



Neutral Citation Number: [2022] EWHC 1137 (Admin)

Case No: CO/2036/2021

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/05/2022

**Before:**

**RICHARD HERMER QC, SITTING AS A DEPUTY HIGH COURT JUDGE**

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**Between:**

THE QUEEN (on the application of)  
THE GET REAL MARKETING COMPANY  
LIMITED

**Claimant**

**- and -**

(1) CULTURE RECOVERY BOARD  
(2) SECRETARY OF STATE FOR DIGITAL,  
CULTURE, MEDIA AND SPORT

**Defendants**

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SAM KARIM QC (instructed by Keystone Law) for the Claimant  
STEPHEN KOSMIN and ADAM BOUKRAA (instructed by Government Legal Department)  
for the Defendant

Hearing dates: 27 April 2022  
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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.

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 10.30am on 13 May 2022

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**RICHARD HERMER QC:**

1. On 5 July 2020 the Second Defendant announced the creation of a ‘Culture Recovery Fund’ (‘CRF’), designed as a rescue package for cultural and heritage organisations adversely impacted by the coronavirus pandemic. One aspect of the CRF’s mandate was to provide loans, on commercially advantageous terms, to organisations and companies operating in the cultural sector. On 6 January 2021 the Claimant applied to the CRF for a loan. On 29 March 2021 the Claimant was informed that his application had been rejected (‘the Decision’). The reason given for the Decision was that the Claimant had not met a relevant criterion for the grant of a loan, namely it had not demonstrated that it had exhausted alternative means of funding. This judicial review is a challenge to the legality of that decision.
2. This judgment is divided into the following parts:

	Paras
Part 1: The CRF scheme	3-11
Part 2: The Claimant’s application to the CRF	12-22
Part 3: The nature of the claimant’s challenge	23-29
Part 4: Analysis and conclusions	30-52

**Part 1: The CRF scheme**

3. A description of the creation, mandate and operation of the CRF was provided in the witness statement of Sir Damon Buffini, dated 9 December 2021, served on behalf of the Defendants. At all the times material to this claim, Sir Damon served as Chair of the First Defendant, the Culture Recovery Board (‘CRB’), which as described below, oversaw applications for loans from the CRF. Further information about the operation of the scheme, including aspects of its decision-making process, were provided in the witness statement of Francis Runacres MBE, of Arts Council England, the body charged with administering and monitoring the scheme on behalf of the Second Defendant.
4. The CRF was a £1.57 billion fund. It was a non-statutory scheme, in other words, it was not created by, or operated in accordance with, either primary or secondary legislation. Sir Damon describes that “*in broad terms, the aim of the CRF was to protect England’s cultural heritage and cinema ecology by providing [financial support to] culturally significant organisations, which had exhausted other funding options and were clearly at risk of financial failure.*”. Sir Damon also explained that the CRF was:

“... to have been designed as a fund of last resort, covering a wide range of cultural organisations from across the arts, heritage and independent cinema sectors, from both the commercial and not-for-profit sectors. It was also designed to be delivered at pace in the expectation that demand would outstrip support available.”

Approved Judgment

5. Of the principal sum in the CRF, £270 million was made available for loans including a budget allocation of up to £100 million for a repayable finance programme. The programme relevant to this claim was the ‘CRF Repayable Finance Round Two’ programme. This permitted cultural institutions to apply for loans for amounts over £1 million. In accordance with HM Treasury stipulations, loans carried a minimum interest rate of 2% repayable over a term of up to 20 years with up to a 4-year repayment holiday. There was no dispute between the parties that the repayment terms were substantially below commercial market rates.
6. The Second Defendant appointed the First Defendant (“CRB”) to oversee the distribution of funds under the CRF. The members of the Board were selected by the Secretary of State and were drawn from across the cultural, financial and business sectors. Their work on the CRB was unpaid. Sir Damon himself was a founding partner of a global investment firm and has extensive experience in the voluntary and arts sectors. Other members of the Board were drawn from cultural bodies broadly falling under the Second Defendant’s auspices (for example the British Film Institute) together with five independent members. The backgrounds of the members of the Board were set out in Sir Damon’s witness statement and there was rightly no dispute with his assessment that *“this was a very high-powered board.”*
7. In order to assist the assessment of applications for loans, the CRB delegated initial assessment and scrutiny to an Investment Sub-Committee (‘ISC’). This was constituted to reflect the commercial, financial and cultural sector expertise of CRB members. It was chaired by Sir Damon. The mandate of the ISC was to provide a detailed review of the merits of each application and to provide the CRB with a recommendation as to whether or not it should be granted. To assist in this process, independent financial consultants (PwC and Smith and Williamson) were contracted to provide assessments of applications through the use of Independent Business Reviews (‘IBRs’).
8. Arts Council England published non-statutory guidance to assist those considering making an application under the scheme. The guidance was entitled ‘Culture Recovery Fund: Repayable Finance Round Two, Guidance of Applicants’ (‘the Guidance’) and was supported by a ‘Frequently Asked Questions’ page on the Arts Council’s website. The Guidance was approved by both the Second Defendant and HM Treasury. Sir Damon’s evidence describes how the Guidance had to be fit for purpose for the full range of anticipated applications, from large commercial theatres through to small community owned church trusts.
9. The Guidance explained that applicants would have to comply with a two-stage process before a loan would be granted. Stage One required an applicant to complete an online application form in which the primary focus was demonstrating their cultural significance. The Guidance explained that applicants would have to provide information on their finances on the application form (in a section with a maximum space for approximately 350 words) which included addressing:  
  
*“how you have exhausted all other reasonable options to ensure that your organisation remains financially viable, including affordable lending, viable alternative options for commercial, contributed and philanthropic income, and using your own resources”*
10. In his evidence, Sir Damon addressed this requirement in the Guidance. He observed:

Approved Judgment

*“When applying the criteria in the Guidance, the term ‘reasonable’ was very significant. It meant that the ISC and later the Board took into account the specific circumstances of each applicant and, applying our experience and expertise, considered whether alternative funding options were or were not reasonable in the context of the applicant, including the nature of an applicant’s business and its sophistication.”*

11. A successful applicant in Stage One, would then be required to provide further detailed, information at Stage Two which was more focussed on financial and recovery plans. The Guidance set out the types of information to be included in a recovery plan. As part of Stage Two, IBRs were carried out by the financial consultants. Sir Damon describe the purpose of the IBR to be “... to provide clarity as to the current financial and/or operational status of an applicant.” All the materials generated as part of both Stage One and Stage Two would be considered by the ISC and thereafter the CRB when making their decisions.

**Part 2: The Claimant’s application to the CRF**

12. The Claimant is a parent company of a group of companies that operates in the music and youth sector. It has three divisions (operating under trading names of Campus Group, BeSixth and Canvas), as well as two property companies for Canvas venues in London and Manchester. Its background and operations are described in two witness statements from Mr Dean James, its Chairman. Mr James describes how the company co-founded, created and curated very well-known festivals such as Wilderness and Lovebox. The company has also been at the forefront of developing and showcasing new music. This includes the creation of a community hub in Tower Hamlets a local venue providing opportunities for the previously culturally underserved community. The focus of the company has been to broaden diversity and inclusivity in its audiences across all its events and venues.
13. The impact of the pandemic on the Claimant was significant. Mr James describes how it wiped out almost all income streams, forcing the Claimant to mothball it’s venues, negotiate standstill agreements with landlords, reduce salaries and place staff on to the government’s Job Retention Scheme. In light of this predicament the Claimant applied to the CRF for a loan of £1,494,740.
14. Mr James’s statements address the application from the Claimant’s perspective. A focus of the application, including the recovery plan, was the Canvas venue, and it described an intention to run (amongst other things) a programme of grassroots music events and programmes relating to health and wellness, as well as environmental and social awareness. As part of the financial details in its recovery plan the Claimant noted that it had successfully applied for a loan from Lloyds Bank (amounting to £250k) but an application from Funding Circle had failed. The recovery plan also provided details of current reserves and the balance sheet which recorded that a Manchester venue had secured a £1.5 million loan for development and that the lease for this property could be used as security for a CRF loan together with the Canvas lease. Mr James describes how the Claimant contracted specialist writers to assist in completing the application forms, not least because of the limited space available to applicants in Stage One. Mr James also records how the Claimant worked cooperatively over a three-week period with PwC as part of Stage Two, providing them with a considerable amount of information and documentation. He notes:

Approved Judgment

*“PwC did not ask me one follow up question to the Recovery Plan document. They did not ask us anything about our other attempts at obtaining finance, because they knew it was blindingly obvious that hospitality businesses could not get funding elsewhere in the current economic climate.”*

15. The application successfully passed Stage One. The assessment of the application in Stage Two is described in detail by Sir Damon who chaired both the ISC and CRB meetings which considered it. A draft report was issued by PwC following their interviews and discussions with the Claimant’s management team. A copy of the draft report was provided to the Claimant who did not identify any errors or material omissions.
16. The ISC was scheduled to meet on 22 February 2021 to consider the Claimant’s application together with others. In advance of that meeting, on 19 February 2021, Mr Runacres circulated a memorandum highlighting issues that the ISC might wish to consider. The memo concerning the Claimant consisted of three short bullet points, the third of which stated *“Exhausted other means? Corporate structure: other possibilities for funding before CRF?”* The ISC were also provided with a ‘Blue Sheet’, a document designed by Sir Damon to be used to assist the committee’s decision making. This was prepared by the Committee’s Secretariat.
17. The meeting of the ISC was attended by all 5 members of the sub-committee as well as the financial consultants. The minutes of the meeting record the core element of their decision as this:

*“The ISC was not convinced that the application met the criteria of having exhausted all other reasonable options to ensure that the organisation remains financially viable and was therefore not able to recommend to the CRF Board the making of a loan to the applicant.”*
18. The minutes recording the decision are very brief. The only further insights to be gleaned from the contemporaneous record were that although the Claimant had discounted the option, previous injections of capital made it seem likely that the applicant could find funding elsewhere and it had not exhausted all options for funding. In addition, the ISC observed that the loan was intended to support an expansion of the business and that it therefore ‘decided’ that the applicant was proposing to use the loan for purposes outside the criteria of the CRF.
19. The following day a memorandum was prepared and circulated to the CRB. This was sent together with the PwC report, the ‘Blue Sheet’ and also a ‘Red Sheet’. This was the same form of document as the ‘Blue Sheet’ and was drafted by the Secretariat to the committee, to reflect the ISC’s recommendation. The Board met on 24 February 2021. Its minutes were even more sparing than those of the ISC. It simply records:

*“The ISC had not been convinced that the applicant had exhausted all other reasonable options to ensure that the organisation remains financially viable and was therefore not able to recommend to the CRF Board the making of a loan to the applicant... .. The Board agreed with the recommendation.”*
20. Mr Runacres’ statement seeks to provide an explanation as to why the recording of decisions of both the ISC and CRB was in such shorthand form – the answer being said

Approved Judgment

to lie in a mix of institutional practice and the exigencies of the pandemic, not least the need to process applications urgently.

21. In any event, Sir Damon's statements provide a more detailed explanation of the decision-making process of the two relevant meetings of the ISC and CRB, both of which he chaired. Sir Damon's evidence is that the analysis of both bodies was based upon consideration of all relevant materials to which they then applied their experience and expertise. In particular they took into account that (i) the Claimant's minority shareholders (having invested through Edition Capital) were "*highly commercial shareholders and a sophisticated collective*" but no explanation (c.f. bare statement) had been provided why no further capital could be raised from them; (ii) the two majority shareholders, one of whom was Mr James, were also sophisticated investors with proven track records who could reasonably be expected to inject more capital into the business to protect their investment or source other funds, for example through a rights issue, or seeking funds from venture capital investors; (iii) the Committees were not satisfied that a convincing explanation had been provided as to why capital sums that the Claimant asserted were ringfenced (cash in the bank in Australia for the Campus Group, and a loan for the Manchester venue) could not be utilised as an alternative to a loan and (iv) the financial history of the Claimant, including a five year group forecast, showed that it was always cash positive. There was no evidence, in the view of the members of the ISC and CRB, to suggest that steps had been taken by the Claimant to fully explore alternative funding streams.
22. On 10 March 2021, Arts Council England wrote to the Claimant to inform them that the application had been unsuccessful. It is accepted that due to a clerical error the Claimant was provided with incorrect reasons for that decision. That error was corrected when a clarificatory email was sent by Arts Council England on 29 March 2021, and this is the decision under challenge in these proceedings. The email stated:  
  
*"The decision of the Culture Recovery Fund Board was to reject your application because they were not convinced that the application met the criteria of having exhausted all other reasonable options to ensure that the organisation remains financially viable."*

**Part 3 – the nature of the Claimant's challenge**

23. The Claimant issued proceedings for permission to seek judicial review on 9 June 2021. Permission was initially refused on the papers but subsequently granted at an oral renewal hearing by Mr David Lock QC, sitting as Deputy High Court Judge, on 20 October 2021. The Judge limited the grant of permission to three of the five grounds contained in the claim form. It was not immediately apparent from either the Claimant's pleadings or the Order precisely what grounds permission was granted on, but the parties helpfully agreed in writing that the issues were whether the Decision of 29 March 2021 was unlawful by reason of:
  - i. First Defendant taking into account irrelevant considerations; and/or
  - ii. The First Defendant failing to give any good reasons; and/or

Approved Judgment

- iii. The decision being irrational and disproportionate in the circumstances.
24. These grounds were materially clarified at the outset of the hearing by Mr Karim QC, counsel for the Claimant. Mr Karim QC made plain that the Claimant's three grounds should be properly understood as collapsing into one composite challenge, namely that the decision reached was irrational. Accordingly, it was not a case premised upon particular 'irrelevant considerations' being taken into account by the ISC/CRB but rather that seen as a whole they failed to address the full factual reality presented to them and accordingly a refusal to grant the requested loan in these circumstances was irrational. Similarly, Mr Karim QC made clear that he was not advancing a 'reasons' challenge in the sense normally understood in public law, e.g. a failure to give reasons at all, or a failure to give sufficient reasons – as per, for example, the well-known case of *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242. Rather, Mr Karim QC made plain that this aspect of the challenge was focused on the reasons given not being 'good reasons' in the sense that the overall conclusion reached was not a good one, or to put it in public law terms, it was an irrational one. This is therefore, as the Claimant accepted, a challenge brought solely on the basis that the decision was not one that any reasonable decision maker could have reached.
25. Mr Karim QC eloquently developed three aspects of his case on rationality as it applied to the decision-making process. Firstly, he submitted that it was irrational for the application to be rejected on the face of the Claimant's own submitted documentation. It was submitted that this plainly demonstrated a viable application; not least it should have been obvious that his clients could not have secured funding from elsewhere – if they could have done, they would have done. Secondly it was said that the ISC and CRB failed to 'apply their own marking' in that their decision was impossible to reconcile with their own internal documentation which it is said demonstrated that all criteria, including financial, had been satisfied. The documents were tables providing assessments of various elements of the application. These documents demonstrated, Mr Karim QC contended in opening submissions, that 'something has gone seriously wrong.' because the rejection of the application was impossible to reconcile with their own internal grading. Thirdly, Mr Karim QC submitted that rejection of the application was irrational in light of the PwC report which had not flagged up any areas of concern about a failure to consider alternative funding schemes despite rigorous examination of the application.
26. The heart of the Claimant's case is that taking into account the manner in which the pandemic was destroying businesses generally, and the cultural sector in particular (reflected not least in the urgent need for the creation of the CRF itself) and taking into account the nature and track record of its business, it is simply unfathomable how anyone could conclude they had realistic access to alternative funds - if they did, it would have been blindingly obvious to anyone that they would have accessed them.
27. Mr James put it powerfully in his second statement, addressing the PwC report but with overlap with aspects of the entire claim:
- “In my opinion it was abundantly clear to PWC from the outset that we had been surviving by cutting costs, not paying our landlord, not paying ourselves and begging for whatever small grants we could get. In those circumstances it was obvious to PWC and the CRB that we had been unable to obtain finance from elsewhere. If we had been*

Approved Judgment

*able to then surely, we would have paid ourself a wage... To infer that we saw this as an easy route to cheap alternative funding is a huge insult to people who had worked tirelessly to save a business and provide employment. As a business we have never taken on debt and the decision to apply to a CBILS loan and the CRF loan was not taken lightly. This was a Government backed emergency fund designed to be employed in a time of crisis and we were, and remain, in dire need of that help.”*

28. The Defendants’ case, advanced with skill by Mr Kosmin, was that the decision of the CRB fell well within the ambit of discretion that it was afforded in the administration of a non-statutory scheme and was entirely consistent with the Guidance. The ISC and the CRB were fully entitled to take into account whether an applicant could source alternative means of funding, indeed this was made plain in the Guidance itself. Both the ISC and the CRB were mandated to apply their considerable expertise and experience to the assessment of any application. Whilst they were assisted by the reports from PwC, these were no more than a helpful source of factual evidence about an applicant company, and their conclusions in no sense bound either Committee. The detail in the report does however serve as a reflection of the seriousness with which applications were taken and the level of rigour applied in the decision-making process. The Defendants rely on the evidence of Sir Damon to show that expertise and experience was applied by the committees in their assessment of the possibility of alternative funding – it was, for example, perfectly rational of them to look at the track record of the directors and investors and assess that not all reasonable avenues had been explored. Furthermore, it was submitted, there was no failure ‘to apply their own marking’ – both the tables were simply aide-memoires prepared by the Secretariat and did not bind their decisions in any way.
29. Mr Kosmin also developed an alternative argument, pursuant to s.31(2A) of the Senior Courts Act 1981, that relief should be refused on the basis that it is highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred. These submissions are premised on the additional reason for the refusal, recorded in the ISC minutes but not in the decision communicated to the Claimant, namely that the funds were sought for business expansion thereby taking it outside of the criteria. This ground was supported by Sir Damon’s evidence that the application would have been refused on this ground alone.

#### **Part 4: Analysis and conclusions**

30. In my judgment the following principles guide the assessment of the legality of the decision under review:
- i. This is a claim challenging the rationality of a decision. As with any rationality challenge, the bar is set high. It is plainly not enough for a party to demonstrate that a different outcome was preferable but rather it must show that the decision was manifestly unreasonable – in other words that it fell outside the range of reasonable responses – see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 and the very many subsequent cases that have applied the ‘*Wednesbury*’ test.



Approved Judgment

- ii. The decision under review is that of a non-statutory body, under a non-statutory scheme, applying non-statutory guidance, introduced by the Second Defendant's common law powers. In many contexts, including this one, the absence of a statutory framework, serves to reinforce the broad discretion given to decision makers. Although decision makers must at all times act fairly (including in accordance with any published guidance) they are unconstrained by bespoke statutory rules governing their decision-making process and enjoy a broad discretion as to how to reach their decisions and the decision itself. There is no challenge here to the vires of the scheme created by the Defendants, nor to the contents of the Guidance, nor to the application of the Guidance by the Committee (in the sense that it is not said they veered off it) – rather this is a rationality challenge seeking to impeach a decision maker who enjoys a very broad discretion in the decision-making process.
- iii. The decision was taken by two committees comprised of individuals selected for their experience and expertise. Although many members of the public would have been aware of the general adverse impact of the pandemic on all sectors of the economy, not least the cultural sector, this broad knowledge should not be equated with the far more detailed expertise required to be applied by the First Defendant when considering an application for a loan. The assessment, amongst other things, of whether a business had exhausted alternative sources of funding required the application of knowledge and expertise of matters such as relevant financial markets, capital availability and the realities facing a company like the Claimant in the cultural sector. These are matters of expertise that fall out with general knowledge and which Courts should be slow to second guess, see for example *R (Mott) v Environment Agency* [2016] 1 WLR 4338.
- iv. This is not a case in which any pre-existing rights of the Claimant have been removed or infringed. There was no 'right' to a loan under the scheme and thus a refusal did not deprive the Claimant of any right that they had previously exercised. This is not therefore in the category of cases in which a Court will give any form of enhanced scrutiny to the decision-making process. The Court will of course intervene where it can be demonstrated that the decision-making process was beyond the bounds of reasonableness, in accordance with the principles set out above.

***Rationality – the Claimant's loan application itself***

31. This was the first of Mr Karim QC's aspects of irrationality, namely that any reasonable decision maker would have concluded, on the Claimant's application and supporting materials, that alternative sources of funding had been exhausted. Although I consider the PwC report and other documents separately below, for the purposes of this part of the Claimant's argument, I take them all as being part of the whole application before the First Defendant.
32. In my judgment there is nothing capable of demonstrating that the conclusion of the First Defendant was irrational. I reach this conclusion for the following five sequential reasons:

Approved Judgment

33. Firstly, there is no dispute that the First Defendant was fully entitled to consider whether alternative sources of funding had been exhausted and equally entitled to refuse an application if they were not so satisfied. This was made explicit in the Guidance.
34. Secondly, in reaching its decisions under this non-statutory scheme, the First Defendant was fully entitled to place the burden of proving that alternative funding sources had been exhausted on the Defendant. This was considered (entirely reasonably in my judgment) to be particularly important in respect of applications from ‘for profit’ companies. Sir Damon described how the ISC and CRB (effectively acting as guardians of public money) were alive to the risk that companies might see CRF loans as commercially advantageous compared to those realistically available on the market and/or that those companies truly unable to secure commercial loans/investment might present as unacceptably high risk for government support. Sir Damon explained:
- “Accordingly, we had close regard to the burden of proof under the Guidance and we rigorously tested assertions as to the lack of alternative funding against however much or little evidence that the applicants had chosen to provide in support”.*
35. Thirdly, flowing from this, the Defendant did not see its role to ‘fill in gaps’ in any application, or necessarily to draw inferences in favour of an applicant where information was thought to be incomplete. Again, this might be thought unsurprising in pressing circumstances of the pandemic in which the scheme was offering tax-payer backed loans, on commercially advantageous terms, to applicants from a range of organisations including ‘for profit’ companies. As Sir Damon explained:
- “The Guidance clearly flagged that it was for applicants to demonstrate in their applications that they had met the specified criteria – and not for the delivery bodies to conduct additional due diligence or investigate independently. Moreover, we (the members of the Board and ISC) understood it to be legitimate for applications to be rejected on the basis of having not made out the case for funding. The decision to place the burden on applicants was a practical consequence of the significant expected demand on the CRF (across Rounds 1 and 2, the delivery bodies processed c.9000 applications), and limitations on the administrative resources available.”*
36. During the course of argument, there was a suggestion from Mr Karim QC that if decision makers considered that there were any gaps in the information provided then it behoved the First Defendant to seek further materials from an applicant prior to making any adverse determination. Even putting to one side this was not a pleaded element of the Claimant’s case, there is nothing in the scheme itself that suggests any such obligation and in light of the evidence of Sir Damon there can be no realistic suggestion that some form of ‘duty to inquire further’ could be said to rest on the decision maker. Equally there was nothing in the materials that could be said to give rise to any form of legitimate expectation of consultation on the facts of this case, even if such a ground of challenge had been pleaded.
37. Fourthly, drawing the points above together, there is nothing in the materials before the Court to suggest that the concerns on which the First Defendant based its decision to refuse the application were in any sense irrational. It considered on all the evidence garnered by both stages of the application that factors such as the experience of the management team, the provenance of their investors, the question marks about their desire to ‘ring fence’ parts of the business and previously secured loans etc, did not

Approved Judgment

satisfy them that alternative funding sources had been exhausted. They did not conclude that alternative sources were definitely available but rather, in light of the evidence, that sufficient questions remained as to whether alternative sources had been exhausted.

38. On the basis of the materials before the First Defendant at the time the Decision was made, the Claimant does not come anywhere close to demonstrating that a failure to reach a contrary conclusion was irrational. The mere fact that a business was suffering during the pandemic, had laid off staff, had sought government assistance etc does not of itself prove that alternative sources of funding were not potentially available. These were no doubt the realities facing an array of businesses and organisations in the sector. It was not irrational to assume that whilst some of those businesses might have exhausted alternative sources of funding, others might not have. Some businesses, well able to obtain commercial sources of funding, or otherwise remain afloat during the pandemic, may well have considered it prudent to take steps such as laying off staff, or seeking government assistance, in light of the impact of the pandemic. These facts of themselves do not necessarily prove that all reasonable steps to seek alternative funding had been exhausted. The First Defendant considered itself entitled, indeed obliged, to look beyond these facts in order to answer the distinct question about the availability of alternative funding. In my judgment they were fully entitled to do so and there is nothing irrational in the decision reached.
39. For the avoidance of doubt, none of this is to conclude that the Claimant had not in fact exhausted alternative means of funding, or that I necessarily reject the evidence of Mr James that it was not in fact realistic. That is not the test to be applied on judicial review. The question is whether it was irrational of the First Defendant not to reach the same conclusion. For the reasons given, it was not.
40. Fifthly and finally, my conclusions on this aspect of the rationality challenge are reinforced by the fact that both the ISC and the CRB were fully entitled to use their expertise and experience in assessing whether the applicant had demonstrated that alternative sources of funding had been exhausted. The decision required insights into areas such as contemporary market conditions, the business acumen of the applicant, its shareholders, corporate structure and knowledge of the workings of cultural sector itself. The First Defendant applied expertise and knowledge that neither a Court nor members of the public more generally could be expected to possess. In order to demonstrate that their conclusions were irrational the Court would need to be presented with very cogent evidence that their analysis was manifestly unreasonable. For example, it would need cogent evidence to demonstrate that it was manifestly unreasonable for the members of the Committees to place any weight on the track record and experience of the investors, that it was manifestly unreasonable to consider that alternative funds could have been raised by a rights issue or an injection of investment by venture capitalists and/or that it was manifestly unreasonable to question whether the Claimant had satisfied the Committee that funds could not be utilised from other sources available to it (e.g. cash in the bank in Australia). There was no evidence that came close to reaching this threshold.

***The Defendants' own documents***

41. This was the second aspect of Mr Karim QC QC's rationality challenge. As set out above, the Claimant's argument is that the positive grading it received from the First

Approved Judgment

Defendant itself during the course of the application process, demonstrated the irrationality of what was said to be an irreconcilable subsequent decision to refuse the application. In short, it is said that the First Defendant's decision, does not match up to its own analysis.

42. In my judgment this argument collapsed at the hearing once Mr Kosmin clarified, during the course of his submissions, the status of the documents. Mr Kosmin identified that the documents in question were the tables prepared for both committees. Mr Kosmin took the Court to the memo prepared by Mr Runacres on the 23<sup>rd</sup> February 2021 enclosing relevant documents including the tables or the forthcoming CRB meeting. The document makes plain that the table enclosed was the work of the Secretariat (i.e. not the ISC or CRB itself) and that the ratings given to each application are “... *inherently approximate so this is intended as a tool to guide discussions rather than as a strict decision-making mechanism.*”
43. There was some dispute as to whether the ratings in the tables did, or did not, reflect a wholly positive assessment of the Claimant's application including the extent to which it even considered the exhaustion of alternative sources of funding. Yet however the documents are to be read, the problem for the Claimant is more fundamental. Even if the tables produced by the Secretariat as a ‘tool to guide discussions’ were fully supportive of the application, there was nothing irrational in the decision makers themselves reaching a decision that alternative funding options had not been exhausted. The tables can in no sense be sensibly taken as binding the decision makers or demonstrating some inherent irrationality in the reaching of a different conclusion. Both the IRC and the CRB were fully entitled to consider the evidence (including the question of its sufficiency) in the round and reach conclusions different to those in guides produced as an administrative aid by its Secretariat (even if that was what the Guides were purporting to do).
44. It may be that the status of the documents had not been fully appreciated by the Claimant until the Defendant's explanation was articulated in oral argument. Mr Karim's earlier submissions appeared to have been predicated on a mistaken instruction that the documents had been generated by committee members rather than their administrative support. Although Mr Karim QC did not formally abandon this aspect of his argument, he declined an invitation from the Court to address it fully in his reply. In any event, for the reasons given, I do not consider that these documents make out a case that the decision was in any sense irrational.

***PwC Report***

45. This was the third and final aspect of Mr Karim QC QC's rationality critique.
46. The PwC report did not address in terms the question as to whether or not the applicant had exhausted alternative sources of funding. Rather, the Claimant asserts that having conducted such a rigorous assessment of the application it was obvious that they had concluded that all criteria for the granting of a loan (including exhaustion of alternatives) had been considered as part of the IBR and it was irrational of the decision makers not to rely on this, and/or reach a different conclusion to their appointed experts.

Approved Judgment

47. In my judgment the Claimant's critique misunderstands the role of the financial consultants and the purpose of their IBRs, as explained in the Defendants' evidence. Sir Damon explained that the purpose of the IBR was to provide close and detailed reviews of the financial information provided by an applicant.
48. There is no dispute as to the importance of the IBR's, Sir Damon noted that they were "*... critical documents in the decision-making process and closely read.*" Yet, there is no evidence to support the contention that the purpose of the reports was to express any expert view (expressly or by implication) on the availability of alternative funding, let alone that the expression of any such view would be capable of binding a decision maker on the ISC or CRB. Rather the purpose of the IBR's was to provide the Committees with key factual materials that would enable them in turn to assess whether the application demonstrated (amongst other things) a company able to access alternative sources of funding.
49. Sir Damon's evidence is that the PwC report in this case provided factual materials on which the committees, in part, based their conclusions that they were not satisfied that alternative funding sources had been exhausted. Thus, the report provided information (for example) about how the Claimant was seeking to 'ring-fence' elements of its operations that might have available funds, e.g. the funding provided to the Claimant's venue in Manchester and also Campus Group, one of its trading brands. In other words, the ISC and CRB relied on the reports not for any independent assessment of whether alternative sources of funding had been exhausted (it expressed no such view) but rather for an evidential foundation on which they could base their own assessment of that question.
50. There is nothing on the materials before the Court that demonstrates that the analytical approach of the ISC and the CRB (as explained by Sir Damon) to the PwC findings was erroneous let alone irrational. As Sir Damon commented, if the report had been misconstrued at either committee meeting, he would have expected the representatives of PwC, present at both those meetings, to have said so.
51. Equally, there is nothing in my judgment in a complaint that PwC failed to include information given by the Claimant to it, potentially relevant to the question of alternative funding. A copy of the draft report was provided to the Claimant prior to the determination of the application – it afforded the Claimant the opportunity to 'fill in the gaps' in respect of any relevant information it considered was missing from the report.
52. For all these reasons, whether taken individually or collectively, there is nothing in any aspect of the decision reached by the First Defendant that is irrational. In light of this conclusion it is not necessary to address the Defendants additional arguments under s.31(2A) of the 1981 Act. Accordingly, for the reasons given above, this claim is dismissed.