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

B E T W E E N:

Uttlesford District Council

Claimant

- and -

Secretary of State for Housing, Communities and Local Government

Defendant

- and -

(1) Stansted Airport Limited
(2) Stop Stansted Expansion
(n-nn) ***other interested parties***

Interested Parties

STATEMENT OF FACTS AND GROUNDS

CONTENTS

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Glossary

ANPS	means the *Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England*, published 5 June 2018;
APF	means the *Aviation Policy Framework*, Cm 8584, dated March 2013;
the Appeal	means the appeal by STAL made under TCPA s 78 against UDC's refusal to grant planning permission for the Application;
the Application	means STAL's application for planning permission for the Development, having the number UTT/18/0460/FUL;
ATM	means aircraft traffic movement;
6CB	means the sixth Carbon Budget, as required by the *Climate Change Act 2008*;
CDL	means the Panel's costs decision dated 26 May 2021;
Condition 15	means UDC's proposed condition to accommodate its objections to the Application;
CORSIA	means the Carbon Offsetting and Reduction Scheme for International Civil Aviation in Volume IV of Annex 16 to the Convention on Civil Aviation adopted by the Council of the International Civil Aviation Organisation on 27 June 2018;
the Development	means airfield works comprising two new taxiway links to the existing runway at Stansted airport, six additional remote aircraft stands, three additional aircraft stands to enable combined airfield operations of 274,000 ATMs and a throughput of 43,000,000 terminal passengers per year;
DfT	means the Department for Transport;
DL	means the Panel's decision on the Appeal, dated 26 May 2021[1];
ES	means STAL's 4-volume *Environmental Statement*, dated February 2018;
ESA	means STAL's 4-volume *Addendum Environmental Statement*, dated October 2020;
MBU	means the DfT's *Beyond the horizon. The future of UK aviation. Making best use of existing runways*, dated June 2018;
PPG	means the *Planning Practice Guidance: Appeals*, published by the Ministry of Housing, Communities & Local Government, 3 March 2014;
NPPF	means the National Planning Policy Framework (February 2019);
the Panel	means the panel of Inspectors appointed by the SofS;
SSE	means Stop Stansted Expansion;
SofS	means the Secretary of State for Housing, Communities and Local Government;
STAL	means Stansted Airport Limited;
TCPA	means the *Town and Country Planning Act 1990*;
UDC	means Uttlesford District Council.

Essential documents for advance reading by Court

See separate list

Reading time estimate

2 days

[1] The DL was corrected for an immaterial formatting error and re-issued on 21/6/21.

INTRODUCTION

1. Between 12 January 2021 and 12 March 2021, over the course of 30 hearing days, three Inspectors (the Panel) heard a public inquiry into an appeal made by Stansted Airport Limited (STAL) against the decision of Uttlesford District Council (UDC) to refuse planning permission for a development at Stansted Airport that would see a significant increase in the number of passengers permissible under its existing planning permission — from 35 to 43 million passengers per annum.

2. On 26 May 2021, the three Inspectors produced a 27-page decision letter (DL) (excluding Appearances and Schedule of Conditions) and a 4-page costs decision letter (CDL). The Inspectors allowed the appeal, granted planning permission and ordered UDC to pay all of STAL's costs. The permission is an escalating one, allowing Stansted airport to grow its operations for decades forward until 2050, but on environmental standards fixed 30+ years earlier.

3. Under s 288 of the TCPA, UDC seeks permission to challenge the lawfulness of both decisions.

4. In relation to the DL, UDC focusses its challenge on:
   (a) the Panel's failure to engage with the issues that had been raised in relation to the third ground on which UDC had refused permission (failure to demonstrate policy compliance in relation to carbon emissions/climate change); and
   (b) the Panel's mistaken understanding and application of the law on planning conditions in its treatment of the condition that UDC had put forward to accommodate escalating passenger numbers (Condition 15), which the Panel refused to countenance.

5. The DL is a superficial document. It does not grapple with the serious issues that the Panel had to resolve. The Panel itself had estimated that these would take 40 days to hear. Though the Inquiry turned out to be 10 days shorter than estimated, the Panel heard evidence from dozens of witnesses and many experts, took in tens of thousands of pages of material and received reams of written submissions. For the greater part, none of this found its way into the analysis in the DL. Instead, the Panel considered that "national aviation policy" (which it treated as comprising just three documents) was "the start and end point" for considering carbon emissions/climate change impacts from the Development regardless of when the growth might occur. Effectively, national aviation policy prejudged the carbon emissions/climate change issue for all times. "National aviation policy" was thus to be read and applied siloed from all subsequent and other policies on carbon emissions/climate change. This was not a matter of weight: as far as the Panel was concerned, when it came to carbon emissions/climate change as against "national aviation policy" (more specifically, MBU) there was nothing to weigh. On this basis, the Panel felt able to ignore those other policies, both for their content and for the purpose of evaluating the contemporaneity of the "national aviation policy" as it related to carbon emissions/climate change. That allowed the Panel to place in the

dustbin the wealth of evidence that it had received on the application of those policies. This was how the Panel was able to make so short what had taken so long.

6. The approach taken by the Panel was wrong. First of all, the "national aviation policy" is not, and does not pretend to be, an exhaustive policy statement on carbon emissions/climate change so far as it relates to airport development. Rather, it sets out necessary but not sufficient carbon emission/climate change policy considerations for the purposes of airport development. Secondly, to the extent that the "national aviation policy" does set out carbon emissions/climate change policy considerations for the purposes of airport development, later government statements specifically directed to carbon emissions/climate change must be accommodated. It was wrong of the Panel to subordinate more recent, specific statements on carbon emissions/climate change to generalities in "national aviation policy" so as to make the latter determinative of carbon emissions/climate change issues. The Panel wrongly blanked out policies that should have been at the forefront of its consideration of carbon emissions/climate change. The reality is that policy developments in relation to carbon emissions/climate change *are* applicable to airport developments involving existing runways and they fill in the interstices in "national aviation policy." The Court cannot be confident that the outcome of the Inquiry would have been the same had the Panel gone about its job properly.

7. In addition, the Panel's approach to UDC's Condition 15 was wrong. UDC had put forward Condition 15 in order to resolve all its objections to the Application. But the Panel accepted STAL's submission that the condition was "clearly unlawful" [CDL6], describing it as an "unnecessarily onerous and misconceived condition that patently fails to meet the relevant tests" [CDL21]. STAL had submitted that it failed to meet all six of those tests. At DL142 the Panel recorded that Condition 15 was "not necessary or reasonable" (ie two of the six tests) but identified no other test that it considered UDC had "patently" failed to meet. So far as necessity was concerned, that conclusion stemmed from the Panel's conclusion that MBU was the one-stop policy shop that had the lot. If the Panel was wrong about that, they were wrong about necessity, not least because some condition had to be introduced to ensure the ability of future generations to allow future passenger growth to go ahead without compromising contemporary (rather than historic) environmental standards. So far as reasonableness was concerned, the Panel appears to have concluded that a conditioned phased release of passenger capacity was unreasonable because "it would be likely to seriously undermine the certainty that a planning permission should provide that the development could be fully implemented" [DL142]. But planning law does not require that sort of certainty. It is in the nature of phased permissions that the requirements for a later phase might not be met. The Court cannot be confident that had the Panel understood the law relating to conditions and taken into account paragraph 7 of the NPPF, it would have reached the same conclusion on Condition 15.

8. Similarly, the CDL does not bear analysis. It is riddled with methodological flaws. STAL's

wilful defiance of binding Ministerial Guidance (in the form of the PPG ID:16-035) and the resultant prejudice to UDC are rendered inconsequential on the say-so of the Panel. UDC's attempt to secure by condition an outcome that would, as passenger numbers escalated, accommodate its legitimate future generations' concerns is mocked as unlawful, but with no analysis of the law. Various costs submissions made by UDC are left unaddressed. The Panel criticises UDC's grounds of refusal as "vague" and "opaque," while overlooking UDC's principal ground of refusal (additional emissions of carbon against a changing UK carbon account) that was neither vague nor opaque. The criticism is a remarkable one given that STAL was perfectly able to address each of the grounds of refusal, something the Panel inexplicably took no account of. There was nothing unreasonable in UDC's decision. The ES that STAL submitted to UDC in support of the Application was out-of-date, pre-dating important policy documents and oblivious to the shifts that they made. Despite almost two years passing before UDC made its decision, STAL did not update the document. When it came to decision-time, UDC was unconvinced by the two-year old material that had been put before it. UDC's conclusion that STAL had failed to demonstrate that the environmental impacts would be acceptable was an entirely legitimate one. UDC was not in a position to guess that the replacement ES — ie the ESA — would yield similar figures. UDC's cautious approach was a view worthy of respect even by those who disagreed with the outcome. This was an escalating development. The environmental consequences would be borne for generations to come. UDC as the representative body for those who were to bear the brunt of the impact of those consequences was right to keep that responsibility firmly in mind in evaluating the Application. The costs award serves to stifle the democratic process on an issue of acute local concern.

9. That the Panel, having received the Statements of Case, had estimated at the Case Management Conference in September 2020 that the Inquiry would last for 40 days gives the lie to any suggestion of there being any "substantive" basis for a costs award. There was substance to the concerns raised in UDC's RFRs. Procedurally, there was nothing that the Panel could point to in the conduct of UDC that justified an award of costs. That the Panel even required UDC to meet the costs of STAL in dealing with issues that were exclusively raised by SSE is testament to the spitefulness of the CDL and the process by which it was reached.

10. There is one further matter. The DL has wider ramifications than the development of Stansted airport. If the Panel's MBU-blinkered approach to carbon policy is sanctified by the Court, it will provide the template for various other airport developments that are currently in the planning system. This would repudiate every recent carbon policy statement. This is not something that the Planning Court should countenance readily.

11. In all, these are two thoroughly unsatisfactory decisions that do no credit to the Planning Inspectorate or to the planning appeal system. The Court is respectfully invited to grant permission for this application.

THE FACTS

UDC's decision

12. On 22 February 2018 STAL submitted to UDC its application for planning permission for the Development. Accompanying the application were numerous documents, including a 4-volume ES.

13. On 14 November 2018 UDC's planning committee resolved that planning permission for the Development should be granted, subject to a s 106 agreement.

14. During the course of its negotiation, the issues raised by the Development came to assume increasing importance for those in the area. That fed its way through to the Council's representatives. That is the democratic way, inconvenient though it is to some.

15. So far as climate issues were concerned, it was a time of great flux, with frequent Government announcements. To the extent that these did not formally alter policy, these put into question former certainties, superannuated existing policies and pointed to likely future change. This was particularly acute in relation to aviation and climate change, as up until then aviation had largely been taken out of the climate change equation. The consistent message coming from policy statements was that this would not continue to be the case. In the following months, with greater understanding and a changing stance in policy statements, concerns within UDC had grown, particularly in relation to the increase in carbon emissions that would result from the Development *vis-a-vis* the existing permission.

16. On 28 June 2019 UDC resolved not to issue the planning permission until its planning committee had considered any new material considerations and/or changes in circumstances since 14 November 2018. STAL did not challenge the lawfulness of that decision.

17. On 17 and 24 January 2020 the application returned to a meeting of the planning committee. After 11 hours of addresses (including from STAL) and debate it was resolved that:

> "...having regard to the changes between 14 November 2018 and now in relation to:
> (a) noise from the development as fully implemented;
> (b) air quality, specifically PM 2.5 and ultrafine particles, resulting from the development as fully implemented; and
> (c) generally accepted perceptions and understandings of climate change,
> ...not to issue a planning decision notice for the development..."

18. The decision notice followed on 29 January 2020, recording that permission had been refused for the following reasons:

> "1 The applicant has failed to demonstrate that the additional flights would not result in an increased detrimental effect from aircraft noise, contrary to Uttlesford Local Plan Policy ENV11 and the NPPF.
> 2 The application has failed to demonstrate that the additional flights would not result in a detrimental effect on air quality, specifically but not exclusively PM2.5 and ultrafine particulates contrary to Uttlesford Local Plan Policy ENV13 and paragraph 181 of the NPPF.
> 3 The additional emissions from increased international flights are incompatible with the Committee on Climate Change's recommendation that emissions from all UK departing flights should be at or below 2005 levels in 2050. This is against the backdrop of the amendment to the Climate Change

Act 2008 (2050 Target Amendment) to reduce the net UK carbon account for the year 2050 to net zero from the 1990 baseline. This is therefore contrary to the general accepted perceptions and understandings of the importance of climate change and the time within which it must be addressed. Therefore, it would be inappropriate to approve the application at a time whereby the Government has been unable to resolve its policy on international aviation climate emissions.

4 The application fails to provide the necessary infrastructure to support the application, or the necessary mitigation to address the detrimental impact of the proposal contrary to Uttlesford Local Plan Policies GEN6, GEN1, GEN7, ENV7, ENV11 and ENV13."

The main party cases

19. On 24 July 2020, the final day allowed for an appeal, at 16:24hrs STAL appealed to the Secretary of State against the Decision.

20. In July 2020 STAL lodged its Statement of Case. It dealt with each of the four grounds of refusal in the Decision.

21. In relation to MBU (June 2018), STAL's Statement of Case noted that the MBU was a policy document that:

> 2.12 ...updated the 2013 Aviation Policy Framework on the issue of making best use of existing and accompanied the Government's Airports National Policy Statement ('ANPS') supporting the construction of a new runway at Heathrow....
>
> 2.13 The 2018 MBU policy clearly states the respective roles for local planning authorities and for government in considering proposals for airport expansion. The policy makes clear that Government expects local impacts, such as noise and air quality, to be taken into account as part of the local planning application process because these impacts will be felt by local communities.
>
> 2.14 However, the MBU policy is unequivocal that aviation's carbon emissions are an important matter that should be considered at the national level, rather than as part of the local decision-making process. The core MBU policy is at paragraph 1.29:
>
> > 'Therefore, the government is supportive of airports beyond Heathrow making best use of their existing runways. However, we recognise that the development of airports can have negative as well as positive local impacts, including on noise levels. We therefore consider that any proposals should be judged by the relevant planning authority, taking careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigations. This policy statement does not prejudge the decision of those authorities who will be required to give proper consideration to such applications. It instead leaves it up to local, rather than national government, to consider each case on its merits.'

STAL went on to say that "this remains the Government's current position on UK airports policy" (§2.15).

22. In dealing with the third reason for refusal (carbon emissions), STAL's case was:

> 4.23 Section 30(1) of the Climate Change Act 2008 provides as follows:
>
> > 'Emissions of greenhouse gases from international aviation or international shipping do not count as emissions from sources in the United Kingdom for the purposes of this Part, except as provided by regulations made by the Secretary of State."
>
> 4.24 Such regulations have not been made. The Government's approach to aviation carbon emissions is set out in the APF and MBU policy, with an update having been given in the Department for Transport's Decarbonising Transport – Setting the Challenge (March 2020), in terms of the Government's current aims and targets, policies to meet those targets and its planned future work.
>
> 4.25 MBU makes clear policy statements: First, aviation carbon emissions should continue to be addressed through international co-operation and are the preserve of national (and international) policy. Second, local planning authorities should instead focus on local environmental impacts (e.g. noise and air quality) when considering planning applications for 'making best use' of existing runway capacity. Finally, MBU confirms Government's support for airports making best use of existing runways and considers that any resultant change in emissions is consistent with national commitments to reduce emissions.
>
> 4.26 Specifically, MBU considered the aviation carbon emissions arising from all airports, including

those in the South East, making best use of their existing runways. It concluded that this was likely to be consistent with the 'headroom' of 37.5MtCO2 for the aviation sector, assumed when the UK carbon budget was first set. This was based on an estimate of emissions associated with forecast demand and the state of knowledge at the time regarding the likely impact of mitigation measures to be adopted by the industry.

4.27 Since then, the potential for mitigating aviation emissions has improved and includes an internationally agreed scheme to address CO2 emissions. Furthermore, based on substantial research and technical evidence, Sustainable Aviation' 2020 DecarbonisationRoadmap concludes that an increase of approximately 150 million passengers per annum above 2018 levels would be compatible with the net zero commitment.

4.28 Informed by advice from the Committee on Climate Change (CCC), the Government recently adopted a target of net zero emissions by 2050 for the whole of the UK and amended the Climate Change Act31, but did not amend Section 30(1), as referenced above. The CCC had previously advised Government that for aviation, growth of 60% above 2009 traffic levels was consistent with a commitment to reduce emissions by 80% by 2050. The CCC's more recent advice is consistent with the industry's view that the potential for mitigating emissions from aviation has improved. The CCC advise that growth of 60% above 2009 traffic levels continues to be compatible with the revised national target, which is now net zero emissions at 2050.

4.29 The Government intends to consult on the CCC's advice and update its assessment of the evidence that underpins its MBU policy. The advice from the CCC has been consistent and compatible with the Government maintaining current policy that supports growth in air traffic associated with airports making best use of existing runways and makes clear that aviation emissions will continue to be the preserve of national policy'.

4.30 MBU remains in force, with airports supported in making best use of existing runways. Therefore, the ES conclusion that the appeal proposal is unlikely to materially impact the UK's ability to meet its 2050 aviation target remains sound and UDC's reason for refusal is contrary to government policy.

23. STAL's "Table of Relevant Documents" listed dozens of documents, including the 4-volume ES dating from February 2018. That was the same ES that had been before UDC's planning committee when it made its original resolution in November 2018, as well as when it made its decision in January 2020.

24. The ES pre-dated the DfT's *Beyond the horizon. The future of UK aviation. Making best use of existing runways* (ie MBU), which is dated June 2018.

25. Although STAL complained in its Statement of Case (§§4.15 and 6.2) that UDC's decision had been "unreasonable," STAL did not foreshadow or explain that it had grounds for making a costs application against UDC or even that it might be doing so.

26. On 16 September 2020 UDC filed its Statement of Case. It set out the background to STAL's application, including earlier planning appeal decisions that had resulted in 2008 in the existing grant of planning permission and the limit on annual passenger numbers:

> MPPA1: The passenger throughput at Stansted Airport shall not exceed 35 million passengers in any twelve-calendar month period.

In granting approval and imposing this limit, the Secretaries of State had stated that this represented "making full use of the existing runway at Stansted." UDC Statement of Case (§2.25) identified the extensive changes in relevant policies, guidance and legislation that had occurred since February 2018. This included 11 documents relating to climate change. It was UDC's case that STAL, in relying on an environmental statement that pre-dated all of them, had failed to demonstrate how it addressed any of them. UDC's case was that the preparation of an addendum to the ES was essential.

27. Central to UDC's case was carbon emissions and the shift that had occurred in the 2 years between the ES in February 2018 and the decision in January 2020:

> 4.65 At the heart of this Reason for Refusal, UDC was not satisfied that the Application was consistent with the Government's Paris Agreement obligations and Net Zero target, namely its duty to reduce greenhouse gas emissions to at least 100% lower than the 1990 baseline, when taking into account advice on growth and emissions issued by the Committee for Climate Change, and the direction of travel of policy in this area.
>
> 4.66 Policy on climate change and carbon emissions from aviation has changed significantly since the ES was published in February 2018. Appendix 6 'Climate change: relevant legislative, guidance, and policy changes since the Climate Change Act 2008 was enacted' attached to this SoC includes relevant legislative, guidance, and policy changes since the Climate Change Act 2008 was enacted, alongside the timeline of the Application, demonstrating the rapidly changing climate policy background against which it was considered. Appropriate reference will be made in UDC's evidence to this background and the increasingly restrictive direction of travel it reveals, but the following specific points can be noted.
>
> ...
>
> 4.68 Secondly, during the period of consideration of the Application:
>
> 1 In February 2019, the Committee for Climate Change, in responding to Aviation 2050, warned the Government, by reference to the Paris Agreement, that stronger action may be needed to constrain aviation emissions to 2005 levels (37.5 MtCO2e). The letter noted that achieving aviation emissions at or below 2005 levels in 2050 will require contributions from all parts of the aviation sector, including steps to limit growth in demand, and actual reductions in emissions rather than reliance on offsets. This was taken forward to the CCC's Net Zero Report (May 2019), in which it was recommended that the UK should legislate as soon as possible to reach net zero greenhouse gas emissions by 2050 covering all sections of the economy, including international aviation, as an appropriate contribution to the Paris Agreement, and achieve that through a number of steps, including more limited aviation demand growth.
>
> 2 In June 2019, the target figure in s.1 of the Climate Change Act 2008 was amended from at least 80% to at least 100% reduction of greenhouse gases below 1990 levels.
>
> 3 Whilst s.30(1) of the Climate Change Act, which excludes greenhouse gas emissions from international aviation from the target, has not yet been amended, CCC's letter of September 2019 on net-zero and the approach to international aviation confirmed that:
>
> - the Government clarified to Parliament that the target must cover the whole economy including international aviation.
> - Its advice that 2050 was an appropriate date for net-zero to be achieved was based on formal inclusion of international aviation emissions within the target.
>
> The letter of September 2019 also advised that:
>
> - the Government should assess its airport capacity strategy in the context that zero carbon aviation is highly unlikely to be feasible by 2050.
> - CCC's scenarios for its net-zero advice suggest aviation emissions could be reduced from 36.5 MtCO2 in 2017 to around 30 MtCO2 in 2050 through a combination of steps, including by managing demand growth.
> - Growth should be limited to no more than 25% above current levels by 2050, and further demand reduction is possible beyond that.
>
> ...."

28. Central to UDC's position on carbon emissions was that STAL had failed to demonstrate that as at January 2020 its proposed development remained consistent with policy:

> 4.70 ....UDC contend that the ES supporting the Application did not present a clear picture on carbon emissions assessed against the full policy background on climate change, and STAL failed to update that picture to address reasonable concerns raised during consideration of the application as to the direction of travel of climate change policy.
>
> 4.71 Importantly, STAL's continued reliance upon the non-amendment to s30(1) of the *Climate Change Act 2008*, the *Aviation Policy Framework 2013*, and *Beyond the horizon, the future of UK aviation: Making best use of existing runways 2018*, fails to provide any assurance to UDC that the direction of travel of national policy on climate change has been properly acknowledged and assessed, and suffers from the same flaw as the ANPS in not taking account of the Paris Agreement and the commitment to net-zero. There are a series of material considerations set out above which must be taken into account and properly assessed.
>
> 4.72 Moreover, UDC will contend that airport expansion plans across the UK, of which this is one

example, should be considered against CCC's recommendations that demand growth should be limited to at most 25% above current levels, that there is potential to reduce emissions further through constraints on demand, and that the Government's airport capacity strategy should be re-assessed in the light of aviation playing its part in a Net Zero strategy....

29. UDC concluded this section of its Statement of Case with the following:

> 4.75 Finally, without prejudice to UDC's case on emissions, the extent to which the increases in annual passenger capacity could be linked to the delivery of carbon emission targets in stages will be explored.

The September 2020 CMC

30. With UDC having identified what its case would be, the Panel convened a case management conference, which was heard on 24 September 2020. The Panel identified (§6) the four main issues as:

> (1) the effect of the Development on aircraft noise;
> (2) the effect of the Development on air quality;
> (3) whether the Development would conflict with UK obligations to combat climate change; and
> (4) whether the development would be supported by necessary infrastructure.

31. The Panel set out (§33) a timetable for the submission of documents:

- 16 Oct 2020 STAL was to submit its updated ES.
- 28 Oct 2020 Submission of the Statements of Common Ground.
- 8 Dec 2020 Submission of proofs of evidence and core documents.
- 22 Dec 2020 Submission of final timings.
- 29 Dec 2020 Submission of final draft planning obligation, CIL compliance etc.
- 5 Dec 2021 Submission of rebuttal proofs.
- 12 Dec 2021 Inquiry opening.

32. The Panel estimated that the Inquiry would absorb 40 hearing days.

33. The Panel asked the parties whether there was any application for costs, reminding them that Planning Guidance required that any such application had to be made as soon as reasonably possible. STAL (who was represented by leading counsel) said nothing to suggest that STAL would be making an application, still less the identifying the basis for it. The note of the CMC produced by the Panel recorded (§34):

> No application for costs is currently anticipated by any party. If an application is to be made, the Planning Practice Guidance makes it clear that they should be made in writing to the Inspector before the Inquiry or as soon as reasonably possible. You are also reminded that in order to support an effective and timely planning system in which all parties are required to behave reasonably, the Inspector has the power to initiate an award of costs in line with the Planning Practice Guidance. Unreasonable behaviour may include not complying with the prescribed timetables.

34. If STAL harboured any intention to make a costs application, it chose to ignore the Panel's prompting. If STAL had a complaint about UDC's evolved position, STAL had no reason (other than the tactical advantage secured by ambush) to continue withholding its costs application.

The Environmental Statement "Addendum"

35. In October 2020, STAL produced what it called its "Addendum Environmental Statement" — the ESA. In fact, it was not an "addendum" in the ordinary sense of the word. It was a 4-volume replacement of the ES that STAL had produced in February 2018. Chapters 12 and 13 of the ESA were devoted to carbon emissions and climate change, respectively.

36. Importantly, these made extensive reference to the changes in legislation, policy and guidance since the 2018 document that it had submitted to UDC. This section of the ESA opened with the following:

> 12.3.1 Since the 2018 ES, there have been updates to the legislation, policy and guidance that inform the assessment of carbon emissions. The updates are summarised below.

The ESA then listed these, giving a summary of the changes each effected, divided by international, European and UK:

- Carbon Offset and Reduction Scheme for International Aviation (CORSIA) (February 2019);
- European Union Emissions Trading Scheme (EU ETS) (2018);
- DfT Aviation Green Paper entitled *Aviation 2050: the future of UK Aviation* (December 2018);
- The Climate Change Act 2008 (2050 Target Amendment) Order 2019 (June 2019);
- Committee on Climate Change (CCC) Net Zero - The UK's contribution to stopping global warming (May 2019);
- Sustainable Aviation – Decarbonisation Road Map: A Path to Net Zero (February 2020); and
- DfT Transport Decarbonisation Plan (June 2020).

37. As the February 2018 ES which STAL had presented to UDC in support of its application pre-dated the MBU, it was the ESA that dealt for the first time with the MBU:

> 12.3.4 The DfT published 'Beyond the Horizon: The future of UK aviation, next steps towards an Aviation Strategy', in April 2018. The document states that "the government must ensure that growth is sustainable and is balanced with local and global environmental concerns".
>
> 12.3.5 In June 2018, the DfT published 'Beyond the Horizon: The future of UK aviation, making the best use of existing runways'. This is the key aviation policy statement relevant to this proposed development. It recognises that there is uncertainty over future climate change policy and international arrangements to reduce CO2 emissions and reflects this uncertainty via carbon traded and carbon capped scenarios. Whilst recognising that each airport development will need to be judged by the relevant local planning authority, the policy makes clear that aviation carbon emissions should be considered at a national level and that the two scenarios considered in the policy or other measures would be available to meet the planning assumption under the policy.

38. The ESA observed that the DfT Green Paper, published 6 months later in December 2018, used its own model to forecast CO_2 emissions from flights (§12.3.6):

> In December 2018 the DfT published the Aviation 2050 Green Paper 'Aviation 2050: the future of UK Aviation'xi as part of development of an Aviation Strategy. This outlines proposals for the new Aviation Strategy to include a range of measures including efficiency improvements, operations and air traffic management, sustainable aviation fuels and market-based measures. The Green Paper reflects the Airports Commission's recommendation to be supportive of all airports to make the best use of existing runways, subject to environmental issues being addressed. As part of the Aviation Strategy the DfT used its own Aviation Modelxii to forecast CO2 emissions from flights departing UK airports to assess the

impact of allowing all airports to make the best use of their existing runway capacity (with and without the Heathrow Airport North West Runway scheme).

39. STAL's only other comment on MBU in this section of the ESA was under the heading "Cumulative Effects", where it opined (§12.10.2):

> Stansted Airport's proposed development is consistent with the UK Government's policy of making best use of existing runways. This growth rate is compatible with the UK's aviation and wider carbon commitments as long as the aviation sector continues to improve its operations, upgrades its fleet with more efficient aircraft and invests in sustainable fuels. As set out in the Sustainable Aviation Decarbonisation Roadmap, the sector believes that growth in UK aviation can be consistent with the government's carbon targets with 'residual emissions' being addressed through market-based mechanisms.

40. Chapter 13 of the ESA (dealing with climate change) also had a section headed "Updates to Legislation, Policy and Guidance":

> 13.2.1 There are some changes in legislation and policy relevant to the climate change assessment from those reported in Chapter 13 of the 2018 ES. These include (but are not limited to) the following.
>
> 13.2.2 The UK climate projections have been updated to UKCP18 which have superseded the UKCP09 climate projections that were used in the 2018 ES.
>
> 13.2.3 The Institute of Environmental Management and Assessment (IEMA) has published new guidance on the assessment of climate change resilience and adaption, which supersedes the 2015 IEMA guidance on Climate Resilience and Adaptation in EIA.
>
> 13.2.4 The National Planning Policy Framework (NPPF) (DCLG, 2019) and the associated Environment Agency (EA) planning practice guidance (Environment Agency, 2017) require a risk-based approach to avoid vulnerability associated with flooding risk and climate change.

The proofs of evidence

41. UDC submitted its proofs of evidence by the prescribed date (8 December 2021), as did STAL. UDC had four witnesses:

    (1) James Trow, dealing with noise.
    (2) Dr Mark Broomfield, dealing with air quality.
    (3) Dr Mark Hinnells, dealing with carbon and climate change.
    (4) Hugh Scanlon, dealing with planning.

    The Statements of Common Ground, including that on carbon emissions, were lodged on 18 December 2020.

42. STAL submitted proofs from 13 witnesses, two of whom (Mr Robinson and Mr Vergoulas) dealt with carbon and climate change. There were rebuttal proofs from Mr Robinson and Mr Vergoulas and, in the case of Mr Robinson, a "supplementary proof" as well. SSE submitted a joint proof on carbon/climate change from Mr Peter Lockley and Mr Michael Young. In all, there were approximately 250 pages of proofs devoted to carbon and climate change, plus many more pages of supporting documents.

43. In his proof of evidence for UDC, Dr Hinnells devoted section 3 to policy, legislation and guidance. He noted that policy with respect to carbon emissions from aviation emissions has been changing rapidly and, in the UK, particularly since the *Climate Change Act 2008* (§16). He added:

This change has intensified since the submission of the Appellant's ES in 2018.

Dr Hinnells listed the relevant policy changes since the 2008 Act (§17). Between December 2018 and December 2020 he identified 14 relevant changes. He noted what policy changes had not featured in STAL's application to UDC or its ES (§§21-23). He noted the evolution of policy following STAL's application and that STAL had not addressed it (§§24-29). He identified the evolution of policy between UDC's refusal decision (January 2020) and STAL's ESA (October 2020) (§§30-39). And he noted the evolution of policy even following the ESA (§§40-43).

44. On 19 February 2019 the Government published a new edition of the NPPF. In the chapter headed "Achieving sustainable development" this included in its opening paragraph (§7):

> The purpose of the planning system is to contribute to the achievement of sustainable development. At a very high level, the objective of sustainable development can be summarised as meeting the needs of the present ***without compromising the ability of future generations to meet their own needs.***" (emphasis added)

The following paragraphs of the NPPF explained how this was to work:

> 8. Achieving sustainable development means that the planning system has three overarching objectives, which are interdependent and need to be pursued in mutually supportive ways (so that opportunities can be taken to secure net gains across each of the different objectives):
>
> (a) an economic objective – to help build a strong, responsive and competitive economy, by ensuring that sufficient land of the right types is available in the right places and at the right time to support growth, innovation and improved productivity; and by identifying and coordinating the provision of infrastructure;
>
> (b) a social objective – to support strong, vibrant and healthy communities, by ensuring that a sufficient number and range of homes can be provided to meet the needs of present and future generations; and by fostering a well-designed and safe built environment, with accessible services and open spaces that reflect current and future needs and support communities' health, social and cultural well-being; and
>
> (c) an environmental objective – to contribute to protecting and enhancing our natural, built and historic environment; including making effective use of land, helping to improve biodiversity, using natural resources prudently, minimising waste and pollution, and mitigating and adapting to climate change, including moving to a low carbon economy.
>
> 9. These objectives should be delivered through the preparation and implementation of plans and the application of the policies in this Framework; they are not criteria against which every decision can or should be judged. Planning policies and decisions should play an active role in guiding development towards sustainable solutions, but in doing so should take local circumstances into account, to reflect the character, needs and opportunities of each area.

45. Paragraph 148 of the February 2019 version of the NPPF (in Ch 14 entitled "Meeting the challenge of climate change, flooding and costal change") provided:

> The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure.

46. Dr Hinnells noted (§101) the policy importance of §7 of the NPPF:

> The objective of sustainable development is summarised in the NPPF as '...meeting the needs of the present *without compromising the ability of future generations to meet their own needs*' (para 7, my underline). The direction of travel over the last few years makes it clear that the needs of future generations mean significantly reduced carbon emissions from current levels. Binding future generations to what has previously been deemed acceptable by earlier generations will necessarily compromise the ability of future generations to meet their own needs. More specifically, the objective of sustainable development within the NPPF expressly includes mitigating and adapting to climate change, including moving to a low carbon economy (para. 8(c)). Section 14 of the NPPF, relating to meeting the challenge of climate change, provides (para. 148) "that the planning system should support the transition to a low carbon future in a changing climate" and "should help to: shape places in ways that contribute to radical

reductions in greenhouse gas emissions". These key objectives within the NPPF, (sustainable development, and using the planning system to support the transition to a low carbon economy) have been my lodestar in the assessment of this development. In my opinion, the ESA falls short of meeting these national planning policy objectives.

47. Having surveyed the policies and their "direction of travel," Dr Hinnells concluded his proof with a section headed "Condition providing for a phased release to development."

> 102. All this said, and as stated above, I do not believe it would be impossible to satisfy both current policy, and policy likely to emerge before the conclusion of the appeal, and further to do so in a way that recognises the important policy objective of not compromising the ability of future generations to meet their own needs.
> 103. In general terms, meeting policy is likely to need substantive changes to aircraft technology, and fleets, and to airport design, facilities and utilities to support different fuels, which the Government has very recently indicated in the Prime Minister's 10 point plan, it is ready to support.
> 104. To enable the proposals to be consistent with reduced carbon emission policy I consider that additional tranches of capacity could be consented, but contingent on delivery of carbon targets which are consistent with the Paris Agreement, and with national and local policy on net zero.
> 105. In my view, the objectives of the NPPF referred to above clearly speak to the need for the planning system to provide solutions that are dynamic — that is to say, a solution that allows the generations that will inherit the airport to address their carbon reduction needs as they then judge, within a changing climate. A phased release condition, such as that proposed by UDC, would be fully consistent with and supportive of this objective. It would be both forward looking and flexible, and would help to shape the airport in a way which contributes to radical reductions in greenhouse gas emissions.
> 106. Given the above, a mechanism is proposed via Uttlesford's proposed Condition 15 for phased release of capacity together with an audit framework which includes:
>
> (a) aviation based emissions:
> (b) ground transport emissions:
> (c) airport operational emissions:
>
> ....
>
> 108. If a condition meeting the substance of proposed condition 15 is not imposed, and based on current data and assumptions, the likely emissions can be regarded as EIA significant, and unacceptable in the context of radical carbon reductions in para 148 of the NPPF, the Paris Agreement and the Climate Change Act.

48. Neither of STAL's witnesses on carbon/climate change (Mr Robinson and Mr Vergoulas) made any reference to any of §§7, 8, 9 or 148 of the NPPF in their main proofs of evidence. STAL's planning witness (Mr Andrew), recognising its importance, repeatedly mentioned the NPPF (§§7.7-7.10, 8.4, 9.18-9.24, 9.26, 9.30, 9.37-9.41, 9.47, 9.50, 9.66, 10.4, 10.7, 10.15-10.16, 10.19, 10.22, 10.26, 10.28, 11.9, 11.10), but nowhere referred to §§7-9 or 148 of the NPPF. Not compromising the ability of future generations to meet their own needs did not feature in their analysis before they opined that the Development was entirely in accordance with Government policy.

The openings

49. The evidence all served, on 12 January 2021 the Inquiry opened. By this time, the Panel had relented in its opposition to the Inquiry being held virtually. Each of the main parties produced a written opening.

50. In its opening, STAL set out its stall in relation to the carbon/climate change issue:

> 16. The Government states expressly in MBU that carbon is: "an important environmental element which should be considered at a national level13, rather than a local level, and has even gone so far as to model the UK-wide impact of the MBU policy to ascertain the likely carbon effects in combination. In so doing it has satisfied itself that the carbon impacts of MBU are acceptable.

17. This is a fixed element of national policy and one that is eminently sensible, as the acceptability of the carbon effects of national aviation policy are self-evidently effects which require consideration at a national rather a local level. Carbon targets are for national governments to meet and there can be no surprise that national governments will seek to exercise control over them centrally.
18. Moreover, it is not for local planning authorities such as UDC or local pressure groups such as SSE to challenge or seek to go behind Government policy in MBU at this inquiry....

...

21. ...it is clear that the MBU policy support for airports across the country making best use of their existing runway capacity cannot be a matter for debate at this Inquiry.
23. ...the modelling undertaken in formulating MBU has already assessed the impact of permitting growth at Stansted to up to 44.5 mppa and has concluded that growth to this level is acceptable. Growth to 43mppa therefore falls within the DfT's national modelling.
24. The principle of growth to 43mppa is therefore a matter which is established by national policy and which is not open for debate at this Inquiry, subject to relevant local considerations being satisfactorily addressed.

51. STAL returned to this theme later in its written opening:

68 ...the way the case is put by UDC and SSE in relation to carbon emissions is fundamentally misconceived, for reasons we have already touched upon above.
69. As we explain above, the distinction between matters to be determined at national and local level underpins the rationale for MBU. To this end, national policy as set out in MBU stipulates that carbon emissions from making best use applications, including at Stansted, are to be addressed at a national level and ultimately through the formulation of national policy. They are not suitable or eligible for local determination at all.
70. Moreover, in formulating MBU, the Government has already modelled the cumulative carbon emissions associated with this airport and all airports in the UK making best use of existing runway capacity and has concluded that the carbon emissions are compatible with the current planning assumption of 37.5MtCO2. The DfT's model "has been extensively quality assured and peer reviewed and is considered fit for purpose and robust for producing forecasts of this nature": see MBU at §1.13.

....

73. In short, therefore, it is neither necessary nor appropriate for the Panel to consider the carbon impacts of this development at this Inquiry. This complex exercise has already been undertaken in formulating MBU and the Government has therefore taken it out of the hands of local planning authorities and Inspectors, whose remit (per *Bushell*) is to consider the impacts of the development at a local level.

52. STAL's contention was that the climate change policy was fixed by the *Climate Change Act 2008*, that international aviation emissions were excluded from the carbon budget and net zero targets and that these had been dealt with elsewhere:

74. ...the Government's policy on aviation emissions will be set out in the Aviation Strategy, which is yet to be published.
75. At the current time, therefore, Government policy in relation to aviation emissions is as encapsulated by the Climate Change Act 2008 ("CCA 2008"). Thus: (i) international aviation emissions continue to be excluded from the carbon budget and the net zero targets in s1 CCA 2008; and (ii) these emissions are instead taken into account via the 'allowance' or 'headroom' set for budgeting purposes, which seeks to limit aviation emissions to 2005 levels by 2050 and which is at the time of writing set at 37.5MtCO2. This policy approach is entirely consistent with MBU.
76. ...MBU must be given full weight in the overall planning balance, as a recent and lawful expression of Government policy.

53. In relation to Condition 15, STAL submitted that it was neither necessary nor reasonable (§96):

Whilst STAL acknowledges the need for appropriate conditions to regulate the future operation of the airport, it cannot support the imposition of a system of "micromanagement" such as apparently now proposed by UDC in the form of its new "Condition 15". STAL is content to maintain a dialogue with UDC in relation to conditions, but these must pass the conventional tests. As Mr Andrew will explain, Condition 15 is neither necessary nor reasonable, in view of the evidence in relation to the potential impacts of the proposed development.

54. By the date of the opening, STAL had not made any application for costs, still less spelled out the grounds for such an application, as required by Ministerial Planning Guidance (ie PPG). Instead, it took its own approach, with a "warning" in the penultimate paragraph of its opening:

> 105. UDC's case has now contracted to the extent that it accepts that the appeal should be allowed and planning permission granted. Its focus is now clearly upon the structure and content of any accompanying planning conditions. In fact, its case could be very largely disposed of at an extended "Conditions and Obligations" Session. By contrast, SSE is so deeply entrenched in its opposition to growth at Stansted that it has fought tooth and nail for this inquiry and seems determined to have its day in court. However, its case is predicated throughout upon positions which represent direct opposition to - or wilful misreading of - government policy. STAL considers the behaviour of UDC and SSE to be unreasonable and warns now that, when the evidence is complete, it will be seeking compensation for any wasted costs which it has been obliged to bear in prosecuting this appeal.

Condition 15

55. Condition 15 had first been proposed by UDC on 8 December 2012 in its planning expert's proof of evidence (Mr Scanlon) (§§8.15-8.16, 10.13-10.14), where he explained the thinking behind it, as well as setting out the condition out in draft:

> 10.13 ....a proposed condition is promoted that would act to remove these concerns, initially 'locking in' those impacts in respect of noise, air quality and carbon to be consistent with those predicted by the Appellant, restricting operations other than in accordance with the Appellant's own identified environmental parameters. It would then link growth with achieving compliance with new policy as it emerges, to ensure that the improvements predicted in the aviation sector are shared with the local community, a constant theme associated with aviation policy. In doing so, it would provide reassurances consistent with the commitments as set out within STAL's Stansted Sustainable Development Plan which promised a proactive management of the environment, to reflect a changing policy context.
>
> 10.14 Revisiting the planning balance with such a condition in place, would significantly add to the positives of the Appeal proposals, to the extent that the balance would weigh strongly in favour of the development being positively considered.

56. STAL made no response to UDC's proposed Condition 15 until 5 January 2021, when rebuttal proofs of evidence were exchanged. In his rebuttal proof, STAL's Mr Andrew stated that Condition 15 "cannot be agreed to by STAL" (§3.2).

57. Mr Andrew objected to the very principle of Condition 15:

> "3.5 To agree to a proposition that would effectively allow growth only in annual increments (assuming a growth as per ESA ICF forecasts and UDC's current suggested wording) would be unreasonable, provide no certainty to any party, would impose a great burden upon STAL and UDC, would be damaging to investment confidence across a range of stakeholders and contrary to the creation of a sound planning framework, including UDC's preparation of its new local plan."

58. Mr Andrew asserted that Condition 15 failed all six tests set out in §55 of the NPPF and that, accordingly, it could not "be considered appropriate, practical [or] lawful" (§3.7). Mr Andrew continued:

> "3.9 The effect of the suggested condition would be to subject the airport to a pseudo planning application, at least four times beyond 35mppa (since UDC suggest no more than 2mppa increments is acceptable). This would not only involve considerable logistical challenges to ensure the required data is available and audited, but would also place UDC as the LPA under a considerable and repeated burden. The timeline of the regular operation of this condition is likely to be extensive. It is also hard to have confidence in how UDC would approach its responsibilities when account is taken of its consideration of each of the 2003, 2008 and 2018 applications.

3.10 In the event that agreement cannot be reached, the condition seeks to remove the statutory provision of appeals in relation to planning conditions and replace it with a non-statutory dispute resolution process. This may need to be the subject of separate legal submissions.
3.11 Furthermore, there are elements of the proposed wording that are simply not enforceable by condition, such as the 4-month deadline suggested for submissions of details. The reliance on other regulatory regimes as is suggested also does not meet the tests.
3.12 There are of course numerous aspects of the wording that are imprecise and that are too numerous to list here, but which can be discussed at the programmed Planning Conditions Session of the Inquiry.
3.13 As an overall approach the suggested condition is, in my judgment, fundamentally flawed, departs from the well-established role of planning conditions and fails the six condition tests."

59. As already noted, notwithstanding that UDC was offering it as the means to bridge their main differences, STAL's counsel made only passing reference to Condition 15 in their written opening (§96).

60. In its written opening, UDC explained that Condition 15:

> 62. ...provides a level of certainty and transparency to the environmental effects arising from the proposed expansion, together with the ability for the local community to benefit from possible improvements, over the longer term, as prevailing standards and policies evolve. The condition does this in four interlinked ways.
> (1) First, it ties the future growth of the airport in passenger throughput to the environmental benefits predicted by the developer within its own assessment work, initially setting these predicted impacts as minimum targets which must be achieved. In this way it delivers reassurances to the local community whilst also providing the developer with certainty regarding its ability to grow sustainably;
> (2) Secondly, it limits the growth of the Airport above 35mppa to phases, to ensure that its future growth and the environmental effects are managed. The Airport will be required to submit for approval an Environmental Scheme covering the topics of noise, air quality, and carbon emissions. This 'Environmental Modalities Scheme' will require the submission of the past performance of the Airport across the three topics, and will also need to detail the mitigation measures it proposes to take to reduce emissions over the next phase of development;
> (3) Thirdly, it requires the Environmental Modalities Scheme to be reviewed by UDC with due regard to prevailing legislation and policy as applicable at that time. Upon approval and implementation, the Airport will be able to increase its passenger throughput up to the next phase of growth, when a refreshed scheme will be required to be submitted;
> (4) And fourthly, it includes a robust dispute resolution procedure, to ensure all parties operate appropriately in the discharge of their commitments specified by the Condition, with a view to a relatively swift resolution, thereby ensuring all parties can have confidence in the process.
> 63. The Aviation Policy Framework is underpinned by the two core principles of collaboration and transparency. These have animated UDC's response to the application and its position at this inquiry. Consistently with those principles, its proposed Condition 15 provides a workable solution to the challenges raised by this application so that the benefits of aviation can be shared in a fairer way than the past. It is a Condition which should be embraced by all parties to the appeal.

61. STAL did not embrace Condition 15. STAL repudiated it.

62. Following suggestions from the Panel, on 5 February 2021 STAL provided UDC with a 9-page document entitled "STAL Position on UDC Condition 15." None of the points made in the STAL Position Statement could not have been made in December 2020. The STAL Position Statement stated that it had to be read in conjunction with Mr Andrew's rebuttal proof arguing that "none of this proposed condition meets all of the 6 tests."

63. The points made in STAL Position Statement and Mr Andrew's rebuttal proof of evidence

were of three varieties:

(1) Objection to Condition 15 on the basis that it fails the six requirements for a valid planning condition.
(2) Textual queries about words in the main body of Condition 15.
(3) Disagreement about figures shown in Schedules A and B.

64. On 9 February 2021 UDC responded with its position statement in relation to Condition 15. Over the course of 16 pages, this set out (§§15-31):
— a legal analysis demonstrating that the condition was mandated by the relevant provisions of the TCPA;
— the applicable case-law on conditions;
— the relevant paragraph (§55) of the NPPF; and
— Ministerial Guidance (PPG) on the use of planning conditions,
before applying the above to demonstrate that the phasing provided by Condition 15 was entirely consistent with them (§§32-44).

65. UDC's position statement then responded paragraph-by-paragraph to STAL's textual queries (§45).

66. On 25 February 2021 STAL lodged a 13-page written response to UDC's position statement, repeating the points it had made before.

67. On 2 March 2021 UDC lodged a 5-page written response to STAL's response.

The oral evidence

68. The witnesses were called one-by-one, topic-by-topic, in the conventional fashion, save that it was all done virtually. As required, each was asked questions in chief, cross-examined and re-examined.

69. Throughout this time, STAL had not made any costs application, still less indicated the basis for such an application. As such, the principles governing the awarding of costs in planning inquiries was not a matter in issue upon which witnesses could legitimately be asked questions.

The closing submissions

70. Closing submissions followed the conventional order, with STAL going last (starting at 10:00am on 12 March 2021). At 9:27am that morning STAL served an 82-page written closing. Although STAL had still not made any application for costs, on four separate occasions (§§117, 173, 237 and 278) its written closing submissions referred to its application for costs. But it gave no indication what might be in that application: UDC was left to guess.

71. In all, the Inquiry had taken 30 days — 10 days less than the Panel had estimated in September

2020 at the CMC.

The last hour of the Inquiry: the costs application

72. STAL's counsel having read out 82 pages of written closing, during the lunch adjournment at 13:13hrs, STAL sent a 22-page submission on costs. This document set out, for the first time, the application, the grounds and what STAL was relying on in support of the application. No explanation was given for any of these having been withheld until then.

73. UDC protested at the manner in which this had been done, not least that STAL's timing had prejudiced UDC's ability to question witnesses on the matters STAL relied upon in support of the application.

74. The Panel were indifferent to this. Having adjourned for 10 minutes, the Panel there and then decided that UDC could deal with the costs application in writing and gave UDC 4 weeks in which to respond.

75. On 9 April 2021, UDC lodged a 55-page submission inviting the Panel to dismiss the costs application. This was supported by a bundle of documents (including witness statements).

76. The Panel allowed STAL to respond. On 23 April 2021 STAL produced a 35-page response. It did not produce any evidence to controvert the evidence that UDC had adduced, nor did it apply to challenge any of it.

After the close of the inquiry

77. On 20 April 2021, after the oral hearings had closed, the Government announced in a formal Press Statement that by June 2021 it would enshrine in law two new carbon commitments:
    (1) It would set a new climate change target to cut emissions by 78% by 2035 compared to 1990 levels.
    (2) The 6CB will incorporate the UK's share of international aviation and shipping emissions.

    The Press Statement advised that legislation setting out the Government's commitments would be laid in Parliament the next day (21 April 2021).

78. The Press Statement referenced the Government's campaign, Together For Our Planet, calling on businesses, civil society groups, schools and the British public to take action on climate change and the Prime Minister's Ten Point Plan for a Green Industrial Revolution (Nov 2020), the sixth point of which was "Jet zero and green ships." The stated object was "help[ing] the UK's trajectory towards meeting the new sixth Carbon Budget."

79. On the next day, as promised, the Government laid before Parliament *The Carbon Budget Order 2021*, under ss 8(3) and 91(1) of the *Climate Change Act 2008*, setting the sixth carbon budget at 965m tonnes of CO_2 equivalent. The accompanying Explanatory Memorandum advised:

> 7.2 This budget is the level recommended by the Climate Change Committee (CCC). The Government has set out its response to the CCC's advice on the sixth carbon budget in more detail in the Impact Assessment (IA), published alongside this Order. This also includes an explanation of how the factors in section 10 of the Act have been taken into account.
>
> ....
>
> 7.4 Emissions from international aviation and shipping will count towards emissions from sources in the United Kingdom for the purposes of the sixth carbon budget. They will be formally included by regulations under section 30 of the Act.

80. After pressing from UDC and SSE, the Panel allowed the parties to provide written submissions on the new commitment. On 7 May 2021 UDC, STAL and SSE each lodged written submissions.

81. UDC and SSE said that it was yet another policy step in a consistent direction of travel that could not be ignored by the Panel. UDC submitted that considerable weight needed to be given to the announced commitments, that they went to the core of the third ground of refusal and that they superannuated STAL's hardline closing submission (§177) that:

> ...the start and end point for the Panel's consideration of the carbon impacts of this development is MBU, which remains in force and has not been withdrawn or superseded by later Government policy.

UDC urged the Panel to reject STAL's monodimensional MBU idée fixe, to recognise that MBU itself had acknowledged that its policy "could increase carbon emissions" (§1.11) and that the policy response to increased carbon emissions was at the time of its writing uncertain (§§1.14-1.16), such that the management of carbon emissions upon which the formal policy statement in MBU (§§1.25-1.29) was premised had fallen away. The Panel needed to recognise that when evaluating what weight it should give to MBU.

82. STAL said the announcement made no difference and that the aviation policy was cemented in by the MBU.

83. On 28 April 2021 the *Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021* was made. The Order implemented the monitoring, reporting and verification requirements of CORSIA.

84. Three weeks later, on 26 May 2021, the three Inspectors produced their DL and their CDL.

85. On the same day the *Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021* came into force.

THE GROUNDS

Summary

86. UDC challenges the lawfulness of the DL on two grounds and challenges the lawfulness of the CDL on one further ground.

87. In summary:

(1) The first ground of challenge to the DL is that the Panel, having identified "national aviation policy" as comprising:

— the APF (March 2013),

— MBU (June 2018), and

— ANPS (June 2018) [DL14-DL23],

wrongly refused to countenance:

(a) subsequent policy developments in relation to climate change/carbon emissions; or

(b) the express limitations of and reservations in "national aviation policy"

as having any materiality in the evaluation of climate change/carbon emissions impacts from the Development, instead treating the Development as receiving unqualified "very strong support from national aviation policy" (DL156). In short, the Panel's approach to relevant climate change/carbon policies was blinkered, both excluding from consideration everything other than "national aviation policy" and reading that policy as both unassailable and untouched by other policy statements. This was a serious failure to understand and apply relevant policy.

(2) The second ground of the challenge to the DL is that the Panel, in rejecting Condition 15 as neither necessary nor reasonable [DL142]:

(a) wrongly refused to recognise that increasing and tightening carbon controls was a part of "current circumstances" [DL142];

(b) wrongly excluded aviation carbon emissions in its consideration of the requirements of paragraph 7 of the NPPF (ie "the objective of sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs") [DL153];

(c) wrongly mischaracterised Condition 15 as seeking "to reassess noise, air quality or carbon emissions in light of any *potential* change of policy that *might* occur in the future" [DL142], when Condition 15 was expressly tied to a re-assessment of legislation, international instruments and policies *actually in force at the time of assessment* (cl 9);

(d) wrongly stated that there was "no policy basis" for the re-assessment process provided for by Condition 15, when in fact it finds express support in paragraphs 7-9 of the NPPF;

(e) failed to recognise that Condition 15, and it alone, accommodated the uncertainties embedded in the passenger forecasts; and

(f) failed properly to explain why Condition 15 was rejected.

(3) The challenge to the CDL is that the Panel, in ordering UDC to pay all the costs of STAL:

(a) was heedless of the Ministerial Guidance (PPG) that "applications for costs should be made as soon as possible," wrongly characterising this as "best practice" [CDL9];

(b) contradicted itself by saying that it was "not unreasonable to wait until the conclusion of the evidence" [CDL9] when it had just stated that the "application could have been made earlier in relation to unreasonable behaviour known to the appellant well before the Inquiry opened" [CDL9] and when the principal "unreasonable behaviour" relied upon was that UDC should have allowed the planning application [CDL2-6], being a "substantive" (as opposed to "procedural") basis that STAL had known for 15 months before the application was made (similarly [CDL22]);

(c) failed to take into account, alternatively failed to explain its rejection of, UDC's submissions on the unfairness and prejudice to UDC in the timing of STAL's costs application, and to evaluate the magnitude of the unfairness and prejudice [CDL12];

(d) mischaracterised UDC's reasons for refusal as "opaque" [CDL17] without identifying what was missing or obscured;

(e) omitted to mention UDC's third ground for refusal (additional emissions against a backdrop of amendments to the UK carbon account) [CDL17] before criticising all the grounds for refusal as "unquestionably vague and generalised" and "opaque";

(f) deliberately misstated UDC's appeal evidence, which was not that "planning permission should be granted" [CDL17] but was that with Condition 15 in place planning permission should be granted;

(g) confused credibility of position with vagueness [CDL18], when in fact the matter identified in CDL18 gave the lie to the criticism in CDL17;

(h) repeated all its mistakes in relation to Condition 15 (see Ground 2 above), which the Panel wrongly described as "misconceived" and as "patently fail[ing] to meet the relevant tests" [CDL21], and thereby failed to take account of the reasonableness of UDC in offering Condition 15 as a way through [CDL19-CDL21]

(i) wrongly excluded UDC's consideration of policy changes and the "direction of travel" in the Panel's evaluation of the reasonableness of UDC's position [CDL22];

(j) relied on the "strength of evidence in favour of the proposal" to conclude that the "application should clearly have been granted planning permission" by UDC [CDL22] when the vast majority of the evidence before the Panel post-dated UDC's decision and the Panel failed to identify what the material UDC had before it that made that decision the only proper one to make; and

(k) in any event, made no adjustment for the time that was attributable to STAL dealing with SSE's case,

each of which makes the CDL unsafe.

The principles governing s 288 TCPA applications

88. The principles governing applications under s 288 of the TCPA are summarised in *St Modwen Developments Ltd v SSCLG* [2017] EWCA Civ 1643, [2018] PTSR 746 at [6]. That was a synthesis of long-established law: *R (East Bergholt PC) v Babergh DC* [2019] EWCA Civ 2200 at [46]-[47].

89. A decision-maker's failure to understand relevant policy is an error of law, and the court may then intervene: *Hopkins Homes Ltd v SSCLG* [2017] UKSC 37, [2017] PTSR 623 at [22]-[26]; *R (Timmins) v Gedling BC* [2015] EWCA Civ 10, [2015] PTSR 837 at [24]. To the same effect, a failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration: *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13, [2012] 2 P & CR 162 at [17]–[22].

90. The contemporaneity of a policy is a matter that must taken into account by the decision-maker in deciding what weight to be accorded to that policy: *Paul Newman Homes Ltd v SSHCLG* [2021] EWCA Civ 15 at [44]-[45]; *Tewkesbury BC v SSCLG* [2013] EWHC 286 (Admin), [2013] LGR 399 at [13].

91. A challenge to the rationality of a judgment on the application of planning or environmental controls may be made out where the decision-maker has attached a meaning to a policy that it is not properly capable of bearing: *R (Springhall) v LB Richmond-upon-Thames* [2006] EWCA Civ 19, [2006] LGR 419 at [6]-[7], [29]-[35]. If there is room for dispute about the breadth of the meaning the words may properly bear, then there may in particular cases be material considerations of law which will deprive a word of one of its possible shades of meaning in that case as a matter of law: *Horsham DC v SSE* [1992] 1 PLR 81 at 88 (CA).

92. The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues." An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration: *South Bucks DC v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at 1964B–G. The purpose of giving reasons is twofold: first so that the parties can know what was decided and why; and second so that the court may, if necessary, decide whether a decision-maker has made an error of law: *Alibkhiet v LB Brent* [2018] EWCA Civ 2742, [2019] HLR 15 at [51].

First ground: ignoring climate change/carbon policies other than MBU

93. According to the Panel [DL14-DL23], what it termed "national aviation policy" was to be

found in just three documents:

- the APF (March 2013),
- MBU (June 2018), and
- ANPS (June 2018).

94. The events that led to the publication of the MBU and ANPS are important to an understanding of their reach and intendment.

95. The APF provided policy support for airports *outside* the south-east of England to make best use of their existing capacity: §§1.24, 1.60. It specifically provided:

> ...that proposals for expansion at these airports should be judged on their individual merits, taking careful account of all relevant considerations, particularly economic and environmental impacts: §1.24

Thus, the APF recognised that "making best use" did not trump "environmental impacts" (and not just local environmental impacts). Additional capacity for airports within the south-east of England was to be considered by the Airports Commission: §§11, 21-24.

96. The Airports Commission's Final Report (1 July 2015) recognised the need for *an* additional runway (singular) in the south-east by 2030, but also noted that there would be a need for all other airports (including those in the south-east) to make more intensive use of their existing infrastructure (p 339). In relation to the relationship between expanded aviation and climate change, the Final Report noted (p 15):

> ***Any change to the UK's aviation capacity to allow the sector to continue to respond to these trends has to be considered in the context of global climate change and the UK's policy obligations in this area.*** Even though aviation currently accounts for less than 7% of the UK's overall carbon dioxide emissions, air travel has an extremely high carbon cost compared to other sources. The UK Climate Change Act 2008 sets a legally binding target to reduce overall UK emissions by 80% below 1990 levels by 2050. Aviation will need to play its part, and the Committee on Climate Change has specified a planning assumption for the sector that requires gross carbon dioxide emissions from aviation to total no more than 37.5MtCO2 by mid century. (emphasis added)

And later (p 24):

> The more that aviation's 'carbon budget' shrinks, the more important it becomes for that budget to be used as efficiently as possible. The most effective option to achieve this is expansion at Heathrow, which provides the greatest benefits for the UK's connectivity and its long-term economic growth.

97. In relation to Stansted airport, the Airports Commission reported (§16.49):

> The Commission considers that there may be a case for reviewing the Stansted planning cap if and when the airport moves closer to full capacity. Its forecasts indicate that this would not occur until at least the 2030s, although the airport has seen rapid growth since its purchase by MAG, which if sustained over a longer period would bring this forward. The Commission does not have any view as to the outcome of any such review, but is clear that it should be carried out on the basis of a full detailed assessment and consultation process, ***taking into consideration the environmental and other issues that supported the imposition of the original cap, as would be expected for any planning application of this nature and scale***. The independent aviation noise authority could be involved in such a review. (emphasis added)

98. On 9 December 2015, in a document called *Review of the Airports Commission's Final Report*, the Government set out its preferred option for a new north-east runway at Heathrow by 2030. The Review noted the uncertainty over future carbon policy (§83).

99. On 21 July 2017 the Government published a document called *Beyond the horizon — the future*

of UK aviation: a call for evidence on a new strategy. The document described itself as "a call for evidence on a new strategy," and that it was seeking views on the Government's proposed approach. The document foreshadowed that the Government was minded to be supportive of all airports (including those in the south-east) that wished to make best use of their existing runways *subject to environmental issues being fully addressed* (§2.10). The document recorded (§1.27):

> Balancing aviation growth with negative environmental impacts is one of the greatest challenges facing the aviation sector. These impacts mainly concern noise and air quality issues experienced by local communities, as well as the global effect of carbon emissions. The government wants to make sure that growth in the aviation sector does not result in unwelcome environmental impacts. Our general aviation sector also has its own particular issues that the government is keen to address.

Under the heading "Carbon Emissions" it recorded:

> 7.14 On climate change, which is a global rather than a local environmental issue, the government's position is that action to address these emissions is best taken at the international level. Global action allows for progress in reducing aviation's climate change impacts whilst minimising the risks of competitive disadvantage to the UK aviation industry. This position is shared internationally. Emissions from international aviation are tackled at the sectoral level through ICAO, which has been working for a number of years on measures to achieve its goal of carbon-neutral growth for the sector from 2020.
>
> 7.15 Measures include technological improvements, operational measures, sustainable alternative fuels and market-based measures. The government agrees that a combination of measures and approaches are needed to tackle this issue. The government is also looking to make progress at a domestic level, including by encouraging the production and use of new aviation fuels in the UK. It has consulted on a proposal to extend the Renewable Transport Fuels Obligation eligibility to aviation fuels, and has announced capital support for UK-based sustainable aviation fuel plants.
>
> 7.16 Emissions from international aviation (along with international shipping emissions) are currently excluded from the legally-binding 2050 target which was set by the Climate Change Act 2008 and from the five carbon budgets which have been set to date (covering the period up to 2032). However, the UK's carbon budgets have been set at a level that accounts for international aviation and shipping emissions, so that the UK is on a trajectory that could be consistent with a 2050 target that includes these emissions.

100. On 5 June 2018, the Government published both the ANPS and MBU. The ANPS is designated as a national policy statement under s 5 of the *Planning Act 2008*. MBU is *not* designated as a national policy statement under s 5 of the *Planning Act 2008* and is not within paragraph 5 of the NPPF. The Panel showed no cognition of the distinction or the significance of that distinction [DL16]: see §88-90 above.

101. The ANPS provides the primary basis for decision making on development consent applications for a north-west runway at Heathrow airport, and is an important and relevant consideration in respect of applications for new runway capacity in the south-east of England, such as Stansted (§1.12).

102. The ANPS sets out the relationship between it and the APF:

> 1.38 The [ANPS] sets out Government policy on expanding airport capacity in the South East of England, in particular by developing a Northwest Runway at Heathrow Airport. Any application for a new Northwest Runway development at Heathrow will be considered under the [ANPS]. Other Government policy on airport capacity has been set out in the [APF], published in 2013. The [ANPS] does not affect Government policy on wider aviation issues, for which the 2013 [APF] and any subsequent policy statements still apply.
>
> 1.39 On 21 July 2017, the Government issued a call for evidence on a new Aviation Strategy. Having analysed the responses, the Government has confirmed that it is supportive of airports beyond Heathrow making best use of their existing runways. However, we recognise that the

development of airports can have positive and negative impacts, including on noise levels. We consider that any proposals should be judged on their individual merits by the relevant planning authority, taking careful account of all relevant considerations, particularly economic and environmental impacts.

.....

1.41 The [ANPS] ***does not have effect*** in relation to an application for development consent for an airport development not comprised in an application relating to the Heathrow Northwest Runway, and proposals for new terminal capacity located between the Northwest Runway at Heathrow Airport and the existing Northern Runway and reconfiguration of terminal facilities between the two existing runways at Heathrow Airport. Nevertheless, the Secretary of State considers that the contents of the [ANPS] ***will be both important and relevant considerations*** in the determination of such an application, particularly where it relates to London or the South East of England. Among the considerations that will be important and relevant are the findings in the [ANPS] as to the need for new airport capacity and that the preferred scheme is the most appropriate means of meeting that need.

1.42 As indicated in paragraph 1.39 above, airports wishing to make more intensive use of existing runways will still need to submit an application for planning permission or development consent to the relevant authority, which should be judged on the application's individual merits. ***However, in light of the findings of the Airports Commission on the need for more intensive use of existing infrastructure as described at paragraph 1.6 above, the Government accepts that it may well be possible for existing airports to demonstrate sufficient need for their proposals***, additional to (or different from) the need which is met by the provision of a Northwest Runway at Heathrow. As indicated in paragraph 1.39 above, the Government's policy on this issue will continue to be considered in the context of developing a new Aviation Strategy. (emphasis added)

103. The ANPS makes no statement as to the policy significance of MBU. The APNS does not describe MBU as a "component of the forthcoming Aviation Strategy" [cf DL16]. Nor does MBU accord itself this eminence. In fact, MBU made quite clear that:

> ...it should not be interpreted as a statement of future carbon policy which will be considered through the development of the Aviation Strategy (§1.20: see also §1.26)

Nor does MBU "build upon the APF" [cf DL17]. MBU does not lay claim to doing any such thing (§§1.1 and 1.9). Rather, MBU (a departmental policy paper of the DfT) is an adjunct to the APNS (a statutory document, published on the same day that spells out the policy for the additional runway at Heathrow airport), making a policy statement that applications seeking to make best use of existing runway capacity by increasing an existing cap by fewer than 10mppa could be taken forward through local planning authorities, whereas those with a greater number would be considered as a national significant infrastructure project: §§1.26-1.27.

104. The MBU considers that some environmental elements:

> should be considered at a national level: §1.11.

The MBU foreshadows that the Government will be using the as-yet unpublished Aviation Strategy:

> to progress our wider policy toward tackling aviation carbon

but that:

> to ensure that [the] policy is compatible with the UK's climate change commitments we have used the DfT aviation model to look at the impact of allowing all airports to make best use of their existing runway capacity: §1.12.

105. The MBU recognises that, at the time of its publication:

> there remains uncertainty over future climate change policy and international arrangements to reduce CO_2 and other greenhouse gases. §1.14.

106. Reflecting that, the "Policy Statement" section of MBU is openly tentative for all aiports other than Heathrow:

> 1.25 As a result of the consultation and further analysis to ensure future carbon emissions can be managed, government believes ***there is a case for*** airports making best of their existing runways across the whole of the UK. The position is different for Heathrow Airport where the government's policy on increasing capacity is set out in the proposed Airports NPS. (emphasis added)

107. Immediately following that, the policy is set out for airports wishing to increase either the passenger or air traffic movement caps, split between those fewer than 10mppa (such as the Application) and those greater than 10mppa:

> 1.26 Airports that wish to increase either the passenger or air traffic movement caps to allow them to make best use of their existing runways will need to submit applications to the relevant planning authority. We expect that applications to increase existing planning caps by fewer than 10 million passengers per annum (mppa) can be taken forward through local planning authorities under the Town and Country Planning Act 1990. As part of any planning application airports will need to demonstrate how they will mitigate against local environmental issues, taking account of relevant national policies, including any new environmental policies emerging from the Aviation Strategy. This policy statement does not prejudge the decision of those authorities who will be required to give proper consideration to such applications. It instead leaves it up to local, rather than national government, to consider each case on its merits.
>
> 1.27 Applications to increase caps by 10mppa or more or deemed nationally significant would be considered as Nationally Significant Infrastructure Projects (NSIPs) under the Planning Act 2008 and as such would be considered on a case by case basis by the Secretary of State.

108. Paragraph 1.28 deals with the implications for overall airspace capacity. After noting that any flightpath changes required as a result of an airport development will need to follow the CAA's airspace change process, it observes:

> This includes full assessment of the likely environmental impacts, consideration of options to mitigate those impacts, and the need to consult with stakeholders who may be affected....

The passage does not qualify "likely environmental impacts" so as to take out of consideration carbon impacts: as such, it is evident just from §1.28 that MBU is not intended to be the exclusive policy source for assessing the carbon impact of an airport development proposal.

109. MBU concludes (in bold face):

> 1.29 Therefore the government is supportive of airports beyond Heathrow making best use of their existing runways. However, we recognise that the development of airports can have negative as well as positive local impacts, including on noise levels. We therefore consider that any proposals should be judged by the relevant planning authority, taking careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigations. This policy statement does not prejudge the decision of those authorities who will be required to give proper consideration to such applications. It instead leaves it up to local, rather than national government, to consider each case on its merits.

110. Notably in §1.29 of MBU:

- the government is stated to be "supportive" of airports such as Stansted making best use of existing runways;
- the policy recognises that this sort of development can have negative impacts;
- because of the potential for negative impacts, the policy considers that any proposals must be judged by (in a case such as the present) the local planning authority;
- that the local planning authority, in judging a development proposal such as the present, must take "careful account of ***all*** relevant considerations, ***particularly***

economic and ***environmental impacts*** and proposed mitigations";

— the policy ***does not*** "prejudge the decision" of that local planning authority; and

— the local planning authority must "give proper consideration to such applications."

In failing to recognise any of this, the Panel got the law wrong: see §§88-90 above.

111. Moreover, as UDC had submitted to the Panel (§§90-93 *Closing Submissions*) but which the Panel took no account of (or, if it did, failed to explain how it was able to reconcile this with its unqualified conclusions), MBU is not an aviation policy that is calibrated to net zero. Rather, MBU was formulated at a time when the carbon reduction policy was 80%. It was approximately one year *after* MBU's publication in 2018 that the *Climate Change Act 2008* was amended by Parliament to reflect net zero and a 100% carbon reduction target. These are now national targets: see §§77-81 above. To suggest, as is embedded in the Panel's reasoning, that none of this will affect domestic and international aviation emissions demanded explanation from the Panel. There is nothing to suggest that the scale of expansion contained in MBU is consistent with *current* government emission reduction targets. Absent convincing explanation, the Panel's approach to MBU was illogical.

112. Having given MBU a status it neither has nor claimed to have, the Panel proceeded to misread MBU — a further error of law (see 88-90 above):

(1) MBU does not claim that the "UK's climate change commitments" used for the modelling on which it relied are to be treated as set in stone, as implied in DL18-DL22. Rather, MBU records that those commitments are an "assumption" — identified in §1.16 as being 37.5Mt of CO_2 in 2050 — upon which the policy is predicated (§1.21). Indeed, MBU expressly stated:

> ...there remains uncertainty over future climate change policy and international agreements to reduce CO_2 and other greenhouse gases (§1.14)

It was that uncertainty that compelled the Airport Commission to devise two scenarios for dealing with forecast carbon emissions from aviation expansion.

(2) The MBU does not remove carbon emission issues as part of local planning application processes, as claimed in DL23. From the outset, the MBU makes it clear that proposals to make best use of an existing runway are "subject to environmental issues being addressed" (§1.5). The express proviso — "subject to environmental issues being addressed" — is a clear statement that making best use of an existing runway does not of itself address environmental issues: the proviso is superfluous if a proposal to make best use of an existing runway addresses environmental issues. Notably, the MBU does not limit this to "local environmental issues" (cf §§1.22-1.24, 1.26, 1.29). It is not to be assumed that leaving out the word "local" was careless drafting or that the Planning Inspectorate is entitled to insert the word so as to give it a fundamentally different meaning. Paragraph 1.26 of MBU (setting out the policy statement in respect of applications for increases less than 10mppa), expressly states that it does not prejudge the decision of a local planning authority, but that each such authority (rather than national government) must consider each case on its merits. There is nothing in §1.26 taking out of that consideration the issue of carbon

emissions. Any residual doubt is removed by §1.29 which compels:

> ...any proposal [to] be judged by the relevant planning authority, taking careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigations.

Pointedly, the text does not include (as had earlier been included in the text — see §§1.22-1.24) the phrase "local environmental impacts," thereby signifying that included in the particular matters that a local planning authority must take careful account of are non-local environmental impacts, such as carbon issues.

(3) The status of Government policy is not undifferentiated, as the Panel implied [DL24, DL85, DL94-DL95]. The Panel accorded MBU an eminence it does not have [DL16, DL85-DL88] (see §103 above). MBU does not operate in spite of the UK's statutory obligations under the *Climate Change Act 2008*, as implied in DL24. MBU does not operate to stymie new climate change targets, as implied in DL24. By requiring local planning authorities to take "careful account of all relevant considerations, particularly economic and environmental impacts" (§1.29), important Government and policy statements on cutting emissions, including:

- The *Climate Change Act 2008 (2050 Target Amendment) Order 2019* (June 2019);
- Committee on Climate Change (CCC) Net Zero - The UK's contribution to stopping global warming (May 2019);
- Sustainable Aviation – Decarbonisation Road Map: A Path to Net Zero (February 2020);
- DfT Transport Decarbonisation Plan (June 2020);
- The *Government Response to the Committee on Climate Change's 2020 Progress Report to Parliament*, presented pursuant to s 37 of the *Climate Change Act 2008* (October 2020) esp at pp 105-106; and
- The *Policies for the Sixth Carbon Budget and Net Zero*, Ch 8 (December 2020),

were sewn into Government policy on aviation and became part of the planning system. The Panel's shelving of such changes – some of which it acknowledged the Government had made "clear" [DL84] – until a later date [DL24-DL25] misread MBU.

113. Having misread MBU as codifying the determination of carbon/climate change issues arising out of an application to increase passenger movement caps on the use of an existing runway, the Panel then proceeded to misapply MBU by treating it as conclusive of the carbon/climate change analysis [DL82-DL102]. Specifically:

(1) The measures that the Panel identified [DL84-DL85] (which are included in the list at §112(3)) did not involve any "move away from [the Government's] MBU policy" [DL85]. The policy reach of MBU is a modest one: see §§107 and 109 above. MBU does not shun the acknowledged "clear" carbon reduction targets [DL84-DL85] when considering an application of the kind with which §1.26 of MBU is concerned. Quite the opposite. All of these can co-exist with the policy statement in MBU (set out at §§107 and 109 above). The "MBU policy" vs "carbon statements" dichotomy that permeates the Panel's reasoning [DL82-DL102] is a false one.

(2) In testing the potential carbon emission implications of making best use policy (MBU §§1.11-1.13), MBU is not setting the 37.5Mt CO_2 figure in stone — quite the opposite. MBU expressly recognises that there is "uncertainty over future climate change policy and international arrangements to reduce CO_2 and other greenhouse gases" (§1.14). This recognition of uncertainty in relation to these matters echoed earlier Government statements: see §98 above. The 37.5Mt CO_2 figure is the "planning assumption" in MBU (§1.16): it is not the conclusion of the matter. MBU is more tentative than the Panel reckoned [DL87-DL88], thus stating that it "is likely" that the identified measures would be available "to meet the planning assumption" in MBU (§1.21). Post-MBU publication announcements have drained the reliability of that planning assumption. The Panel was wrong to leave the announcements out of account: the Panel had to consider where that left the planning assumption in MBU [DL94].

(3) MBU does not give any support for the first-come first-served logic adopted by the Panel [DL93]. This logic served to evaluate individual airports in isolation from each other, rather than considering whether and to what extent an airport's absorption of carbon emission allowance represented the best way forward having regard to other proposals. The Panel compounded the error by wrongly assessing the carbon impact of the proposed development against the entire UK carbon emission allowance, to conclude:

> "...given the very small additional emissions forecast in relative terms, there is also no reason to expect that the Council's climate emergency resolution should be significantly undermined" [DL94]

The reality is that every development before a local planning authority produces "very small additional emissions...in relative terms": larger developments are dealt with by central government. The Panel asked itself the wrong question to get the wrong answer. Had the Panel asked itself the correct question, it would have yielded the answer that the proposed development reversed into the direction of travel, increasing carbon emissions when policy statements were demanding a reduction.

(4) There was no basis for the Panel's mantra that:

> Carbon emissions are predominantly a matter for national Government and the effects of airport expansion have been considered, tested and found to be acceptable in MBU. DL153

This epitomised the Panel's misunderstanding of both the reach and status of MBU: see §§26-24 above. It was that misunderstanding that gave the Panel the misplaced confidence to assert:

> It is clear that UK climate change obligations would not be put at risk by the development, including the Government's 20 April 2021 announcement. DL153

114. The approach of the Panel stands in sharp contrast to that of the Secretary of State and his four examining Inspectors (who prepared a 789-page report) on the application for a proposed development at Manston airport (9 July 2020 and 18 October 2019, respectively). These both recognised that making best use of existing runways was *subject to* environmental issues being addressed: see in the Secretary of State's letter §§21, 63 and in the Inspectors' report §§5.5.28 and 6.5.71. The Panel were referred to the Manston decision. The Panel did not attempt to reconcile either their approach or the outcome of their approach with that taken in Manston.

This was legally impermissible, inviting the criticism that the Panel's decision was unprincipled and idiosyncratic (see §91 above) or, at best, failing to supply reasons on a key issue before it (see §92) above.

115. Wrongly applying a wrongly-read policy to which it had given the wrong status, the Panel made a wrong decision.

Second ground: erroneous rejection of Condition 15

116. UDC put forward Condition 15 as a mitigating measure enabling, within fixed ceilings, limits to be set for the three main environmental effects produced by the flights for the additional passenger movements for which STAL sought planning permission. Condition 15 recognised that the full fruit of the planning permission would not be borne for years, possibly decades. It recognised that no-one would be able to pinpoint the date, the year or even the decade when the developer would harvest all the fruit of the development allowed by the grant of planning permission. It also recognised that environmental standards and understandings of what is environmentally necessary could change, sometimes quite radically and sometimes over a short space of time.

117. Seeking to accommodate all of this, condition 15 sought to impose numeric limits on noise exposure, air quality emissions and carbon emissions from the development, which were set out in two schedules to the condition. Schedule A set out the numeric limits that were to apply from commencement of the development and Schedule B set out the numeric limits that were to apply from the start of the first year in which the passengers per annum exceeded 35 million: Condition 15 §§1-3. Of the remainder of Condition 15, §§4-14 set out the mechanism by which Schedule B would operate and §§15-16 defined various terms. In splitting the numeric limits in this way and providing for phased release of increased passenger numbers, Condition 15 served to ensure that the benefit of the developer being allowed to increase the maximum number of passengers per annum from that allowed under its existing permission (35 mppa) would be shared with those living in the vicinity of the airport, both current and in the future. It did so in a way that did not pre-empt the needs of future generations. Condition 15 was thus firmly rooted in and supported by §§7-9 of the NPPF and by §3.3 of the APF. The Panel had to acknowledge that and explain itself before castigating Condition 15 in the way that it did.

118. The condition had been first proposed by UDC on 8/12/20 in its planning expert's proof of evidence (Hugh Scanlon) at pp 81-91 (the missing schedule B was supplied shortly afterwards (CD26.1)). Mr Scanlon had concluded his proof by summarising the attractions of Schedule 15 (§§10.13-10.14):

> "...a proposed condition is promoted that would act to remove these concerns [ie as to whether the predicted impacts will be realised], initially 'locking in' those impacts in respect of noise, air quality and carbon to be consistent with those predicted by the Appellant, restricting operations other than in accordance with the Appellant's own identified environmental parameters. It would then link growth with achieving compliance with new policy as it emerges, to ensure that the improvements predicted in the aviation sector are shared with the local community, a constant theme associated with aviation

policy. In doing so, it would provide reassurances consistent with the commitments as set out within STAL's Stansted Sustainable Development Plan which promised a proactive management of the environment, to reflect a changing policy context.
Revisiting the planning balance with such a condition in place, would significantly add to the positives of the Appeal proposals, to the extent that the balance would weigh strongly in favour of the development being positively considered."

119. STAL made no response to UDC's proposed Condition 15 until 5/1/12, when rebuttal proofs of evidence were exchanged. In his rebuttal proof, STAL's Mr Alistair Andrew had stated that Condition 15 "cannot be agreed to by STAL" (§3.2). As noted above, Mr Andrew did not engage with the figures in Schedules A and B, but objected to the very principle of Condition 15 (§3.5) and complained that it failed *all* six tests set out in §55 of the NPPF (CD14.6) and that, accordingly, it could not "be considered appropriate, practical [or] lawful" (§3.7, and further §§3.9-3.13).

120. The Panel appears to have accepted all of Mr Andrew's complaints. This is borne out by the CDL, where the Panel summarised STAL's complaint that Condition 15 was:

> clearly unlawful and fail[ed] to meet the tests contained in the [NPPF] [CDL6]

and its comment that it was an:

> unnecessarily onerous and misconceived condition that patently failed to meet the relevant tests [CDL21]

121. There was nothing unlawful about Condition 15. In its written submissions on Condition 15 lodged on 9 February 2021, UDC had set out:
   - at §§15-20, the legislative sources for planning conditions;
   - at §§21-27, the salient case law on planning conditions;
   - at §§28-31 , the policy and ministerial guidance on planning conditions; and
   - at §§32-44, a detailed analysis of the application of Condition 15 to each of the above.

122. UDC's account of the law relating to planning conditions was and is unimpeachable. To the extent that the Panel disagreed with the legal analysis, the Panel did not reveal its reasons for doing so other than its partiality to all STAL's submissions. Given its centrality to UDC's case and to the Panel's decision (including CDL), the implied acceptance that Condition 15 was unlawful, devoid of reasoning, was a serious legal flaw in the DL: see §92 above.

123. To the extent that the Panel did pick out any reasons for rejecting Condition 15, these reveal a misconstruction of Condition 15, a misunderstanding and misapplication of the law and guidance on planning conditions, and a misunderstanding of planning policy: see §§88-90 above.
   (1) The Application was for a development that would see escalating passenger numbers at Stansted airport until 2050. Other than Condition 15, there was nothing before the Panel that would allow future generations to ensure that as passenger numbers escalated the development would meet contemporary environmental standards. This is what §§7-9 of the NPPF requires. For the Panel to write:

   > The appeal proposal accords with current policy and guidance and there is no evidence that it would compromise the ability of future generations to meet their own needs [DL141]

   implied that the Panel was certain that current policy and guidance would suffice for

the 2050 generation. The Panel had no basis for that certainty. It was mere say-so on their part. The previous 30 years (ie 1990-2020) had shown that the needs of one generation in setting and meeting environmental standards could differ radically from the needs of the next generation in doing the same. The conditions that the Panel "discussed" at DL128-DL140 made zero provision to enable future generations to set and meet their own environmental standards [cf DL141]. The conditions that the Panel discussed at DL128-DL140 would tie future generations to the environmental standards of 2021, leaving those generations helpless as they watched passenger numbers grow. It was this wrong-headedness that enabled the Panel to say:

> In light of the Panel's conclusions on these matters, there is no policy basis for seeking to reassess noise, air quality or carbon emissions in light of any potential change of policy that might occur in the future. DL142

(2) There *was* a policy basis for seeking to reassess noise, air quality or carbon emissions in light of any potential change of policy that might occur in the future. Quite apart from the support given to it by §§7-9 of the NPPF, the APF insists that the benefits of aviation be shared with the local communities around airports which experience its environmental effects: §3.3. Applied here, this meant that if STAL were to have the benefit of the additional 8mppa which it sought, national aviation policy required that those benefits be shared through the capacity increase being tied, as a minimum, to the environmental benefits which STAL stated it could achieve over the period they had assessed. The Panel did not engage with this.

(3) The phasing of environmental requirements is specifically supported by Government policy to which the Panel made no reference:

- ANPS at §1.20;
- DfT *Aviation 2050* at §3.14; and
- *Clean Air Strategy 2019* at pp 7 and 30.

None of this was referred to by the Panel, still less dealt with before it concluded that the Condition 15 was both "not necessary" and "unreasonable" [DL142].

(4) Condition 15 did not require:

> the Council's reassessment and approval periodically as the airport grows under the planning permission, allowing for a reconsideration against new, as yet unknown, policy and guidance. DL142

Condition 15 redeployed the detail in the ESA, using STAL's own figures to populate Schedule A: for the sources, see §§27.1.4, 28.1.2, and, in relation to noise App 9, p 43, in relation to air quality, p 32, and in relation to carbon emissions §6.1.2. Schedule B of Condition 15 deployed these figures to require improvement in each of those three environmental detriments in a way that was certain, using metrics that STAL's own experts had used.

(5) The Panel, in asserting that Condition 15:

> would be likely to seriously undermine the certainty that a planning permission should provide that the development could be fully implemented. DL142

did not explain how that would be nor did it identify a single example of how that "serious undermining" of certainty might occur. In making this criticism, the Panel did no more than copy over the gist of submission that STAL had made to it. A

proper decision letter would have stated the reasons for such an accusation. In fact, there was no basis for it.

(6) The Panel unfairly characterised Condition 15 as seeking:

> to reassess noise, air quality or carbon emissions in light of any *potential* change of policy that *might* occur in the future [DL142]

In fact Condition 15 was expressly tied a re-assessment of legislation, international instruments and policies *actually in force at the time of assessment* (cl 9). Clause 9 of Condition 15, in requiring UDC to "take account of" legislation, international instruments and policies relevant to aircraft noise, noise control, carbon emissions and air quality, strove to secure that what would be approved would be consistent with the contemporary requirements of legislation, international instruments and policies. This should have commended it to the Panel, rather than suffering its condemnation.

(7) Condition 15 also accommodated the uncertainties that were inherent in the passenger number forecasts. Those uncertainties were acknowledged and in evidence before the Panel: Bishop, first witness statement §§87-90, second witness statement §12. Condition 15 was the only condition that accommodated those uncertainties: these made it a necessary condition. Unlike any other condition before the Panel, Condition 15 tied the measures limiting the environmental effects of the proposal to increased passenger numbers *as they happened*. This was consistent with the national aviation policy's objective of sharing the benefits of aviation growth. None of this was addressed by the Panel. It was a key submission of UDC. The reader of the DL has no idea on what basis — other than idiosyncratic antipathy— the Panel could have found a lack of reasonableness or necessity: cf §92 above

124. In short, the Panel got the law on planning conditions wrong, it got the guidance wrong, it got planning policy wrong, and, on top of all that, it misconstrued Condition 15 and failed to make the link with STAL's own evidence.

Third ground: unprincipled costs award

125. Section 250(5) of the *Local Government Act 1972* confers power on the Secretary of State to make an order as to the costs of the parties at public inquiries. Paragraph 6(4)-(5) of Schedule 6 to the *Town and Country Planning Act 1990* applies s 250(5) to planning inquiries.

126. Costs do not "follow the event" in planning inquiries. The general rule is that the parties bear their own costs: *Competition and Markets Authority v Flynn Pharma Ltd & ors* [2020] EWCA Civ 617, [2020] Costs LR 695 at [96]. The availability of costs orders in planning inquiries is not intended to deter parties from exercising their rights, from being heard or from making what they legitimately consider to be the right decision for the right reason.

127. The Secretary of State has had for many years a published policy on costs which has, in essence, remained constant. Currently it is to be found in the *Planning Practice Guidance: Appeals* (ie the PPG ID:16-027), which planning inspectors are supposed to adhere to and apply

when deciding whether or not to make a costs order and, if so, the nature of any such costs order.

128. In summary, under the PPG the *discretion* to award costs arises where a party had:
    (1) behaved unreasonably; *and*
    (2) that unreasonableness has directly caused another party to incur unnecessary or wasted expense.

129. In relation to the first requirement, unreasonable behaviour may be either (or both):
    — procedural; or
    — substantive.

130. Unreasonable *procedural* behaviour covers matters such as failing to meet deadlines, failure of witnesses to attend, behaviour that results in adjournment of the inquiry, failing to attempt to resolve statements of common ground, withdrawing without good reason, disruptive behaviour and so forth.

131. There has never been any suggestion that there was anything on the part of UDC that constituted unreasonable *procedural* behaviour. There is nothing in CDL to suggest that it relied upon unreasonable *procedural* behaviour. That is because UDC's procedural conduct of the Inquiry was exemplary. There was, on the other hand, failure by STAL to engage with UDC on conditions: see §§56 - 62. The CDL makes no reference to this as one of the matters that it took into account. This is consistent with a disparity of treatment by the Panel.

132. As there was no unreasonable procedural behaviour on the part of UDC, that leaves unreasonable *substantive* behaviour as the only potential basis for awarding costs against UDC. Typically, unreasonable substantive behaviour involves running points that have no legal basis or for which no evidence is adduced.

133. In deciding the costs issue, the Panel was required to have regard to the position as a whole: *Manchester City Council v Mercury Communications Ltd* [1988] JPL 774 at 775, 777.

134. The PPG spells out how a party makes an application for costs. It opens (ID16-035):

> Applications for costs ***should be made as soon as possible,*** and no later than the deadlines below... (emphasis added)

And a little further on:

> In the case of hearings and inquiries:
> — All costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions.

This section of the PPG concludes with:

> Anyone making a late application for an award of costs outside of these timings will need to show good reason for having made the application late, if it is to be accepted by the Secretary of State for consideration.

135. In the case of *procedural* unreasonable behaviour, that may arise during the course of the inquiry hearing itself, so that it will not be possible to make the application for costs until that has occurred.

136. But in the case of *substantive* unreasonable behaviour, that behaviour will normally be apparent from a party's statement of case. Or, at the latest, it will be manifest either from the date that proofs of evidence are filed or upon one or more of that party's witnesses recanting from a major part of his/her evidence relied upon by the party to sustain its case.

137. There was nothing of the sort here. UDC filed its Statement of Case on 16 September 2020. That Statement of Case spoke to each of the four reasons upon which UDC relied for refusing to grant planning permission. It identified the policy basis relied upon for each of those bases.

138. In making its application for costs:
    (1) STAL majored upon the "background to the application for costs" (§§9-30) in support of that application. In summary this was that UDC had resolved in February 2018 to grant planning permission and then in January 2020 had decided not to grant planning permission. All of this was known to STAL from January 2020.
    (2) STAL complained that through this 23-month process UDC had "delayed" the development (§§31-46). All of this was known to STAL from January 2020.
    (3) STAL complained that UDC had formulated "imprecise and value reasons for refusal" (§§47-74). This was known to STAL from January 2020.
    (4) STAL also complained that UDC had "failed to produce evidence to substantiate each reasons" and that it had made "vague generalised or inaccurate assertions about the proposal's impact, unsupported by any objective analysis" (§§47-74). The complaint is not accepted, but even if it had had any basis in truth, this would have been apparent to STAL from the exchange of proofs of evidence (8 December 2020). In fact, STAL felt the need to file extensive rebuttal proofs of evidence to respond to the points made by UDC's witnesses, giving the lie to the complaint in the costs application. Thus:
        (a) Mr Cole's rebuttal proof engaged with the detail of the proof of UDC's witness (Mr Trow) on noise issues, with no criticism by Mr Cole of vagueness, generalisations or inaccuracy in the proof of Mr Trow.
        (b) Mr Bull's rebuttal proof engaged with the detail of the proof of UDC's witness (Dr Broomfield) on air quality issues, with no criticism by Mr Bull of vagueness, generalisations or inaccuracy in the proof of Dr Broomfield.
        (c) The rebuttal proofs of Mr Robinson and Mr Vergoulas engaged with the detail of the proof of UDC's witness (Dr Hinnells) on carbon emissionissues, with no criticism by either of them of vagueness, generalisations or inaccuracy in the proof of Dr Hinnells.
        (d) The rebuttal proof of Mr Andrew engaged with the detail of the proof of

UDC's witness (Mr Scanlon) on planning issues, with no criticism by Mr Andrew of vagueness, generalisations or inaccuracy in the proof of Mr Scanlon.

(5) Finally, STAL complained that it was unreasonable for UDC to refuse permission without "at the very least considering whether its concerns could be resolved by the imposition of a revised conditions or set of conditions" (§77). This was known to STAL from January 2020.

139. In short, the bulk of the complaints made by STAL to support its costs application were matters present by January 2020 and all were known to STAL by 8 December 2020.

140. Thus, STAL could have made its application for costs when it filed its Planning Appeal Form on 24 July 2020. That form (section H) asks an appellant: "Have you made a costs application with this appeal?" STAL ticked "no."

141. STAL did not make its costs application "as soon as possible," as required by the PPG. Indeed, in relation to the long-stop "and no later than the deadlines below," STAL waited until the very last moment possible.

142. Against this backdrop, the Panel made a costs decision that was as unprincipled as it was irrational. Intentional or otherwise, its effect is to stifle local planning authorities from making important planning decisions according to their assessment of the issues that arise from the application.

143. The Panel managed to make 11 substantive, methodological mistakes in the space of its four-page costs decision:

(1) The Panel was heedless of the Guidance that "applications for costs should be made as soon as possible." Contrary to how the Panel brushed this off, making the application as soon as possible is not just "best practice" [CDL9]: it is what the Guidance demands. The Panel's defence that it was:

> "not unreasonable to wait for the conclusion of evidence in anticipation that the Council might yet substantiate the need for a costs application" CDL9

does not bear analysis. The great bulk of what STAL relied upon in support of its costs application was known by January 2020 and did not become clearer thereafter. The very things identified by the Panel in support of making a costs order were known to STAL by January 2020: see CDL13 (UDC's January 2020 reconsideration of its February 2018 resolution), CDL14 (UDC's reasons in February 2018), CDL15 (officer advice at the time of the January 2020 decision and lack of identified impact), CDL16 (UDC not having sought further information before making the January 2020 decision), CDL17 (vagueness of reasons for the January 2020 decision), CDL18 (reason 3 in the January 2020 decision being "vaguer still" and not being "credible or respectable", CDL19 (reason 4 in the January 2020 decision being unclear and no conditions offered to resolve it).

The Panel approached the timing issue in the wrong way. The Panel needed to recognise that the costs application, in having not been made earlier in the appeal process (as the Panel recognised — CDL9), had not been made in accordance with the Guidance, was *not* properly made: cf CDL10. There is nothing "overly legalistic" in interpreting "as soon as possible" to mean "as soon as possible," and the Panel was wrong to proceed on the footing that adherence to guidance would be being "overly legalistic": CDL10. Had the Panel not wrongly exhibited this indifference to the timing precepts of the PPG, the Court cannot be sure that the Panel would have entertained STAL's last-minute costs application.

The Panel's attempt to protect itself by asserting that there could be no suggestion that UDC was disadvantaged or deprived of an opportunity to deal with the issues raised [CDL10] does not recognise or address the prejudice to UDC from STAL's withholding of its costs application until the last minute. As noted above, the basis of the of STAL's application was *substantive* unreasonable behaviour. Where the applying party's complaint is one of *substantive* unreasonable behaviour (as opposed to *procedural* unreasonable behaviour), the other party will need to know the substance of the complaint as soon as possible, in order that:

- it can decide from whom it needs to adduce evidence;
- the contents of its proofs of evidence; and
- the questions to ask of the applying party's witnesses in cross-examination.

The need is particularly acute where, as here, the parties were under tight time-limits in cross-examining witnesses and in adducing further evidence in chief. By the Panel's own admission [CDL11], "the full details of the [costs] case against the Council" was only made in the costs application, served minutes before the close of the 30-day inquiry. It was not for the Panel to guess that UDC must have anticipated what would be in such a document and to then make the remarkable statement:

> ...there was nothing to be gained from hearing further oral evidence on what are largely matters of fact and public record. CLD11

That statement from the Panel betrays a closed mind that is antithetical to due process.

(2) In a similar vein, the Panel contradicted itself by saying that it was "not unreasonable to wait until the conclusion of the evidence" [CDL9] when it had just stated that the "application could have been made earlier in relation to unreasonable behaviour known to the appellant well before the Inquiry opened" [CDL9] and when the principal "unreasonable behaviour" relied upon was that UDC should have allowed the planning application [CDL2-6], being a "substantive" (as opposed to "procedural") basis that STAL had known for 15 months before (similarly [CDL22]).

(3) Further to the above, the Panel failed to take into account, alternatively failed to explain its rejection of, UDC's submissions on the unfairness and prejudice to UDC in the timing of STAL's costs application, and to evaluate the magnitude of the unfairness and prejudice [CDL12]. Given the detailed submissions that UDC had made and the importance of the costs issue, the Panel was required to grapple with and articulate its reasons on each of those. It did not and fell short of the basic

requirements of a lawful decision letter: see §92 above.

Moving to the "substance" of the Panel's reasons for ordering costs:

(4) The Panel disparaged UDC's reasons for refusal as "unquestionably vague and generalised" and that they "left the actual and specific concerns of the Council opaque" [CDL17]. Given the Panel's criticism and the strident terms in which it was expressed, what is unquestionable is that the Panel had to identify what was "vague" and "opaque." The Panel's denigration of UDC's reasons for refusal found no actual support in STAL's Statement of Case. STAL's Statement of Case deals one-by-one with the four reasons for refusal — an impossibility if the concerns of the Council were "opaque." First it dealt with, noise, then with air quality, then with carbon emissions, and finally with mitigation and insufficiency of infrastructure — all at some length. The Panel does not explain how STAL managed this feat or how it reconciled this with the Panel's disdain for UDC's reasons: cf §92 above. Indeed, the Panel appears not to have taken STAL's Statement of Case into account before degrading them in the way that it did. Nor did STAL make this complaint in its 102-page Opening Statement. Again, the Panel does not explain how it reconciled its characterisation of the reasons for refusal as "vague" and "opaque" when the party appealing against those reasons for refusal was able to devote 102 pages to saying what was wrong with them: cf the requirements set out in §92 above.

(5) Similarly, in singling out for special criticism the third reason for refusal:

> The reasons for refusal become vaguer still at reason 3 which sought to rely on a conflict with general accepted perceptions and understandings of the importance of climate change. CDL18

the Panel collapsed its own conclusions on the issue into its criticism of UDC's articulation of this reason. Given the criticism that the Panel was making, it should have concentrated on how UDC had expressed its third reason for refusal. In the third reason for its decision notice, UDC had spelled out that:

> The additional emissions from increased international flights are incompatible with the Committee on Climate Change's recommendation that emissions from all UK departing flights should be at or below 2005 levels in 2050. This is against the backdrop of the amendment to the Climate Change Act 2008 (2050 Target Amendment) to reduce the net UK carbon account for the year 2050 to net zero from the 1990 baseline. This is therefore contrary to the general accepted perceptions and understandings of the importance of climate change and the time within which it must be addressed. Therefore, it would be inappropriate to approve the application at a time whereby the Government has been unable to resolve its policy on international aviation climate emissions

The Panel did not identify what was vague about this. Given its conclusion and the basis for that conclusion, the Panel had to: see §92 above. Moreover, given the Panel had already found UDC's reasons for refusal left its concerns "opaque" it is difficult to see how the reasons could have become "vaguer still" — at least given the normal meaning of the word "opaque."

(6) The Panel fundamentally misrepresented UDC's appeal evidence. UDC appeal evidence was not:

> ...that the planning balance was favourable, such that planning permission should be granted CDL17

The evidence from UDC's planning expert, Mr Scanlon was clear and consistent that planning permission should only be granted provided that environmental impacts

could be guaranteed against specified limits, being the limits that UDC had spelled out in Condition 15: see §§2-6-2.9, 3.8-3.9, 9.12, 9.25, 9.77-9.80, of Mr Scanlon's proof of evidence. Mr Scanlon stated in as clear terms as could be:

> 2.11 ...the Council's position requires the imposition of a condition on any positive decision forthcoming from this Inquiry, that provides sufficient security regarding future environmental conditions. Given that the positive outcome to the planning balance exercise was dependent upon the magnitude of environmental impacts as identified by the Appellant, there is a requirement to ensure development at the Airport performs consistently with these projections. There is also a requirement to enable future environmental performance of the Airport to be linked to a changing policy context, with a review mechanism in place, designed to apply appropriate standards as they are adopted.

To make no reference or allusion to this (or any of the above-cited paragraphs), or in any way to qualify the statement in the final sentence of CDL17, was a wilful distortion on the part of the Panel that infected the CDL.

(7) Similarly, the Panel confused the "credibil[ity] or respectab[ility]" [CDL18] of UDC's position on climate change with the "vague[ness]" of the third reasons for refusal [CDL18]. There was nothing "vaguer still" about reason 3 in the decision notice. STAL was able to address it at length in its Statement of Case, in the proofs of evidence of Mr Robinson and Mr Vergoulas, as well as in its 102-page Opening Statement. The Panel's confusion of thought is insupportable.

(8) The Panel repeated all its mistakes in relation to Condition 15 (see Ground 2 above), which the Panel wrongly described as "misconceived" and as "patently fail[ing] to meet the relevant tests" [CDL21]. Regardless of whether the Panel thought Condition 15 misplaced, insofar as Condition 15 related to the question of costs the correct approach for the Panel was to ask itself whether UDC's offering that condition as a way through was so unreasonable that it should be met with a costs order for suggesting it. Had the Panel asked itself the correct question, it would have reached the correct answer: namely, that there should have been no order for costs as UDC had put forward a reasonable *via media* that accommodated all its reasons for refusal.

(9) The Panel was wrong in stating that UDC's taking into the "direction of travel in policy or emerging policy" was not a valid consideration in reaching its decision to refuse planning permission [CDL22]. Emerging policy is a material consideration when deciding a planning application. Other Inspectors dealing with recent airport capacity applications have recognised this, eg Manston §6.5.71. The Panel was wrong to take a wayward view of the relevance of the direction of policy travel, not to explain how it had reached so different a view from other Inspector's dealing with like appeals, and then rely on that errant view in support of its decision to award costs against UDC.

(10) The Panel stated that

> The strength of evidence in favour of the proposal is such that the application should clearly have been granted planning permission by the Council [CDL22].

The vast majority of the evidence before the Panel in favour of the proposal post-dated UDC's decision, most notably the replacement for the ES — ie the ESA. Given that the basis for the costs application was *substantive* unreasonable behaviour, this

obvious point could not be overlooked. The Panel had to identify what constituted that "strength of evidence" and when it had been brought before UDC. The Panel did not do so. This was a fatal methodological mistake and reflected sloppiness of thought.

(11) The Panel gave no thought to a partial costs order. SSE had raised numerous issues that formed no part of the reasons for refusal or UDC's case and evidence. These included traffic forecasting, surface access, health and well-being, socio-economic impacts. STAL devoted time and energy on these issues, preparing proofs of evidence from:

- Dan Galpin on air traffic forecasts and projections;
- Philip Rust on surface access;
- Andrew Buroni on health and well-being; and
- Edith McDowall and Louise Congdon on socio-economic impacts,

with rebuttals from each of them. STAL examined each of those witnesses in chief and cross-examined SSE's witnesses on the same. UDC played no part in any of this. It consumed a very significant part of the inquiry. There is no principled basis for UDC meeting STAL's costs so far as it related to those issues. The Panel gave no reasons for not dealing with this: this fell far short of what was required (see §92 above).

144. Quite apart from all these, the costs decision was one that no right-minded, impartial panel of inspectors would have made: see §91 above. This sort of costs decision has no place in the planning system of this country.

Conclusion

145. The Court is respectfully invited to grant permission on each of the three grounds of challenge.

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