Neutral Citation Number: [2018] EWCA Civ 2252

Case No: C1/2017/2014

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION,
(ADMINISTRATIVE COURT IN BIRMINGHAM)
Mr Justice Singh
CO/5964/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2018

Before:

SIR BRIAN LEVESON
(PRESIDENT OF THE QUEEN'S BENCH DIVISION)
LORD JUSTICE McCOMBE
and
LORD JUSTICE IRWIN

- -

Between:

THE QUEEN (1. SKY BLUE SPORTS & LEISURE LIMITED; 2. ARVO MASTER FUND LIMITED; 3. OTIUM ENTERTAINMENT GROUP LIMITED)	**Appellants**
- and -	
COVENTRY CITY COUNCIL	**Defendant/ Respondent**
-and-	
(1) ARENA COVENTRY LIMITED **(2) WASPS HOLDINGS LIMITED** **(3) TRUSTEES OF THE ALAN EDWARD HIGGS CHARITY**	**Interested Parties/ Respondents**

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Rhodri Thompson QC and Nicholas Gibson (instructed by Fieldfisher LLP) for the Appellants
James Goudie QC and Ronnie Dennis (instructed by Legal Department, Coventry City Council) for the Defendant/Respondent
Fenella Morris QC and Kelly Stricklin-Coutinho (instructed by Kennedys Law LLP) for the First and Second Interested Parties/Respondents
The Third Interested Parties did not appear and were not represented.

Hearing dates: 26 and 27 June 2018

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Approved Judgment

Lord Justice McCombe:

(A) Procedural Introduction

1. This is an appeal by the appellants named above (whom together I will call "Sky Blue") from the order of Singh J (as he then was) of 17 July 2017 refusing Sky Blue's application for permission to apply for judicial review of a decision of the defendant Council ("the Council") of 7 October 2014. As quoted in the amended Judicial Review Claim Form the challenged decision was,

> "1. To approve the sale of 100% of the shares in Arena Coventry Limited ("ACL") currently held by Coventry City Council via North Coventry Holdings Limited (50% of the total shares in ACL) for 2.77m to London Wasps Holdings Limited.
>
> 2. To approve the sale of a lease extension to ACL of 211 years for £1m giving a total lease duration of 250 years subject to the acquisition by London Wasps Holdings Limited of the other 50% shareholding in ACL."

2. The judicial review application challenged the decision on the basis that the transactions resulting therefrom constituted unlawful "state aid" contrary to Article 107 of the Treaty on the Functioning of the European Union and a breach of s.123 of the Local Government Act 1972.

3. By his order the judge had refused Sky Blue's application to amend its pleadings and to rely upon expert evidence. He also refused their application for permission to appeal to this court. Permission to appeal was, however, granted by my Lord, Irwin LJ, by his order of 12 September 2017. By further order of 28 November 2017, my Lord and Flaux LJ allowed Sky Blue's appeal from those parts of the judge's order which had refused permission to amend the pleadings and to rely on expert evidence. It was directed that the remainder of the appeal (for which permission had been granted on 12 September 2017) be adjourned to the rolled-up hearing then already listed for a date in May this year. As the court indicated in paragraph 9 of its summary reasons following that hearing, the further hearing in this court was to be the hearing of the appeal against Singh J's refusal of permission to bring the judicial review claim and, if that appeal succeeded, the judicial review itself. Directions were further given for the amendment of Sky Blue's pleadings and consequential amendment of the pleadings of the Respondents. There were also directions given as to the filing of expert evidence and other ancillary matters. The additional material has served to flesh out the underlying facts surrounding the disputed decision, but the basic structure of the transactions involved is not different from what was known about it at the time of Singh J's decision.

4. Following failure of a mediation, also ordered on 28 November 2017, the rolled-up hearing of Sky Blue's remaining grounds of appeal and, if successful, the judicial review itself, was conducted before us on 26 and 27 June 2018.

(B) Background Facts

5. I set out here a very short summary of the factual background to the case in order to isolate the narrower issues arising in the appeal before us. A fuller summary of the early history of the disputes, from which my own is gratefully adopted, appears in the judgment of 30 June 2014 of Hickinbottom J (as he then was) in earlier litigation between these parties: see *R (Sky Blue Sports and Leisure Ltd. & ors. v Coventry City Council, (& ors. as Interested Parties)* [2014] EWHC 2089 (Admin), affirmed by this court in its judgment of 13 May 2016, [2016] EWCA Civ 453 ("Claim 1").

6. The "sky blue" playing strip of Coventry City Football Club ("CCFC") and formerly the black shirts (now black and gold) (with their wasp logo) of Wasps RFC ("Wasps RFC") have been well-known in sporting circles for many years. The on-field performances of the two teams, playing football under their respective codes, have brought pleasure to the many who have followed them. None of that, however, is material to the issue arising on this appeal.

7. The present case concerns the new sports stadium at Coventry known as the "Ricoh Arena" ("the Stadium"). From the start of the 2005/6 football season, following the development of the Stadium in the immediately preceding years on a derelict gasworks site, CCFC started to play its home matches there. Unfortunately, from 2001 its playing results declined, leading to financial difficulties. Nonetheless, they continued to play at the Stadium from August 2005 until May 2013, when there was a temporary re-location and "ground share" for one football season at the home ground of Northampton Town FC. In August 2014, shortly before the making of the decision in issue, CCFC returned to the Stadium for its home fixtures under a "sub-licence" agreement on a short term basis.

8. As a result of the transactions, following the challenged decision in October 2014, the Stadium also became the home ground of Wasps RFC, who played one of their matches there for the first time in December 2014. Since then, the Stadium has been shared for home games by CCFC and Wasps.

9. The freehold interest in the Stadium has been held at all material times by the Council which had acquired it in 2002 as part of a regeneration plan for the area; it still owns the freehold estate today. The Second Interested Party, Arena Coventry Limited ("ACL"), was originally formed as a 50/50 joint venture between CCFC and the Council for the purpose of operating the Stadium. At the beginning of the decline in its football fortunes, previously mentioned, the CCFC interests sold their 50% shareholding in ACL to the Third Interested Party, Alan Edward Higgs Charity ("AEHC"), a local Coventry charity. The agreement included an option for CCFC to reacquire its interest as and when it might be able to do so. The option had its short part to play in the precise timing of events of 2014/5 effected in part following the decision now challenged.

10. In December 2003, ACL acquired a 50 year leasehold interest in the Stadium (the "2003 Lease") for a term expiring on 16 December 2053, with the rent being payable, at its option, of £1.9 million per annum or by way of a premium of £21 million. Additional rent ("Super Rent") might have become payable, based upon ACL's profits, but profits at the relevant level were never made and the details of this Super Rent do not matter now. In February 2006, ACL obtained £22 million loan finance from Yorkshire Bank ("the Bank"), secured by fixed and floating charges over ACL's assets, principally the leasehold interest in the Arena. The loan was used to pay the

£21 million premium payable under the 2003 Lease which was assigned to a wholly owned subsidiary of ACL, Arena Coventry (2006) Limited ("ACL 2006"). Sublease and licence arrangements were made with CCFC, from which rents in the order of £1.3 million per annum were payable to ACL.

11. The history of the matter between that stage and the events which became the subject of challenge in the two sets of litigation is a lengthy one and it is not necessary now to descend into the detail of it. I consider that the following will suffice.

12. The financial position of CCFC continued to decline. In these circumstances, the SISU group of companies ("SISU") entered the scene in 2007 as investors in CCFC, which was facing insolvency. SISU is now the controller of Sky Blue, the appellants. CCFC fell into rent arrears and from April 2012 stopped paying rent entirely. (Hickinbottom J described this as a "rent strike".) Inevitably, this placed ACL in difficulty in servicing the loan from the Bank. There were negotiations between the various interested parties during which the commercial pressures available to each appear to have been exercised sufficiently fully as to end in mutual recrimination and mistrust between ACL (the Council and AEHC) on the one hand and SISU on the other.

13. On 15 January 2013, the Council reached a formal decision to make a loan of £14.4 million to ACL which was then to be used to repay a negotiated sum to the Bank for the full and final discharge of ACL's obligations to the Bank. It was this decision which was challenged as unlawful state aid in Claim 1. In paragraphs 78 and 79 of his judgment in Claim 1, Hickinbottom J set out a summary of his findings as to the facts and commercial situation of the parties at the time of the decision by the Council to make the loan.

14. Hickinbottom J's conclusion in dismissing the claim was that a rational private market operator in the Council's position at the time might well have considered that refinancing ACL on the terms agreed was commercially preferable to allowing ACL to become insolvent. He found that the loan agreement fell within the wide ambit of decision making extended to public authorities and that the loan was not, therefore, unlawful state aid. He also dismissed a rationality challenge.

15. Following the making of the Council's loan to ACL the company operating CCFC went into administration and subsequently, in August 2013, liquidation. The administrator sold the assets of CCFC to the Third Appellant, Otium Entertainment Group Limited ("Otium").

16. As I have said, Hickinbottom J's judgment was delivered on 30 June 2014. The losing claimants appealed against it; their appeal was dismissed by this court (Tomlinson, Treacy and Floyd LJJ) on 13 May 2016: see [2016] EWCA Civ 453. An application for permission to appeal to the Supreme Court was refused by that court on 28 November 2016.

17. With the appeal to this court in Claim 1 pending, the Council reached its decision now under challenge. In new evidence, filed in the present proceedings in January 2018 following this court's decisions of 28 November 2017, Mr Barry Hastie of the Council sets out a summary of the sequence of events from the making of the Council's loan to ACL to the Council's October 2014 decision. He does so from the

Council's point of view and the summary is helpful in understanding the Council's internal view of the decision made. It suffices to say that acrimony between the Council/AEHC and SISU continued. Factual disputes about the events and/or about the interpretation of the events emerge from Sky Blue's evidence, emanating principally from Ms Joy Seppala, the Chief Executive Officer of SISU. The disputes on these matters, on which each side holds strong views, engender more heat than light in the court's task of analysis of this case and in summarising the events up to October 2014. The summary, therefore, need only be a light one.

18. In April 2013, the proceedings in Claim 1 had been issued. For the 2013-4 season CCFC was to play its home matches at Northampton and the future of the Stadium, ACL and the Council's stake in the Stadium clearly needed a new initiative. Not surprisingly, the picture that emerges from the evidence as a whole is that the finding of a sporting tenant/purchaser for the Stadium seemed to be the most desirable outcome. Mr Hastie, in his evidence, speaks of approaches made by three interested parties, without specific sporting interests, whose interest in the Stadium does not appear to have advanced far. There were further discussions between the Council and the SISU interests which, however, ended inconclusively at a meeting between the Council leader and Ms Seppala of SISU on 8 November 2013.

19. In the same month, it seems, there came the first approaches from Wasps with a view initially to them acquiring a majority stake in ACL, obviously with the view to using the Stadium as Wasps' home ground. These approaches were taken up and negotiations with Wasps continued through to the following year when the transactions in dispute were entered into.

20. It is important at this stage to note one feature of the commercial reality of the situation that faced the Council in 2014. For reasons that were not, and could not be, fully explored before us, AEHC were implacably opposed to the idea that either their shares or those of the Council in ACL should be sold to the SISU interests. Mr Hastie sets out direct quotations to that effect from the Charity's officers in his evidence. They made it clear that they would not consider selling their own interests in ACL other than to Wasps. On the evidence before us, there is no doubt that such were the views held by AEHC and they appear to have been robustly held.

21. From March 2014, the Council sought and obtained advice from KPMG as to the desirability and commerciality of the various proposals emerging from the negotiations with Wasps. An early offer by Wasps was rejected as being insufficient. At the time of the decisions now in question the Council had before them the version of a draft report from KPMG, entitled Project Godiva and dated 3 October 2014. I will return to salient features of this report below. As Mr Goudie QC for the Council showed us the terms of the final report did not vary in any material way from this draft.

22. On 7 August 2014, Heads of Terms were reached between the Council and Wasps whereby the Council would seek to acquire the 50% shareholding of AEHC in ACL and would then sell 90% of the resultant holding in ACL to Wasps for £5 million, thus retaining a 10% interest. ACL would acquire an extension to its lease to create a total term of 250 years for a further £1 million. ACL would pay £1 million of the outstanding loan from the Council and the term of the loan would be reduced to 20 years.

23. These outline arrangements were satisfactory to AEHC and the arrangements ended up with the entire share capital of ACL (rather than 90% only) being sold to the Second Interested Party (Wasps) for £5.54 million. AEHC and the Council each received 50% of this consideration. The extension of the existing lease to ACL to a total term of 250 years from December 2003 was achieved, as a matter of conveyancing mechanics, by the surrender of the existing outstanding leasehold terms (some 39 years unexpired) to the Council and a new grant of a 250 year term from December 2003. The lending by the Council to ACL became, in effect, a liability of Wasps.

24. The timing of the overall transaction was complicated by the existence of the pre-emption rights, already referred to, in favour of the old CCFC company (then in liquidation) to repurchase from AEHC the 50% shareholding originally acquired by AEHC from that company when the shareholding was originally transferred to the charity. This required that an opportunity be given to the liquidator to take up the pre-emption rights. The structure of the revised arrangements including the sale by the Council of its 50% holding in ACL (rather than acquiring and then selling 90%) was explained by Mr Hastie in his contemporaneous report to the Council of 7 October 2014 in these terms:

> "2.4.17 Compared with the revised Heads of Terms described above, the new proposed transaction structure is as follows:
>
> - The City Council sells 100% of the shares it holds in ACL (via NCHL) to LWHC for £2.77m
>
> - Wasps and AEHC will enter an agreement to allow Wasps a call option on 100% of their shares in ACL (held via FIL) which can be exercised after AEHC has fulfilled its legal obligations under its option agreement with CCFC Ltd
>
> - At the conclusion of this process, if there is no third party offer that is acceptable both to AEHC and Wasps (who will have a right of veto over the sale of AEHC shares), Wasps will exercise their call option to purchase the AEHC shares
>
> - At this point, ACL will purchase a lease extension of 211 years for £1m and make a further £1m payment against the amount outstanding on the City Council loan."

25. The Council had the advice of KPMG as to the value of the share capital of ACL and of the freehold interest of the Council expectant upon the existing lease. They noted that the proposed extension of the lease to create a term of 250 years was "economically equivalent" to the sale of the freehold. KPMG valued the total equity share capital in ACL (of which the Council held 50%) at £3m-£5m. They valued the freehold in the range of £0.6m-£1.0m.

26. At its meeting on 7 October 2014 the Council approved the proposed transaction as explained to them by Mr Hastie in his report. It is that decision which is challenged in these proceedings.

27. Sky Blue began the proceedings by Claim Form issued on 19 December 2014. The proceedings were, however, stayed by consent by order of Patterson J of 27 January 2015 pending resolution of the litigation on Claim 1. The stay ended with the Supreme Court's refusal of permission to appeal on 28 November 2016.

28. In 2015, in the context of a bond issue to be made by Wasps Finance plc, an associated company of Wasps, a prospectus was issued which included a report dated 23 April 2015 from Strutt & Parker ("S&P") valuing the 250 year term then owned by ACL at £48.5m. I return to more detail of this valuation below.

(C) Challenge to the Decision

29. Sky Blue summarises its challenge to the decision in paragraph 1 of their Amended Detailed Statement of Grounds and Statement of Facts as follows:

> "1. By this claim for judicial review, the Claimants challenge the Defendant Council's decision of 7 October 2014 ('the 2014 Decision') on the basis of the Council's failure to obtain market value for the transfer of an interest in land to its former 50% subsidiary, Arena Coventry Limited ('ACL'), the First Interested Party, and thereby to ACL's new owner, Wasps Holdings Limited ('Wasps'), the Second Interested Party. In particular, the 2014 Decision included approval for the Council to extend ACL's lease over the Ricoh Arena ('the Arena'), of which the Council is freeholder, from under 40 years to 250 years, the overall effect being to confer on ACL (and Wasps as its owner) a 100% leasehold interest of 250 years in the Arena under which no rent is payable to the Council as freeholder ('the Land Transfer')."

In their skeleton argument, they submit that the total consideration provided by Wasps was £20.74 million as against what they contend was the true market value of "a 250 year leasehold interest in the [Stadium] of £48.5 million" (paras. 2(3)(b) and 4(2)). The higher value attributed is based upon the report by S&P. Thus, it is argued by Sky Blue that the Land Transfer, "in the context of the overall transaction", was effected at an undervalue of approximately £26.96 million, constituting unlawful "state aid" by the Council to Wasps, which Wasps should be ordered to refund to the Council.

30. At the hearing before this court in November 2017, when permission was given to Sky Blue to amend its claim and to adduce expert evidence, it was expressly conceded that it was not Sky Blue's case that the transfers of shares in ACL to Wasps represented transfers of those shares at an undervalue and the court made it clear that no challenge wider than a challenge to the "Land Transfer" would be permitted before this court: see paragraphs 4 and 5 of the Court's summary reasons for its rulings at that hearing. The hearing of the appeal proceeded on that basis. However, Sky Blue maintains that the "Land Transfer", as defined in its pleading, was effected at an undervalue "in the context of the transaction as a whole".

(D) The Law

31. The relevant law was not in significant dispute between the parties and was helpfully summarised in the skeleton argument of Mr Thompson QC and Mr Gibson for Sky Blue.

32. Article 107 of the Treaty on the Functioning of the European Union ("TFEU") prohibits, as being incompatible with the EU internal market, aid granted by a Member State in any form which distorts or threatens to distort competition by favouring recipients of such aid or the production of certain goods and which affects trade between Member States. The Article allows for the approval of certain types of State aid considered beneficial and, therefore, compatible with the internal market, but it is the function of the EU Commission to determine the issue of such compatibility.

33. Article 108 of the TFEU requires the Commission to be notified, of any proposal to grant state aid in sufficient time to enable it to exercise its functions. A state may not put any such aid proposal into effect until the Commission has produced a final decision on the question. A national court is entitled, however, to determine whether any particular measure is or is not an aid which should have been notified to the Commission: see per Lord Woolf MR in *R v Customs and Excise Commissioners, ex p. Lunn Poly Ltd.* [1999] STC 350, 358-9; the question of the intrinsic benefit and overall assessment of an aid remains a matter for the Commission.

34. Whether a particular act of a state is a relevant "aid" is determined by reference to the "market operator principle", i.e. whether the state is doing any more than a rational private party, motivated by commercial considerations, would be prepared to do in the position in which the state finds itself: *Commission v EdF and France* [2102] 3 CMLR 17, paragraphs 78-81.

35. Mr Thompson QC for Sky Blue also drew our attention to paragraph 81 of the Commission Notice on State Aid (post-dating the decision in question here) of 19 July 2016 concerning "consecutive transactions" which is in these terms:

> "In certain cases, several consecutive measures of State intervention may, for the purposes of Article 107(1) of the Treaty, be regarded as a single intervention. This could be the case, in particular, where consecutive interventions are so closely linked to each other, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, that they are inseparable. For instance, a series of State interventions which take place in relation to the same undertaking in a relatively short period of time, are linked to each other, or were all planned or foreseeable at the time of the first intervention, may be assessed as one intervention. On the other hand, when the later intervention was a result of unforeseen events at the time of the earlier intervention the two measures should normally be assessed separately."

That may not, therefore, require one to include as an aspect of "state aid" dealings with assets already owned by the other party (here the existing unexpired 50 year

lease) or assets owned by third party, private persons (here AEHC's shares in ACL). But, Mr Thompson also drew attention to paragraphs 86 and 87 of the same document relating to "pari passu transactions" which provide as follows:

> "86. When a transaction is carried out under the same terms and conditions (and therefore with the same level of risk and rewards) by public bodies and private operators who are in a comparable situation (a '*pari passu*' transaction), as may occur in public private partnerships, it can normally be inferred that such a transaction is in line with market conditions. In contrast, if a public body and private operators who are in a comparable situation take part in the same transaction at the same time but under different terms or conditions, this normally indicates that the intervention of the public body is not in line with market conditions.
>
> 87. In particular; to consider a transaction 'pari passu', the following criteria should be assessed:
>
> (a) whether the intervention of the public bodies and private operators is decided and carried out at the same time or whether there has been a time lapse and a change of economic circumstances between those interventions;
>
> (b) whether the terms and conditions of the transaction are the same for the public bodies and all private operators involved, also taking into account the possibility of increasing or decreasing the level of risk over time;
>
> (c) whether the intervention of the private operators has real economic significance and is not merely symbolic or marginal; and
>
> (d) whether the starting position of the public bodies and the private operators involved is comparable with regard to the transaction, taking into account, for instance, their prior economic exposure vis-à-vis the undertakings concerned (see section 4.2.3.3), the possible synergies which can be achieved, the extent to which the different investors bear similar transaction costs, or any other circumstances specific to the public body or private operator which could distort the comparison."

36. With regard to land transactions the state aid rules mean that the sale or lease of land by a state authority at an undervalue will constitute aid to the purchaser for these purposes: see *Valmont v Commission* [2004] ECR II-3145, at paragraph 45.

37. The Commission's guidance on *State Aid Elements in Sales of land and Buildings by Public Authorities* 97/C 209/03 10.7.97 advises that such sales should be through an

unconditional bidding procedure or be based upon an "independent evaluation carried out by one or more independent asset valuers in order to assess market value on the basis of generally accepted market indicators and valuation standards". This is a position confirmed by the Commission Notice of July 2016: see paragraphs 101 and 103.

38. Sky Blue contends that the Land Transfer in this case did not meet these requirements.

39. The Council contends that the Land Transfer was effected at proper market value and that it acted in proper reliance upon valuation advice given to it by a number of expert valuers from KPMG. It points out that, at the time of the relevant decisions, it was in the course of litigation with Sky Blue in Claim 1, which raised the very issue of state aid and that it was very conscious of the need not to infringe the relevant rules. Further, it maintains that it had nothing to gain and everything to lose by selling its assets at less than their true worth. Apart from price, the Council argues that there were other proper commercial advantages to it in securing the transaction with Wasps.

40. Finally, in his judgment on Claim 1 Hickinbottom J set out ten principles derived from the authorities and other materials which, in its judgment on the appeal, this court said were (subject to some small immaterial qualification) uncontroversial. It is not necessary to set them all out here. They are to be found in paragraph 88 of Hickinbottom J's judgment and in paragraph 16 of this court's judgment. Mr Goudie QC and Mr Dennis for the respondents in their skeleton argument referred us to point (x), as follows:

> "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."

(E) The decision of Singh J

41. As already mentioned, since Singh J's decision pursuant to the directions of this court of November last year, new evidence has been filed, including expert evidence. The material before the judge was, therefore, more limited than that before us. The judge had refused Sky Blue's application to adduce such material and the appeal against that part of his decision was allowed as a result of the November 2017 hearing in this court. However, as I have said, it seems that there was nothing in the essential

structure of the transaction or of the Council's decision under challenge which was not apparent at the time of the judge's decision.

42. Having dismissed Sky Blue's procedural applications, the judge also refused their substantive application for permission to apply for judicial review. He did so for the reasons which he gave in paragraph 21 of the judgment as follows:

> "21. Returning to the merits of the present application for permission, it is important to bear in mind two things. The first is the nature of the decision sought to be challenged. As originally formulated, that relates to the extension of the lease which would have otherwise expired in 2053 and would be extended to being one of 250 years. The second point to recall, as I have already mentioned by reference to the relevant legal principles, is that it is the material which was before the defendant authority at the time of the decision under challenge which is properly the subject of judicial review such as this. At that time the defendant authority had the advantage not only of obtaining its own internal advice, but also the advice of a reputable external organisation, namely KPMG. That provided it with a valuation of the relevant interest which it was extending. The valuation analysis, as Mr Goudie on behalf of the defendant has pointed out, in substance treated what was being done as being the transfer of the freehold (see in particular p.386 in volume 2 of the court bundle). That document stated that, because there had been a £21 million prepayment, in 2006, the freehold was estimated to be worth around £0.6 to £1 million. In fact, as it happens, the council received the consideration of £1 million for the transfer concerned which was at the top end of the estimation given by KPMG. In my judgment, Mr Goudie is right to submit that what the claimants seek to do in reality in this case is to compare apples with pears. The valuation which was before the defendant authority at the time from a reputable external adviser was one which, in my judgment, perfectly entitled it to come to the view that it did. There would, accordingly, in my judgment, be no arguable basis for the court to conclude that there was unlawful State aid in this case."

(F) The Appeal

43. The essence of the appeal, as I have said, is based upon the contention that the impugned decision was "to approve a sequence of commercial steps whose effect was to confer on [Wasps] a 100% control over a 250-year leasehold interest in the [Stadium], an asset whose market value was £48.5m, for total consideration of approximately £20m, an underpayment of approximately £28m or c.60%" (ground 1 of the grounds of appeal).

44. In this context, the remaining principal grounds challenge the judge's reliance upon the courts' decisions on Claim 1, which (it is submitted) did not concern the sale of land, and wrongly accepted what is contended to be the respondents' argument that

the residual freehold interest should be valued in isolation from the overall transaction. It is further submitted that the judge wrongly focussed on the value of the benefit conferred on Wasps by the transaction by reference to the value of the Stadium in the hands of the vendor rather than by reference to whether the sale price could have been obtained by the purchaser under normal market conditions: per the *Valmont* case (supra) paragraph 45 (grounds 1(2) – (3)).

45. In supplement to these grounds, the appellants' skeleton argument criticises the Council's failure to pursue an open bidding process (paragraphs 15-25) and contends that it did not obtain an independent market valuation of "the long leasehold interest to be sold to Wasps" (paragraphs 26-27). In this latter respect, in oral argument, Mr Thompson QC for Sky Blue presented a "critique" of various aspects of the KPMG valuation upon which the Council relied in forming an understanding of the value of the assets in their hands which were to be the subject of the sale.

46. In passages above, I have already endeavoured to summarise the broadly uncontroversial principles of law applicable in this case, taken deliberately on my part from Sky Blue's Detailed Statement of Facts and Grounds (as amended). One of the first points to note is that in land sales by state bodies the fact that a transaction has not been realised through a tender (or open marketing process) does not automatically mean that the transaction does not comply with market conditions, to use the terminology of the Commission notice cited by the appellants. Market price established by independent asset valuers is "the minimum price that can be agreed without granting state aid": see *Land Burgenland and Austria v Commission* Case T-268/08 and Case C-214/12 before the General Court and the Court of Justice of the European Union ("CJEU"), as cited by the respondents in their skeleton argument (at paragraph 68).

47. The real issue in the appeal is not lack of marketing but the allegation of sale at undervalue. It is, therefore, necessary to see what the Council sold, what it got in return and what the market value of the sold assets was.

48. To state the obvious, the prohibition of "state aid" is directed to aid by the state to, and resultant benefit derived by, a person or body corporate from the provision of that aid by the state. As it seems to me, benefit is only conferred upon such a person or body corporate by the state, in an undervalue transaction, if it is the state's asset that has been transferred at such undervalue. That other assets are already owned by the recipient or are acquired at the same time from other parties, conferring an overall benefit on the recipient, is not relevant to the question whether or not aid has been provided *by the state* by a transfer of *its* assets at an undervalue.

49. Thus, it is necessary (a) to identify the asset that the state has sold and at what price and (b) to compare that price with the proper market value of the asset.

50. In most cases, step (a) is relatively easy. In a land sale, the state owns land, which we can call "Blackacre", and sells it to a purchaser for £/€x. The argument over step (b), whether the true value is greater than £/€x may exercise the skill of valuers and may give rise to debate between equally skilled professionals in that field, but it is a task which is common in the profession and a market value can usually be ascertained – at least within a range.

51. Here, however, step (a) appears to present difficulty, because of the unusual mix of property and share interests owned by the Council and because of the nature of other property interests (in the hands of AEHC and ACL) which the Council did not own.

52. At the date of the decision the Council held two assets: (i) a 50% (non-controlling) interest in ACL; and (ii) the freehold reversion in the Stadium land, expectant upon the expiry in December 2053 of the 50 year lease held by the subsidiary of ACL, ACL (2006). It did not own the other 50% of the ACL shares, which were owned by the charity AEHC. Nor could it, at October 2014, sell the unencumbered freehold in the Stadium or grant an immediate 250 year lease in possession over the Stadium to Wasps or to anyone else for that matter, without the concurrence of AEHC and procuring the surrender of the existing unexpired term of the 50 year lease held by ACL.

53. It is, therefore, to my mind, a fallacy in Sky Blue's case to say as they do in various ways in their pleadings, grounds of appeal and skeleton argument, as the foundation of the state aid case, that "the 2014 Decision included approval for the Council to extend ACL's lease over the [Stadium]…to 250 years, the overall effect being to confer on ACL (and Wasps as its owner) a 100% leasehold interest of 250 years in the Stadium under which no rent is payable to the Council" (paragraph 1 of the Statement of Facts and Grounds). That statement elides the single element of the transaction consisting of the grant of the lease extension (which the Council could achieve on its own) with the ultimate effect of the transaction as a whole (which it could not).

54. At one point in his helpful oral submissions, Mr Thompson QC for Sky Blue, took us through the essentials of the conveyancing mechanics whereby Wasps ultimately acquired their 250-year lease. He showed us how the existing 50 year term(s) were surrendered and an entirely new 250 year term (from the same commencement date as the old term was granted). He submitted, according to my note that,

> "The critical question is whether the consideration [paid] by Wasps for the new lease reflected *the open market value of that new lease*" (Emphasis added)

In my judgment, that was not the question at all, let alone the critical one. The question was whether the consideration reflected the open market value of the lease extension, even if one adds the rider "in the context of the transaction as a whole". The surrender of the old lease and the grant of a longer new one were simply conveyancing mechanics whereby the old lease, in commercial terms, was extended to the longer term date.

55. The Council sold the assets which it did own (paragraph 50 above), which together with ACL's existing unexpired term and the sale of AEHC's shares in ACL had the effect of Wasps holding in the end a term of 250 years in possession, from the initial commencement date of 19 December 2003. In October 2014, the Council could not grant such a term for the simple reason that it had, several years previously, granted a 50 year lease over the Stadium, which still had 39 years to run, in return for the payment to it of the not insignificant premium of £21m.

56. The S&P valuation of April 2015, upon which so much reliance is placed by Sky Blue, did not value the asset which it was open to the Council to sell in October 2014.

It valued the amalgam of assets collected together by Wasps from various sources. As Mr Goudie QC and Mr Dennis submit in their written argument Sky Blue "…cannot challenge KPMG (and Mr Brent)'s valuations of the Land Transfer by relying on valuations of a wholly different asset: namely ACL's 250-year lease of the Arena/ACL as a business. In this respect, Singh J was right to conclude that: "what the claimants seek to do in reality in this case is to compare apples with pears"".

57. The nature of the asset valued by S&P, and valued for a very different purpose from the assets valued by KPMG in October 2014, appears from paragraph 20.1 of the S&P report. The paragraph says this:

> "We have valued the long leasehold interest as set out in the Certificate on Title, which is a term of 250 years from 19th December 2003 at a peppercorn rent.
>
> In large part, the Property is a trading operational business. The trading operations of the Arena, events, conferencing, exhibition areas etc. and the hotel generate the major income stream. This is supported by the contractual income derived from the G Casino underlease and the other minor licences and underleases and the grant of licences to both Coventry City Football Club and Wasps for use of the stadium bowl for football and rugby matches respectively.
>
> There is significant current and potential future additional income derived from stadium naming rights and sponsorship which adds income on a very high margin basis.
>
> Our valuation of the whole has therefore been derived from the contribution of three principal elements, namely:
>
> - The capitalised net income from trading activities undertaken in the stadium bowl, conferencing, banqueting, events and ancillary spaces. Within this we have included the licence fees received from Wasps and Coventry City F.C. and the other income from minor sublettings etc.
>
> - The net income from the hotel operated under a franchise agreement by De Vere Hotels.
>
> - The investment created by the letting of space to Grosvenor Casino for the purpose of running a Casino.
>
> Trading properties are usually sold as a fully operational business including trading potential and all trade furniture, fixtures, fittings, plant and equipment, but excluding trading stock and it is on that basis that we have approached the valuation of the trading elements. We assume that a purchaser would take over the benefit of all bookings and take over existing staff, but not necessarily senior management. Trading

> stock is excluded from our valuation as it is normally acquired at value on the date of completion.
>
> It is important to note that in valuing the Property and reflecting its actual trading history and potential future trading potential, we are including **only** property goodwill, that being goodwill derived from the property and its planning consent. We are seeking to replicate the view that other competent operators in the market would take in assessing how successfully they might operate the Property. In particular, we are not including any personal goodwill – that being any extra trade generated by the particular owner or occupier. In so far as Wasps or Coventry City F.C. are concerned therefore, we have not reflected any income from team sponsorship such as that associated with shirts or players, income or payments received from the Rugby Football Union or the Football League."

58. S&P were valuing a trading and operational business, including the presence of both football clubs. In valuing the assets transferred by the Council in October 2014, the element to be provided by Wasps' business was being provided by it and was not a business independently available to the Council as a feature of the assets that it was selling. As Mr Goudie QC for the Council put it, in paying what they did for the assets acquired, Wasps were not going to pay for the synergies that their own business would bring, which were included in the S&P valuation of ACL's business as a whole, including its interest in the Stadium.

59. In short, it seems to me that Sky Blue have not provided any evidence of a rival value for the Land Transfer that the Council was really making as a result of the contested decision, and thus no evidence from Sky Blue either of the benefit conferred upon Wasps, in contrast to the KPMG valuations of that asset.

60. The court made it "abundantly clear" in November 2017 (see paragraph 5 of the reasons given) that no extension of Sky Blue's claim beyond the criticism of the Land Transfer would be permitted. In my judgment, by use of the language of "the context of the transaction as a whole" Sky Blue, in its arguments on the appeal, have endeavoured to make just such an extension to their claim. Sky Blue's case persistently attempts to equate the grant of a 250 year lease of Blackacre with the grant of an additional term/a sale of a freehold reversion *expectant upon the expiry of an existing 50 year term* over the same Blackacre.

61. The problem posed for the valuers in attempting to find whether the Land Transfer was at an undervalue is caused by the unusual mix of assets in the hands, respectively of the Council, ACL and AEHC in October 2014. It is obvious from the industry expended by the various experts who have been involved in this case (and I have read their evidence with interest) that none of them would, I think, describe the work that they had to do as straightforward. This has not been a case, like many that come before the courts, in which rival valuation evidence is examined in detail at a trial over a number of days with cross-examination of the reporting experts. This judicial review procedure requires the court to take a broader view in deciding whether the Council made an unlawful decision to participate in the series of transactions as a

whole because those transactions included a grant of the lease extension at an undervalue.

62. In my judgment, Sky Blue demonstrate the problem in the case that they make on the valuation evidence by the submission in paragraph 72 of their skeleton argument, dealing with the difference between the KPMG and S&P valuations as follows:

> "72. …The difference in outcomes rather reflects (i) the fact that KPMG did not even attempt a conventional market valuation of the 250-year leasehold interest transferred to Wasps pursuant to the 2014 Decision; and (ii) the approach of KPMG to the valuation of ACL in the hands of Wasps was based on a series of subjective discounts that were unconventional and unjustified, with the underlying figures suggesting a range of values that would be entirely consistent with the conventional assessments of market value by S&P, as independent specialist property valuers: Pilgrem 1 ¶¶ 3.2-3.39 **[A4/34/434-446]**; Pilgrem 2 ¶¶ 2.2-2.8 **[A4/37/552-555]**, …"

Counsel adds to that passage, "…which [Mr] Hastie refuses to answer". (Mr Pilgrem, there referred to, is one of the experts instructed by Sky Blue).

63. The answer, which is said to have been refused by Mr Hastie, is one that is not in fact required for the decision of this appeal. The reasons are: first, because (for reasons given above) point (i) is immaterial as the Council did not have an immediate 250 year leasehold to sell in October 2014, and secondly, because point (ii) is immaterial as Sky Blue have conceded that it is no part of their case that the transfer of shares in ACL was at an undervalue and they are not permitted to extend their claim to say the contrary. Indeed, as regards (ii), it is difficult to see how any challenge could be made to the value received for the Council's 50% holding in ACL, since it received precisely the same price for its shares as AEHC received for an identical 50% holding. Further, as Mr Thompson said in argument, the charity held the equivalent of a "ransom strip" and, to my mind, it was in an ideal position to obtain the best price that it could for its shares.

64. Even if it were arguable that KPMG's valuation of ACL could be criticised along the lines indicated in paragraph 72 of Sky Blue's skeleton argument, by reference to Mr Pilgrem's evidence, as to which I express no view, that is not an issue open to Sky Blue on the appeal. Moreover, it is not realistic to try to criticise KPMG's valuation of what the Council sold to Wasps under the Land Transfer by reference to a valuation of an entirely different asset.

65. Mr Thompson submitted that the whole transaction was interlocking and that the end result desired by all was that Wasps should achieve a 250 year leasehold term in possession. Thus, it was that 250 year lease that needed to be valued as at October 2014. I agree that the transaction was interlocking and the plan was as Mr Thompson stated. However, the only assets which the Council could insert into the transaction, and the only benefit (or aid) that it could confer thereby on Wasps, was by the transfer to Wasps of assets which it owned. It simply did not own sufficient, in its own right, to grant a 250 year term. Such a term did not have to be valued.

66. In the course of argument, Mr Thompson for Sky Blue addressed a number of criticisms to the KPMG report on its own terms.

67. First, he submitted that KPMG valued the wrong asset. For reasons already given, I do not accept that submission.

68. Secondly, he said that KPMG did not provide an "open market valuation" of the assets that it did value, but rather a justification of the price that was proposed to be paid by Wasps. This submission was based upon a paragraph in Appendix 4 to the KPMG October 2014 report in these terms:

> "KPMG has been engaged by the Council to provide our opinion ("Opinion") as to whether the Proposed Transaction price is consistent with the estimated price at which we consider Wasps and the Council, as identified knowledgeable and willing parties acting commercially, would be expected to transfer the relevant Proposed Transaction assets or liabilities; and that reflects the respective interests of those named parties."

However, reading on (on the same page of the Appendix), it seems to me to be clear that advice on the price proposed was to be effected in the context of KPMG advising the Council upon the values both of the shares in ACL and of the lease extension which KPMG (for understandable reasons) regarded as "economically equivalent" to the freehold. This emerges later on the same page of Appendix 4, as follows:

> "The Scope of our work includes:
>
> Review and discussion of the terms of the Proposed Transaction;
>
> A valuation [1] of the equity of ACL and the Freehold at a current date, for the purpose of which the valuation of ACL to be considered on two bases (the Two Scenarios):
>
> Reflecting the current strategy under existing ownership, based on the main business plan and forecasts for ACL in place at the Valuation Date, as provided by ACL management; and
>
> Based on the strategy proposed by Wasps, as provided in the Wasps' business plan and associated financial forecasts.
>
> Consideration of the terms of the Proposed Transaction relative to our view on the value of ACL using the Two Scenarios and the Freehold, from the perspective of the Council only;
>
> Consideration of the number and nature of any offers received to date for the equity of ACL (aside from Wasps), as a result of the passive marketing of ACL (through

> national and local media etc), based on public information and that provided by the Council;
>
> Provision of an independent report ("the Report" or "the Deliverable"), which summarises the scope of our work, our supporting analysis and conclusions as to the appropriate valuation range for ACL and for the Stadium on the two bases provided; and
>
> Subject to our work enabling us to do so, provision of an opinion, within the Report, as to whether the Proposed Transaction price is consistent with the estimated price at which we consider Wasps and the Council, as identified knowledgeable and willing parties acting commercially, would be expected to transfer the relevant Proposed Transaction assets or liabilities; and that reflects the respective interests of those named parties."

In the second bullet point in the passage just quoted there is a reference, next to the word "valuation", to footnote 1 which was in these terms:

> "Note: [1] For the purpose of our Valuation under the Two Scenarios we define Market Value in accordance with the International Valuation Standards ("IVS") Framework proposed by the International Valuation Standards Council. Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

69. It is clear that KPMG did value the lease extension/freehold as part of their report. The valuation appears (on internal page 11 of the report) as follows:

> "**Arena Freehold**
>
> We estimate the value of the Arena freehold to be £0.6-£1.0m. the value is relatively low as a result of the £21.0m prepayment which was made by ACL in 2006 and which means no rent is receivable by the Council (as the freeholder) until 2053.
>
> We believe that a lease extension to 250 years as proposed would have materially the same value as a freehold interest.
>
> The Proposed Transaction terms assign a price of £1.0m for the lease extension. This price is therefore at the upper end of our estimated value of the freehold of £0.6m-£1.0m."

The methodology appears (on internal page 20) and begins with the short comment, under a heading "Key takeaways" in these terms:

> "**Key takeaways**
>
> In 2006, ACL exercised an option in the lease with NCHL to pay a £21m rent prepayment premium for the remaining 50 years lease period. NCHL cannot again request rent over this period. We valued the potential rent post 2053 using the premium paid to imply the present value of rent over a 50 year period. We projected this forward at inflation and discounted by 11%. Based on the potential for ACL based on the short term business plan (Wasps and ACL) the present value of future rent is low. However, conditions may change considerably over the longer term."

In my view, this short passage indicates that KPMG valued the true asset that the Council had to sell, namely the lease extension – not a new 250 year term in possession.

70. Thirdly, Mr Thompson submitted that KPMG valued the lease extension in isolation from the other features of the transaction. However, as Mr Goudie QC submitted, KPMG did value that asset in the context of Wasps' acquisition of the entire share capital of ACL. They did so by reference to ACL's management plan and Wasps' own forecasts for ACL's business, resulting in a lesser discount under the latter than under the former. They did much the same exercise in their cross-check valuation.

71. Mr Brent, instructed on behalf of the Council, did a further exercise in valuing the lease extension, from the respective points of view of the landlord and the tenant, and found a wide range of possible value in the hands of the purchaser, namely £0.8 to £1.9 million. However, in summary, he states in his report (at paragraph 5.17) this:

> "5.17 Of particular relevance in this regard is the reference that my "valuation should also take account of the context in which the Council proposed to sell the Lease Extension, specifically that it would only be sold to ACL (2006) if and when Wasps had purchased 100% of the shares in ACL (2006)'s parent company, ACL." This raises several questions in my mind. Firstly, the Lease Extension needed to have been considered in light of the overall transaction. Regardless of the value of the Lease Extension, a figure of £1 million does not look low in the context of the overall transaction, where 100% of the equity was being sold for £5.5 million or thereabouts. Secondly, the Lease Extension (in the form of the new Headlease) was still subject to the sublease to ACL and this raises questions marks over whether that Lease Extension could realistically have been sold to anyone other than the existing tenant/a party who had control of the existing tenant as that party would need to pay higher consideration than the existing tenant for a lease they would obtain no benefit from for a period 39 years and they would need to pay the sublessee compensation at the end of their lease, if they wished to occupy the premises for the purposes of their own occupation."

72. From this evidence, it seems clear that Mr Brent (reviewing KPMG's work) considered the matter very much in the context of the overall transaction and reached his view as just quoted.

73. In contrast, Mr Pilgrem consistently valued ACL's business as a whole, as is apparent from paragraph 5.1 of his report where he says:

> "5.1 The authors of the KPMG Report concluded that the value of the ACL group's business in the hands of Wasps was about £23 million, plus or minus £1 million, as at 17 September 2014. The authors of the S&P Report concluded (essentially, as I explain below) that the value of the ACL group's business as at 23 April 2015 (about 7 months later), when it was in the hands of Wasps, was £48.5 million. …"

A little earlier in his report (paragraphs 2.29-2.30), Mr Pilgrem answers the question of how he accounted "for the different outcomes of the KPMG Report and the S&P Report". His answer was:

> "2.29. In respect of their quantified results and conclusions, the outcomes of the KPMG report and the S&P Report were very different. As shown in Figure 2-2 above, the authors of the KPMG Report concluded that the value of the ACL group's business in Wasps' hands was about **£23 million**, as at 17 September 2014. The authors of the S&P Report appear to me to have concluded that its market value was about **£48.5 million**, about 7 months later.
>
> 2.30. The difference between the results of the valuation analysis of the authors of the KPMG Report and that of the authors of the S&P Report can be understood as follows:
>
> (1) the authors of the KPMG Report had much lower expectations of the performance of the ACL group's business in Wasps' hands than did the authors of the S&P report;
>
> (2) as I identify in Section 3, the lower expectations of KPMG were primarily reflected in a significant subjective 'company specific' premium added by KPMG in assessing the discount to apply to Wasps' forecasts of the performance of the ACL group's business in its hands. KPMG's discount rate of 15.8% (in nominal terms) was significantly higher than S&P's of 12.5% and, if S&P's analysis was on a pre-tax basis, which appears to me to be likely, the relevant point of comparison may be a discount rate of about 10.5%; and
>
> (3) as I identify also in Section 3, the authors of the KPMG Report also effectively reduced their

> assessment of the value of the ACL group's business by 11.6% (£3.075 million) by making a deduction for 'marketability'."

74. These conclusions, it seems, led to the submission made by Sky Blue in their skeleton argument, paragraph 72 (quoted above), criticising KPMG (i) for failing to value an asset that the Council did not have to sell, and (ii) for undervaluing the share capital of ACL which is not open to challenge.

75. It is clear that an essential feature of Sky Blue's argument, in seeking to rely upon the S&P report, is a challenge to KPMG's valuation of the shares in ACL while maintaining that they do not seek to challenge the share sale. Those positions are contradictory and the argument as to the value of the ACL shares sold by the Council has been conceded by Sky Blue (inevitably so when one takes into account the identical purchase price paid for the ACL shares owned by AEHC) and the ruling of this court on 28 November 2017 prevents them from resurrecting it.

76. In the circumstances, I would dismiss this appeal and would uphold the order made by the judge, refusing permission to apply for judicial review.

77. As I have said above, I consider that the judge was correct to refuse permission to apply for judicial review, on the basis that Sky Blue's case was based essentially on a comparison between "apples and pears". Nothing has been revealed since then about the essential structure of the transactions approved by the Council in the decisions under challenge. Further, however heavily disguised, the amended claim required Sky Blue to challenge the value of the consideration paid for the Council's ACL shares, a challenge which Sky Blue themselves eschewed before the Court on 28 November 2017 and which they were prevented by the Court from resurrecting. The amendment of the claim has turned out to be nugatory.

78. In addition, as Singh J noted, following the decision of the Supreme Court refusing permission to appeal from this court's order on Claim 1 and the expiry of the consensual stay of these proceedings, there was significant delay in pursuing the claim at all until the application was made to make the amendment to the Statement of Facts and Grounds. While Singh J would not have refused permission to apply on the original grounds on the basis of delay, which had been presented within time, he regarded his refusal of the application of permission to amend as effectively superseding the question of delay arising out of the making of the application to amend. This court, in November last year, granted permission to make the amendment to the Statement of Facts and Grounds. It did not grant permission to apply for judicial review. It left that matter over to the "rolled up hearing" which had previously been directed.

(G) Conclusion

79. For the reasons given, I would dismiss the appeal and would uphold the order of Singh J of 17 July 2017.

Lord Justice Irwin:

80. The difficulty in cases such as this, if there is one, is firstly to hold clearly in mind the asset capable of being transferred by the public body, and secondly the valuation of that asset. There is no doubt here that the asset transferred is the extension of the lease to 250 years, not the whole lease once extended. Thus, on the facts of this case, the relevant value is the value of the extension, not the value of the extended lease.

81. The case might be altered where the public asset transferred represented a 'ransom strip' or similar asset, without which other assets held, or to be transferred, would be of much reduced or even no value. There, the valuation of the public asset transferred would have to address the value unlocked by the transfer, rather than an artificial value ignoring such consequences: that would be intrinsic in establishing the value of the asset which the public body had the capacity to transfer.

82. Such is not the case here. The lease extension added to the value of other assets held, or to be held, by Wasps. But those other assets are very far from being of negligible value on their own. For the reasons given by McCombe LJ, I agree that there was no undervalue of the public assets transferred here. Hence, I agree with McCombe LJ and would dismiss the appeal.

Sir Brian Leveson P:

83. I agree with both judgments.