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

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

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

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

> "20. … A private investor may well inject new capital to ensure the survival of a company experiencing temporary difficulties, but which after, if necessary, a restructuring will become profitable again…
>
> 30. … Where this call for finance is necessary to protect the value of the whole investment the public authority like

> a private investor can be expected to take account of this wider context when examining whether the commitment of new funds is commercially justified…".

x) Although the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market. Consequently, a public authority has a wide margin of judgment (see, e.g. the 1993 Communication at [27] and [29] ("… a wide margin of judgment must come into entrepreneurial investment decisions…")); or, to put that another way, the transaction will not fall within the scope of State aid unless the recipient "would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation…" (Déménagements-Manutention Transport at [30]: see also Westdeutsche Landesbank Girozentrale v Commission [2003] ECR II-435 at [260]-[261]). Therefore, in practice, State aid will only be found where it is clear that the relevant transaction would not have been entered into, on such terms as the State in fact entered into it, by any rational private market operator in the circumstances of the case.

The Relevant Issues

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.

90. Mr Thompson submitted that no rational private market operator would have entertained a loan to ACL for £14.4m on the terms entered into by the Council. Although a "global" issue, in respect of the elements of the transaction he submitted:

i) No rational private investor would have advanced £14.4m to ACL in January 2013 on any terms, given the value of ACL, which was less than half of that sum. The valuation of the company was further diminished by the fact that, since April 2012, ACL faced the imminent significant risk of becoming insolvent.

ii) Given the valuation of ACL, the security for the loan was hopelessly inadequate.

iii) The term of the loan (about 41 years) was very substantially longer than any term which a private investor would have countenanced.

iv) The interest rate and rate of return inadequately reflected the commercial risk taken by the Council in making the loan.

v) There was no commercial justification for the loan. In making its decision to make the loan, the Council took into account policy objectives. Furthermore, a rational market operator would have taken into account and pursued one of the commercial alternatives to a loan which created no value in its shareholding in ACL, namely (a) pursuing SISU's plan to purchase and then write off the

Bank loan in return for a shareholding in ACL and thus the Arena, (b) restructuring the Bank loan or (c) the insolvency of ACL.

91. In respect of these, Mr Thompson relied particularly upon the PwC Report of 14 September 2012, prepared for ACL, the Higgs Charity and the Council, for the purposes of buying out the debt. As I have indicated (see paragraph 54 above), that report adopted the valuations of Richard Ellis, which as at March 2011 valued the Arena with no CCFC rent at £6.4m, with a rental of £200,000 at £8.6m, and with a rental of £400,000 at £10.8m. The PwC Report said that these figures "could be discounted by up to 30% in an insolvency scenario". It said that a commercial loan would typically be 60-65% Loan to Value ("LTV"), at a rate of 5% above LIBOR, and an average of 7-10 years repayment period.

92. Although interwoven, I will deal with these strands in turn, before finally considering the overall question of whether any rational private market operator would have made the loan to ACL for £14.4m on the terms entered into by the Council in the circumstances of this case.

93. However, before I do, I would make three overarching points.

94. First, I emphasise that I must compare the Council's action in making the loan on the terms that it did with a hypothetical private market economy investor with the same characteristics as the Council. Those notably include the fact that the Council was not a new investor: it was also a 50% shareholder in ACL. Much of the evidence (including the PwC Report) concerns the criteria by which a new investor would or may have made a loan to ACL in December 2012/January 2013. I have little doubt that a new investor would not have made a £14.4m loan to ACL on the terms that the Council did; but that is not the question that I have to consider, which is whether a private market economy operator, with a 50% shareholding in ACL, would have effectively restructured its business by making a £14.4m loan to ACL on the terms that the Council made the loan. I emphasise that point because many of Mr Thompson's submissions were based on a comparison with a new investor. As I have said, the data in the PwC Report, upon which he heavily relied, concerned a loan by such an investor.

95. Second, as I have described, several parties were negotiating on a number of fronts. In relation to different counterparties, they adopted different approaches. For example, when discussing a loan buy-out with the Bank, it was of course in the interests of the Council (as well as those of ACL and SISU) to talk down the value of ACL and thus the value of the loan the Bank held. For example, ACL and the Council used the Richard Ellis analysis and the PwC Report figures for the value of the Arena lease to a third party when negotiating with the Bank, in an attempt to persuade the Bank that the company was valued at less than the outstanding loan and ACL simply could not service the Bank loan of £15m. So, at the 20 September 2012 meeting with the Bank, in support of his offer to buy the loan for £6m, Mr West relied upon the PwC Report figures (based on the earlier Richard Ellis analysis), notably the valuation of £6.4m with no rent (see paragraphs 13 and 55 above); and, on 6 December, in response to the Bank's £15.5m loan restructuring proposal, ACL relied on Richard Ellis's analysis that, with a rent of £200,000 from the anchor tenant, the Arena lease was valued at £8.4m (ibid).

96. Mr Thompson relied upon these as evidence, akin to admissions, that ACL's worth was £6.4m, £8.4m or at least only a relatively small proportion of the £14.4m of the loan. However, leaving aside the corporate difference between the Council and ACL (upon whose Board the Council-nominated directors were a minority), what was said by a party to negotiations at a time when they were attempting to persuade the Bank to sell the loan for as low a price as possible is scant evidence of the true value of the Arena to the Council as a shareholder. It is clear that the Bank was not persuaded by these representations: the Bank, in possession of the relevant valuations and analyses, refused to sell the loan for £12m (because it considered it was, in all the circumstances, worth more) and offered to restructure the whole £15.5m loan (because it considered ACL could, in all the circumstances, service it).

97. The third point concerns the court's approach.

98. At first blush, the Claimants' submissions appear inherently unattractive. SISU are a commercial organisation, committed (and entitled) to pursue their own commercial interests. Until April 2012, ACL had been profitable: its balance sheet showed a profit every year (see paragraph 13 above). On the other hand, the SISU company CCFC had incurred substantial losses – regular losses of £4m-6m per year including, in 2011-12, a £5m loss on a turnover of £10m – and was clearly balance sheet insolvent. It appears to be common ground that poor management greatly contributed to these commercial problems of CCFC. SISU invested about £40m in CCFC until 2012, and, as I understand it, another approximately £10m from April 2012 until CCFC's demise.

99. SISU now seek to blame these financial woes on the rent for the Arena which they had to pay, which, they have been at pains to stress at every opportunity, was considerably higher than CCFC's competitors in the Championship yet alone League Division One, but that is to look at only one small part of the whole canvas. In this case, (i) CCFC had sold their right to revenues from the Arena, to the Higgs Charity for good consideration; (ii) when SISU bought CCFC, they did so in full knowledge of the absence of any right to Arena revenues and CCFC's contractual commitments including the commitment to pay rent at £1.3m to ACL; and (iii) the outgoings on rent were only a relatively small percentage – less than 10% – of the Football Club's expenditure. ACL, the Council and SISU agreed to negotiate towards a restructuring; but ACL and the Council were under no legal compulsion to restructure them in any particular way, and SISU had no proper legal expectation that they would be restructured after negotiations in the manner in which they wished.

100. In April 2012, the crisis in ACL was triggered by CCFC/SISU refusing to pay rent which CCFC was legally obliged to pay, in pursuit of the SISU strategy to obtain a return on their investment by buying into ACL cheaply. SISU took that action quite deliberately to distress ACL's financial position, with a view to driving down the value of ACL and thus the price of a share in it, which they coveted. Indeed, as I have indicated, in these proceedings, the Claimants' use the argument that ACL's impending insolvency (which SISU provoked) drove the value of ACL down by up to 30%. Those were commercial decisions that SISU were entitled to take.

101. SISU now seek to show that, in making a £14.4m loan to ACL in which it owned a half-share, the Council acted in a way which no rational private investor would act. However, they invested perhaps £50m in the hopelessly loss-making Football Club –

£10m after April 2012 – in the speculative hope that they could make profits in the future, by buying into the Arena. The documents make clear that, by the relevant time, all of the investment made in the Football Club had been written off by SISU and the investors who invested through them.

102. Mr Goudie expressed himself, as ever, in modest terms – but it is quite clear from his submissions and the documents I have seen that the Council considers SISU's approach to these matters to have been outrageous. For their part, the Claimants have made very serious allegations against the Council and its officers (e.g. that they were motivated by improper considerations, and acted all but dishonestly), most of which were not pursued to a conclusion. As between the parties – and, as shown by the press cuttings to which I was referred, others including the supporters of the Football Club who have reacted to events with bemusement and anger – emotions have, at times, run high.

103. However, although it has a commercial background and one ground requires consideration of how a rational private market economy operator might have acted in the place of the Council, this is a public law claim. In such a claim, of course it is not unusual for the Claimant or other party to be driven by its own private interests – because decisions of the State often impact on private interests – but that too does not detract from the inherent nature of these proceedings. I have to determine whether the Council erred in law by granting State aid to ACL, or by determining to make the loan to act without taking into account all material considerations. That is a task that I must – and will – tackle dispassionately, applying the law (which is uncontroversial) to the facts of this case.

The Amount of the Loan and Security for the Loan

104. Mr Thompson submitted that no private investor would have made a loan of £14.4m to ACL on any terms, given the value of the company. The PwC Report suggested that, as no rent was coming in from the anchor tenant, the lease of the Arena (ACL's only substantial asset) was worth £6.4m, and a private lender would be prepared to lend no more than 65% LTV, i.e. £4.1m (see paragraph 54 above). However, he submitted, in reality, even this figure was substantially higher than the figure probably achievable in January 2013; because ACL's financial position had deteriorated since September 2012. By January 2013, it was on the verge of insolvency as a result of the unsustainable debt burden upon it, with the result that its value may have diminished to less than £3m. The Council recognised that the value of ACL was significantly less than £14.4m: in ACL's letter to the Bank of 14 December 2012 (see paragraph 63 above), it was said that the £12m offer made was "significantly in excess of the property valuation and in the light of the ongoing uncertainty over the relationship with CCFC would be higher than any third party would be prepared to pay". Mr Thompson also relied on other documents in which the Council, ACL and the Higgs Charity confirm that no third party would lend ACL £14.4m or anything like.

105. However:

i) The Richard Ellis/PwC valuation figure of £6.4m was based on ACL obtaining no rent from an anchor tenant. However, by January 2013, to the Council, the most likely outcome of the rent negotiations with CCFC was that a rent of £400,000 would be agreed. Although it was assumed in ACL's Business Plan

that CCFC would quit the Arena and pay no more rent (see paragraphs 76-77 above), the Council was not to know that SISU would not agree any rent figure unless they achieved access to ACL revenues, and that that access had been effectively closed since August 2012. On 11 December 2012, CCFC/SISU had offered to pay a rent of £400,000 for the rest of the lease period; and, albeit after the event, on 29 January 2013 (i.e. after the Bank loan purchase by the Council), an on-going rent of £400,000 was agreed between CCFC and ACL, subject to SISU approval. I do not accept Mr Thompson's submission that no private investor would have lent money to ACL without final resolution of the rent negotiations with the anchor tenant. The Council had considered the risk of losing CCFC as an anchor tenant, concluding that ACL was sustainable without rent from CCFC; and, in any event, the Council reasonably considered that, by solving the problem of loan repayment payments to the Bank, that would remove the impasse in the rent negotiations between ACL and CCFC/SISU. With an anchor tenant rent of £400,000, the Richard Ellis/PwC valuation rose to £10.8m.

ii) In any event, the £6.4m valuation was based upon the premise that the Arena had no anchor tenant for the rest of the 41 year lease period: even if CCFC left the Arena, there was the possibility that ACL would obtain another anchor tenant in the future.

iii) The Richard Ellis/PwC valuations (which were valuations as at March 2011) did not take into account ACL's ability to increase revenues and decrease expenditure, identified in ACL's Business Plan. SISU themselves considered that the value of ACL could be considerably increased by marketing the Arena better; and Deloitte and the Bank recognised the possibilities of making significant cost savings.

iv) Mr Goudie also relied upon assets of ACL, other than the Arena lease, notably the £3.4m debtors and cash shown in the ACL balance sheet as at 31 December 2012. The debtors presumably included CCFC; but as at January 2013, the Council was entitled to consider CCFC would pay at least something towards arrears of rent (as was provisionally agreed in January 2013), although the £3.4m figure would have to be discounted to take into account trade and other creditors (excluding the Bank), i.e. nearly £1.7m. The net asset here is therefore less than Mr Goudie suggested, but nevertheless not insignificant.

106. Mr Goudie submitted that, in the circumstances, I could be satisfied that the value of the ACL business as at January 2013 was likely to be equal to or greater than the loan provided. Although I accept that the value was considerably higher than the figures relied upon by Mr Thompson – the valuations of £6.4m and less were worst-case scenarios on the basis that the Arena would not earn any rent from an anchor tenant for the next 41 years, and the Council was entitled to proceed on a more realistic basis than that – I would not go that far. On all the evidence, a realistic valuation of ACL as at January 2013 was no less than £10.8m, but less than £14.4m. But a private investor in the position of the Council would not focus exclusively on LTV. The Council was entitled to consider the longer-term, as a private investor would. I have to consider whether a private investor in its place would restructure its commercial business by making the loan on the terms it did make and on the basis of additional steps (as to increasing revenues and reducing costs) that it required ACL to make

through its business plan. Such an investor might do so, if the immediate burden on the company could be mitigated by reducing its expenditure (including its annual expenditure on loan repayments) and increasing income. That is precisely what the Council wished to do, and the ACL Business Plan proposed.

107. Two further matters can usefully be dealt with under this heading.

108. First, Mr Thompson criticised ACL for not having obtained independent advice on the commercial pros and cons of making the loan on the terms that they did, and for not having a business plan from ACL before the event.

109. However, it would be too much to expect for independent advice to be obtained as to precisely what a hypothetical private investor in the position of the Council would do. The Council had the advantage of advice from PwC; and the Council did obtain a Business Plan from ACL before 15 January 2013. Indeed, as I have indicated (see paragraph 76 above), it was a condition precedent of the loan that a business plan would be provided. That was clearly to ensure that ACL could service the loan. The Business Plan evidenced that: it showed that, on the basis of the adopted assumptions (which included the worst-case scenario of there being no anchor tenant and CCFC not paying any further rent), ACL could meet its repayment obligations and still be in a positive cashflow position at the end of each financial year. As both 50% shareholder with two seats on ACL's Board, and major creditor, the Council was able to exercise considerable scrutiny over the commercial activities of ACL. Of his consideration of the commercialities of the loan, Mr Hastie confirmed that:

> "This involved a detailed assessment of the ACL business plan, careful consideration of its ability to finance any proposed loan repayment and the development of a financing proposal." (31 January 2014 Statement, paragraph 75).

110. Second, the security for the loan is closely linked to the value of ACL. For the reasons I have given, although I accept that ACL may not have been worth £14.4m in January 2013, nor do I accept that its value was as low as £6.4m. In addition, the Council had the benefit of the two guarantees that had initially been given for the Bank loan, in the aggregate sum of £0.5m. The private investor in the shoes of the Council would have been properly entitled to take the view that ACL was capable of servicing a loan for £14.4m over 41 years, and the security was sufficient to make the risk of it failing to do so commercially worthwhile. It is noteworthy that, in December 2012, the Bank was not prepared to accept £12m for the loan and (having had all of the relevant valuation evidence) considered ACL capable of servicing a larger loan over a shorter period with annual repayment of £1.3m, and leaving £7.5m (to be serviced on an interest-only basis) outstanding as at 20 years. Although it served the formal default notice based on a lack of security, it appeared to consider that a restructured loan with the security in place was at least preferable to continuing with the enforcement proceedings.

111. Mr Thompson criticised the Council for saying that it was "uniquely well secured" because of its ownership of the freehold of the Arena. I accept that that phrase, used in briefings of councillors, was not one which a commercial lawyer would perhaps have used: the fact that the Council was freeholder was not relevant to the adequacy of the security for its loan to ACL as leaseholder. However, it must be seen in the

context of an officer briefing councillors. In considering whether to make the loan as a commercial transaction, the Council was entitled to take into account its position as freeholder of the Arena, just as much as a private market operator would have been. If for any reason ACL failed, the lease of the Arena would almost certainly revert to the Council as freeholder, and it would have the opportunity to re-let it.

The Term of the Loan

112. Mr Thompson submitted that the term of the loan (for the balance of the lease period, about 41 years) was substantially longer than any term which a private investor would have countenanced. The effect of the loan facility was that capital repayments well above SISU's valuation for the Arena lease would remain outstanding for over 30 years; and a private investor would not have been prepared to have advanced the loan on that basis. The PwC Report confirms that a term of 7-10 years was likely to have been the maximum available from an outside private lender.

113. However, this again ignores the position of the Council as a shareholder. It was not an outside investor. Just as the Bank were prepared to put forward a debt restructuring proposal that would have meant £7.5m capital (much higher than the SISU valuation) would have been outstanding after 20 years – because it was to be serviced for that time on an interest-only basis – assuming the terms as a whole to have been appropriate, it would have been reasonably open to a private investor rationally to make a loan over the whole term of the lease, on the basis of a restructuring of the business.

The Interest Rate and Rate of Return

114. Mr Thompson submitted that no private market investor would have made the loan, for that amount and for that term, for the rate of return the Council could reasonably have expected. The loan was to be made initially out of cash reserves, but at some stage was to be funded by prudential borrowing at an average rate of return of £100,000 per year on the whole £14.4m loan (i.e. 0.69%). PwC had said that a private lender would have required a rate of 5% above LIBOR, even if the loan were restricted to 65% LTV over no more than 10 years.

115. However:

i) The interest return is not as low as Mr Thompson suggested. The loan is at a fixed rate of 5%, and then variable upwards only at the Council's discretion. The Council's net interest return whilst it uses its cash balances to fund the loan (estimated to be for at least 3-5 years) would be about 4% or £500,000 per year. When it becomes necessary for the Council to borrow to fund the loan, its rate of return will be the minimum loan rate of 5% less its cost of borrowing, which was 1.85% as at January 2013. As it is entitled to charge ACL at least 2% above its own borrowing rate, it will always achieve a net rate of return of 2%.

ii) The EU Commission uses a particular methodology to assess whether an interest rate is at market rate for the purposes of applying State aid rules. This is set out in the Commission's Communication on the Revision of the Method for Setting the Reference and Discount Rates (OJC14/6) (19 January 2008)

("the 2008 Communication"). Of course, this can only be a proxy for the real market rate; but in circumstances in which the comparator is necessarily hypothetically placed in the unique circumstances of the State organ in the actual transaction, it is clearly worthy of note and the Commission and the European Court appear to accord it considerable weight. The methodology sets reference rates by taking a base IBOR rate, and applying margins to it that are informed by the borrower's credit rating and the security used as collateral. In his skeleton argument (at paragraph 156 and following), Mr Goudie shows that, on a £10.8m valuation of the Arena and even if ACL was considered to have a "bad" credit rating (which, he contends, would not apply to ACL), the private investor rate would be 5.19% compared with the 5% minimum rate required by the Council's loan to ACL. Mr Thompson submitted that these proxy reference rates are of limited value when there is other available evidence as to the applicable private investor rate. However, the Commission has said that there are policy reasons why there should be reference to the rate assessed by use of this methodology, notably legal certainty and equal treatment (see Belgium v Commission [2003] ECR I-6931); and, for what it is worth, the minimum loan rate of 5% appears to accord approximately to the reference rate.

iii) In respect of other evidence, the PwC Report rate was for an incoming new property lender, with no interest in ACL. It is again of very limited assistance here. In any event, the 12 month LIBOR rate in January 2013 was just less than 1%, and so the PwC rate would be less than 1% more than the minimum loan rate in fact agreed. The Bank offer of December 2012 was at an effective rate of 5.91%. Furthermore, prior to disclosure of the actual rate, SISU appear to have assumed a rate of 5% on a £14m loan may be reasonable (Statement of Laura Deering of 17 April 2013, paragraph 6.1 and 6.5: Ms Deering is an Investment Manager with SISU Capital Limited, who was directly involved in the purchase and management of CCFC).

116. In any event, obtaining a commercial interest rate of return was only one of the commercial objectives of the Council: the other objectives included obtaining the opportunity to benefit from dividends and/or Super rent from ACL in the future, and the transfer of Car Park C back to the Council for nil consideration (see paragraph 79 above).

117. Whilst all of these factors must be considered together, looked at discretely, the commercial return for the Council on the transaction could not in itself be regarded as one which no rational private market operator would have countenanced.

Commercial Justification for the Loan

118. Mr Thompson made two submissions.

119. First, he submitted that the Council's decision to make the loan was to a substantial extent based on policy objectives. He referred to the Hastie Report, where these factors featured large. In paragraph 6.1, the Report said:

> "The recommendations of this report aim to secure the original and ongoing objectives of the Arena project through the

> existence and effective operation of the stadium business, which are:
>
> - To deliver regeneration/inward investment
> - To create jobs
> - To promote Coventry
> - To provide a major sporting and cultural venue
>
> These objectives are contributing towards the Council achieving the following of its core aims – a prosperous Coventry, making Coventry an attractive and enjoyable place to be; and encouraging a creative, active and vibrant city."

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.

124. Mr Thompson submitted, second, that there was in any event no commercially plausible basis for the Council having made the loan that it did. As a shareholder in ACL, if the loan was for more than the worth of the company, it did nothing to create a positive value in the Council's shareholding, the value of that shareholding remained at zero. The Hastie Report acknowledged that, conceding that the value of the Council's shares was "likely to be negative in value as a result of the withheld rent and existing Bank loan" (paragraph 2.10); and, Mr Thompson said, it was obvious to the ACL shareholder directors (including Mr Reeves and Mr West, the Council officers) that no value would be created in the shareholding unless the Bank debt could be discharged for a sum less than the value of ACL itself. That is further recognised by the Council's own accounts for the period 2012-3, which record the shareholding in ACL as having "net value of nil".

125. In those circumstances, Mr Thompson submitted that no rational private investor with a shareholding in ACL would have contemplated making a loan of £14.4m to ACL. They would have pursued other options.

126. Mr Thompson suggested that such an investor would rather have pursued the SISU plan, and/or the Bank's offer to restructure the loan. However, for the reasons I have given, the SISU plan had by September 2012 irretrievably run aground, and ACL had rejected the Bank's offer on the basis that they did not consider they could service the loan on the basis put forward. In this context, Mr Goudie compellingly stressed the difference in corporate personality between ACL and the Council; but, whoever made that commercial decision, it was reasonable. Indeed, SISU do not suggest that the restructured loan could have been serviced in practice, without CCFC rent which was not to be forthcoming because SISU were only prepared to agree a new rental agreement as part of an overall package that was doomed for the other reasons I have given.

127. Therefore, Mr Thompson's main alternative to buying out the loan, as the Council did, was insolvency: he submitted that there was no commercial purpose in the Council avoiding ACL's insolvency, because its shareholding in ACL was of no value and remained of no value after the loan had been made.

128. However, this submission fails to give appropriate weight to the European jurisprudence which recognises that not all private market operators invest for speculative or short-term gain: some private investors (as opposed to creditors) are guided by a longer-term view of profitability, and are willing to retain (and, if necessary, restructure and refinance) investments because they consider there is a realistic prospect of longer-term profits (see paragraph 88(viii)-(ix) above). In this case, even if the value of the share in ACL was still nil, the new financing enhanced the position of ACL and its shareholders by reducing the negative equity in the company. The Council reasonably concluded in January 2013 that ACL could, and likely would, be able to repay the loan at £0.8m per year, and return to profitability, particularly on the basis of ACL's Business Plan which showed an intention to increase non-anchor tenant revenue streams (including its hotel, catering, conferencing and events businesses) and reduce costs. In my view, a rational private investor in the position of the Council might have come to that same conclusion. Deloitte and the Bank were of course confident that, with such steps, ACL would be able to service a loan at £1.3m repayments per year for at least 20 years; and the Claimants appear to accept ACL's business could have been put on a sound footing if

"drastic measures" were taken and ACL had been able to agree "sensible and sustainable" terms with its anchor tenant (Skeleton Argument, paragraph 87 (footnote 29)). For the reasons I have given, in January 2013, it was reasonable to assume that a long-term rent deal with CCFC was possible – probably at £400,000 per year. There was a substantial risk that no such deal would come to fruition, but even then there was substantial evidence that ACL would remain sustainable.

129. On the basis of all the evidence, in my judgment, a rational private market operator in the position of the Council might well have considered that refinancing ACL on the terms in fact agreed was commercially preferable to allowing ACL to become insolvent.

Discussion

130. Although I have taken the relevant elements as Mr Thompson saw them in turn, as I stressed at the outset, whether action by the State amounts to State aid is a "global question" which must be considered in the round. Having considered the matter in that way, I have firmly concluded that a rational private economic operator may have made the loan to ACL on the terms the loan was in fact made by the Council; and thus the loan was not State aid.

131. In coming to that conclusion, I have taken into account all relevant matters, including those to which I refer above, but particularly the following.

i) The failure of CCFC/SISU to pay rent – and their refusal to consider paying any rent except on SISU's terms – put the Council an invidious commercial position. As it was intended to do, it placed ACL in considerable financial distress, compounded by the indications that CCFC/SISU were unwilling to pay any rent unless and until a commercial deal was struck on their terms, including a significant (at least 50%) share in ACL; and by SISU's indications that they were fully prepared to put CCFC into administration or even liquidation.

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.

iv) In coming to that view, he would have taken into account (i) the likelihood of retaining CCFC as an anchor tenant at a rent of £400,000, together with a significant contribution towards the rent arrears, (ii) the risk of CCFC going into administration/liquidation, and paying no further rent, (iii) the ACL Business Plan, which indicated that, even if CCFC left the Arena, ACL was sustainable on a worst-case scenario, without any anchor tenant rents; and (iv) the possibility in any event of obtaining another anchor tenant within the course of the 41 years left of the lease. He would also have taken into account the scope for cost savings and increased income, as identified in the ACL Business Plan; and the probable return of £500,000 per year for the first 3-5 years of the loan, and a minimum net return of 2% thereafter, over the whole of the 40 years of the lease, together with the possibility of further returns from the development of Car Park C and from the dividends or Super rent, in due course.

v) In January 2013, such an investor would have considered it likely that rent would be agreed with CCFC at £400,000 per annum. The Richard Ellis/PwC analysis would have valued the lease at £10.8m on that basis; but the private investor would have taken into account the fact that the valuations were made as at March 2011 without the benefit of the cost cutting and non-football income exercises that had intervened. He would have considered the value of ACL to be probably less than £14.4m, but probably more than £10.8m.

vi) Such an investor would be alive to the mismanagement and failure of the Football Club, whilst in SISU's hands; and the failure of CCFC to produce a convincing business plan for a sustainable football club. His faith and trust in SISU would have been less than full. He would also have been alive to the commercial risk of SISU attempting to buy the Bank loan, with a view to gaining access to ACL; and SISU's wish to recoup their investment, which could probably only be done through buying into ACL.

vii) He would also have taken into account the fact that, in August 2012, having taken advice from PwC, the Higgs Charity valued its share in ACL at £5m-6m (see paragraphs 37 and following above). Furthermore, in December 2012, the Bank had considered the debt to be worth over £12m; and the Bank were willing to restructure the Bank loan over 20 years, with confidence that ACL could service the loan repayments of £1.3m per year.

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.

Other Matters

133. Mr Quigley adopted the submissions of Mr Goudie in relation to the above; but he also relied on two further grounds for contending that the loan was not State aid.

Given my finding above, which is determinative of the ground, I can deal with these very shortly.

134. First, he submitted that the loan did not benefit the recipient (ACL) but rather its shareholders, including the Council. I was unpersuaded that this would deny a finding of State aid.

135. Second, he submitted that the loan did not affect trade between Member States. He stressed that the adverse effect on trade must be evidenced. He submitted that the Claimants had put forward no, or no sufficient, evidence.

136. I understand that this is a matter for the national court to decide, and each case is fact-specific. Nevertheless, whilst I was referred to a number of cases which suggest that the application of this criterion has in practice been challenging, it seems to me that the European Court generally has little difficulty in finding a distortion of trade is liable to affect trade as between Member States. It appears to be settled that a transaction that strengthens the position of one undertaking compared with others competing within the EU is sufficient to conclude that it is liable to distort competition and affect trade between Member States (Philip Morris Holland BV v Commission [1981] 2 CMLR 321 at [11]). The 2014 Draft Communication says, at paragraph 188:

> "For all practical purposes, a distortion of competition within the meaning of article 107 TFEU is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be competition."

137. In this case, the Arena is not simply a local facility: it was designed to be a facility that would attract national and international events. There is evidence before me of the Arena hosting events in respect of which stadiums in different Member States are likely to be in competition, and that are likely to attract individuals from different Member States; and that the operation of such stadiums is conducted on a cross-border basis. In the light of my findings above, I do not need to determine this issue: but my provisional view would be that, had this loan distorted or threatened to distort competition, then it would have affected trade as between Member States.

Conclusion

138. However, for the reasons I have given above, I do not consider that the Council's loan to ACL was State aid. Ground 1 consequently fails.

Ground 2: Failure to Take into Account Material Considerations

The Law

139. The relevant principles of domestic law are again uncontroversial:

i) A local authority acts unlawfully if, in making a decision, it fails to take into account a material consideration (R (Alconbury Investments Limited) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 at [50]). For these purposes, a consideration is material if the

decision-maker might have decided the matter differently had he taken it into account (R v Royal Borough of Kensington and Chelsea ex parte Kassam (1994) 26 HLR 455 at page 465).

ii) Decision-makers in a local planning authority (usually councillors, in full Council or in a committee to which decision-making is delegated) often act on the basis of information provided by its officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. In the absence of contrary evidence, it is a reasonable inference that, where a recommendation is adopted, the decision-making councillors follow the reasoning of the report.

iii) The councillors are not deemed to know something that the officers know, but which is not transmitted to them (R (National Association of Health Stores) v Department for Health [2005] EWCA 154 at [29] and following, [73] and [88], citing and adopting guidance from the High Court of Australia in Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24 at pages 30-1).

iv) The officers' report is therefore often a crucial document. It has to be sufficiently clear and full to enable councillors to understand the important issues and the material considerations that bear upon them; and decide those issues within the limits of judgment that the law allows them. However, the courts have stressed the need for reports also to be concise and focused, and the dangers of reports being too long, elaborate or defensive. The councillors do not have to be provided with every detail of every relevant matter, but only those matters which are so relevant that they must be taken into account, i.e. the salient facts which give shape and substance to the matter such that, if they are not considered, it can be said that the matter itself has not been properly considered (Health Stores at [62]-[63], and Peko-Wallsend at page 61). The dangers of reports being too full have been emphasised thus:

> "… [T]he courts should not impose too high a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves." (R (Morge) v Hampshire County Council [2011] UKSC 2 at [36], per Baroness Hale).
>
> "The court should focus on the substance of a report by officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them

> effectively." (R (Maxwell) v Wiltshire Council [2011] EWHC 1840 (Admin) at [43], per Sales J).

The assessment of how much and what information should go into a report to enable it to perform its function is itself a matter for the officers, exercising their own judgment (R v Mendip District Council ex parte Fabre (2000) 80 P&CR 500 at page 509; and Health Stores at [69])

v) Of course, if the material included is insufficient to enable the decision-making councillors to perform their function, or if it is misleading, a decision taken on the basis of a report may be challengeable. However, when challenged, officers' reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole (R (Zurich Assurance Limited trading as Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) at [15]). Furthermore, in the context of planning cases, it has been said:

> "[A]n application for judicial review based on criticisms of the planning officers' report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ).

The same is true in non-planning cases, where the authority's decision-makers rely upon an officer's report.

vi) In construing reports, it also has to be borne in mind that they are addressed to a "knowledgeable readership", including councillors "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (Fabre at page 509, per Sullivan J as he then was). As in this case, they may have been given briefings prior to the meeting at which the decision is taken. Furthermore, in deciding whether they have got sufficient information to make a properly informed decision or request further information or analysis, again that involves the exercise of judgment on their part. They are entitled to ask for more. Given the experience and expertise of councillors, coupled with the fact that they are democratically elected, the judicial approach to challenges to their decisions should be marked by particular prudence and caution (see Bishops Stortford Civic Federation v East Hertfordshire District Council [2014] EWHC 348 (Admin) at [40]-[41] per Cranston J).

The Claimant's Case: Introduction

140. Mr Thompson submitted that the decision-making councillors in full Council failed to take into account a number of material considerations, because senior officers (particularly Mr Reeves and Mr West, but presumably including Mr Hastie) failed to

draw their attention to them. He relies upon seven such matters, which I will deal with in turn.

The First Matter

141. The first material consideration relied upon as one which was wrongly kept from the councillors is the fact that the Council was in receipt of advice from PwC that a private investor would not have been prepared to lend above 65% of the value of ACL or to lend for more than a term of 7-10 years.

142. The Hastie Report refers to the fact that PwC had been commissioned jointly by the Council, the Higgs Charity and ACL to provide analysis of ACL's financial position and the options for the Bank. The Report said that the Council in the form of its officers had reviewed this work, discussed the detail with ACL and arrived at a view on the amount of cash that ACL would have to meet loan repayments to underpin the recommendations of the Report. The Report also indicated that the worst-case scenario Arena valuation, based on no rent from CCFC, was £6.4m so that there was a significant negative equity. That figure was of course based on the Richard Ellis analysis which had been adopted in the PwC Report.

143. That was all true, and no complaint is made of it. However, it is submitted that the Hastie Report erred in failing to set out the PwC opinions as to the loan and the terms upon which a private property investor without a shareholding in ACL (i.e. a private investor in different circumstances from those of the Council) might have been willing to make a loan to ACL. Leaving aside the changes that had occurred since March 2011 (the effective valuation date), e.g. the cost cutting steps etc, it is not arguable that this was something to which the Council, as an ACL shareholder, was bound to have regard in deciding whether to lend ACL the money on the terms proposed. A valuation on a basis entirely different from the circumstances in which the Council found itself would be of no – or, at most, bare peripheral – relevance.

The Second Matter

144. The second material consideration relied upon is the fact that ACL had recognised on 14 December 2012 that a lower offer of £12m was more than any private investor would be prepared to pay for the Bank loan.

145. There is no merit in this. First, ACL were indicating only that a private investor in a position different from the Council – namely, again, a new investor, without a shareholding in ACL – would not pay more than £12m for the loan, which could not arguably be described as crucial to the decision the Council, as an ACL shareholder, had to make. Second, the indication by ACL was made in the course of negotiations with the Bank, and therefore cannot be of assistance as any sort of admission or proper indication as to the true value of the loan to the Council.

The Third Matter

146. The third material consideration relied upon is the fact that the Bank had been in negotiation with ACL's shareholders and SISU, with a view to restructuring the Bank's debt; and particularly that these negotiations had reached an advanced stage on 10 December 2012 when (it is said) the Football Club agreed in principle to a

revised rent as part of a solvent restructuring of ACL's debt on terms which alleviated the risk of ACL becoming insolvent.

147. This too is hopeless. Mr West updated the Labour councillors on 3 December, to the effect that the Bank considered ACL would be able to pay the loan, although ACL did not think that that was the case. ACL rejected the Bank's restructuring proposal on 6 December, on the basis that it could not safely service the repayments proposed (£1.3m per year). The Claimants do not say how they consider such repayments could reasonably have been made. It is also simply not correct to say that CCFC had agreed a revised rent on 10 December: the parties were still far apart on proposals for on-going rent and rent arrears (see paragraph 73 above). The Hastie Report properly recited that SISU had failed to reach an agreement to pay future rent or arrears (paragraph 3.1.3).

148. Mr Goudie submitted, rightly, that this is not a public law ground of challenge: in essence, it is a plea by the Claimants and SISU that the only proper course the Council could have followed would have been to have agreed to the commercial course that SISU were pursuing. For the reasons I have already given, that course was fundamentally flawed; and, in any event, the Council was not bound to pursue the course preferred by SISU – it was entitled to pursue the course it considered was in its own best interests.

The Fourth Matter

149. The fourth material consideration relied upon is that substantial payments of rent had been received by ACL by virtue of the draw down of £500,000 from the escrow account and the £10,000 "pay per play" interim agreement for the 2012-13 season.

150. However, such rent had not been paid. Paragraph 2.12 of the Hastie Report accurately set out the position with regard to rent; as did Mr Reeves' presentation to the majority Labour councillors on 3 December 2012. No rent had been paid since April 2012, and it is recited that the escrow account of £0.5m had been exhausted in August 2012. No rent having been paid, a judgment for it had been obtained and (by the time of the Hastie Report) a statutory notice served. The next step would be for a winding up petition to be served, with the likely result that CCFC would enter insolvency proceedings. That précis cannot be faulted. It refers to the escrow account being used, and the £10,000 per match was not an "interim rent agreement": it was a payment in respect of expenses. It is true that such expenses had not been payable in addition to rent whilst contractual rent was being paid; but that rent was not being paid. Past payment towards expenses did not touch upon the question of rent.

151. Again, it is unarguable that the report was deficient or misleading.

The Fifth Matter

152. The fifth material consideration relied upon is the fact that the Council's officers had recognised the commercial advantage of not reaching a permanent agreement on rent, because it strengthened the Council's bargaining position with the Bank.

153. However, these were statements used in the course of negotiations, and thus very little weight (if any) could possibly be attached to them. In the task in which the

councillors were engaged, these statements were insignificant. Certainly, the Hastie Report was not deficient in making no reference to them.

The Sixth Matter

154. The sixth material consideration relied upon is the fact that ACL faced on-going financial difficulties independently of the rent issue.

155. However, although PwC had indicated that some of ACL's income was non-recurring, historically ACL had been profitable year-on-year whilst the Arena rent was being paid. It was in the nature of the Arena that some of its revenues would result from non-recurring items, that would have to be replaced; but, as Mr Goudie put it, "ACL was going along quite nicely until the rent strike".

156. It was not arguably misleading to say that ACL's financial distress resulted from CCFC withholding rent.

The Seventh Matter

157. The seventh material consideration relied upon is the fact that the Council had been party to Heads of Agreement on 2 August 2012, based on principles of cooperation between (amongst others) SISU and the Council, whilst the Council's officers had, without informing SISU, acted in a way to undermine that course by commencing unilateral negotiations with the Bank to purchase the ACL loan.

158. The Council do not accept that its officers acted in a manner "calculated fundamentally to undermine" the SISU negotiations. But, in any event, as I have explained, the SISU plan had terminally stalled by the end of August 2012, because it was impossible for them to agree to purchase the Higgs Charity share in ACL, which was vital to the plan as a whole. This ceased being a material consideration well before January 2013.

Conclusion

159. Consequently, I do not consider there is any arguable force in any of the seven discrete elements of Ground 2.

160. However, it would be remiss of me if I left Ground 2 there. As I have indicated, officer's reports are to be read broadly and as a whole. Reading the Hastie Report thus, I consider the belated criticism of it unfounded. In my view, it set out, properly and succinctly, the important relevant matters that the councillors were required to take into account, including the relevant risks of the proposal as well as the potential benefits. The courts have been rightly cautious about requiring officers' reports to be too full (see paragraph 139(iv) above): the dangers of such a requirement are obvious. A focused and succinct report, such as Mr Hastie's Report in this case, is in my judgment positively to be commended.

161. Mr Goudie and Mr Quigley submitted that, the Third Claimant (CCFCH) having been dissolved, the First and Second Claimants have insufficient standing to bring this new claim. I did not find that submission strong. However, they submitted, with considerably more force, that the Claimants were simply too late to make this entirely

new claim, and permission should be refused on the grounds of delay alone. Had I considered any part of Ground 2 to be arguable, I would have taken into account the extraordinary delay in making this claim to which (contrary to Mr Thompson's submission) I do not consider any failure on the Council's part to give disclosure materially contributed. However, for the reasons I have given, I do not consider any element of Ground 2 to be arguable, on the merits; and, on that basis, I refuse permission to proceed.

Ground 3: Irrationality

162. Mr Thompson maintained, if but very faintly, the submission that, even if his other grounds failed, I should find that the Council's decision to make the loan was irrational, in the sense that no local authority could reasonably have made it.

163. I can deal with that ground very shortly: it clearly cannot survive my findings in relation to the other grounds, particularly those in respect of State aid.

Conclusion

164. This claim fails in its entirety. Formally, I refuse the application on Grounds 1 and 3, and refuse permission to proceed on Ground 2.