Judicial Review

Acknowledgment of Service

Name of court

High Court of Justice
Planning Court

Claim number

CO/2356/2021

Name of claimant (including any reference)

R (on the application of Uttlesford District Council)

Name of defendant

Secretary of State for Housing, Communities and Local Goverment

Interested parties

(1) Stansted Airport Limited
(2) Stop Stansted Expansion

This Acknowledgment of Service is filed on behalf of

Name

Stansted Airport Limited

who is the

- [ ] Defendant
- [x] Interested party

Name and address of person to be served

Name

Elizabeth Smith

Address

Building and street

Uttlesford District Council Offices, London Road

Second line of address

Town or city

Saffron Walden

County (optional)

Postcode

C B 1 0 4 E R

Section A

Tick the appropriate box

- [x] I intend to contest all of the claim
  – complete sections B, C, D and F
- [ ] I intend to contest part of the claim
  – complete sections B, C, D and F
- [ ] I do not intend to contest the claim
  – complete section F
- [ ] The defendant (interested party) is a court or tribunal and intends to make a submission
  – complete sections B, C and F
- [ ] The defendant (interested party) is a court or tribunal and does not intend to make a submission
  – complete sections B and F
- [ ] The applicant has indicated that this is a claim to which the Aarhus Convention applies
  – complete sections E and F
- [ ] The Defendant asks the Court to consider whether the outcome for the claimant would have been substantially different if the conduct complained of had not occurred (see s.31(3C) of the Senior Courts Act 1981)
  – A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

Section B

B1. Insert the name and address of any person you consider should be added as an interested party.

1. Name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email (if you have one)

2. Name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email (if you have one)

Section C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Please see the attached summary grounds of defence

Section D

D1. Give details of any directions you will be asking the court to make.

Note: If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties form **N464PC** with this acknowledgment of service.

☑ Set out below

☐ attached

The First Interested Party requests that this claim be categorised as a significant Planning Court claim as defined at paragraph 3.2 of Practice Direction 54D to the CPR.

Section E

Response to the claimant's contention that the claim is an Aarhus claim

E1. Do you deny that the claim is an Aarhus Convention claim?

☐ Yes. Set out your grounds for denial in the box below.

☐ No

E2. Do you wish to vary the costs limits under CPR 45.43(2)?

☐ Yes. State the reason why you want to vary the limits on costs recoverable from a party.

☑ No

Section F

Statement of truth

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☐ **I believe** that the facts stated in this form are true. I confirm that all relevant facts have been disclosed in this application.

☐ **The defendant** believes that the facts stated in this form are true. **I am authorised** by the defendant to sign this statement.

☑ **The interested party** believes the facts stated in this form are true. **I am authorised** by the interested party to sign this statement.

Signature

☐ Defendant

☐ Litigation friend

☑ Defendant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
02	08	2021

Full name

Simon Ricketts

Name of defendant's legal representative's firm

Town Legal LLP

If signing on behalf of firm or company give position or office held

Partner

Give an address to which notices about this case can be sent to you

Name

Simon Ricketts

Address

Building and street

Town Legal LLP, 10 Throgmorton Avenue

Second line of address

Town or city

London

County (optional)

Postcode

E C 2 N 2 D L

If applicable

Phone number

[redacted]

DX number

Email

[redacted]

If you have instructed counsel, please give their name address and contact details below.

Name

Thomas Hill QC

Address

Building and street

39 Essex Chambers, 81 Chancery Lane

Second line of address

Town or city

London

County (optional)

Postcode

W C 2 A 1 D D

If applicable

Phone number

[redacted]

DX number

Your reference

Email

[redacted]

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, listed below), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

Administrative Court addresses

Administrative Court in London

Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

Administrative Court in Birmingham

Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

Administrative Court in Wales

Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

Administrative Court in Leeds

Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

Administrative Court in Manchester

Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

IN THE HIGH COURT OF JUSTICE **CO/2356/2021**

QUEEN'S BENCH DIVISION

PLANNING COURT

IN THE MATTER OF AN APPLICATION UNDER S288 TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N:-

THE QUEEN

(on the application of

UTTLESFORD DISTRICT COUNCIL)

Claimant

-and-

SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT

Defendant

-and-

(1) STANSTED AIRPORT LTD

(2) STOP STANSTED EXPANSION

Interested Parties

SUMMARY GROUNDS OF DEFENCE
ON BEHALF OF THE INTERESTED PARTY

As the claim bundle is unpaginated, references are to the PDF page numbers

Page references to the IP's bundle are in the form [IP/page no]

List of essential pre-reading:

- *Summary grounds of defence*
- *Appeal DL and Costs DL [CB/4-37] and [CB/38-41]*
- *STAL closing submissions [CB 279-360]*
- *STAL submissions on condition 15 [CB 207-219]*
- *Costs application, response to costs application and final reply [CB 361-382], [CB 383-437], [IP 156-190]*
- *Making Best Use of Existing Runways [CB 661-670]*

Time estimate for pre-reading: ½ day

INTRODUCTION AND SUMMARY

1. The Claimant, Uttlesford District Council ("UDC"), seeks permission to challenge the decisions of a Panel of three Planning Inspectors, (Michael Boniface MSc MRTPI, G D Jones BSc (Hons) DipTP MRTPI and Nick Palmer BA (Hons) BPI MRTPI):
    a. allowing an appeal by Stansted Airport Ltd ("STAL") against UDC's refusal to grant planning permission for airfield works comprising two new taxiway links to the existing runway, six remote aircraft stands and three additional aircraft stands to accommodate an eventual annual passenger throughput of 43 million passengers per annum ("mppa") ("the Appeal DL" [CB/4-37]).
    b. ordering UDC to pay to STAL the full costs of the appeal proceedings ("the Costs DL") [CB/38-41].

2. STAL's appeal was considered at a public inquiry which sat (virtually) for 30 days, between 12 January and 12 March 2021. As UDC is at pains to emphasise in its statement of facts and grounds ("SoFG") the Panel's decision was taken after hearing extensive evidence in respect of the four reasons for refusal ("RfR") promulgated by UDC, including from thirteen witnesses called by STAL and four witnesses called by UDC. Stop Stansted Expansion ("SSE") was also given Rule 6 status at the Inquiry. It was represented by two Queen's Counsel, and it called witnesses on a range of matters, including climate change, forecasting, socioeconomics and surface access, although it opted not to call a number of witnesses to give oral evidence, thus shortening the time originally set aside for the inquiry. The Panel also had the benefit of opening and closing submissions from Counsel for all three parties, as well as interim legal submissions concerning the Council's proposed "condition 15", discussed further below.

3. It can come as absolutely no surprise to UDC that, at the end of this lengthy process, the Panel was able to express its conclusions with concision in the 27-page Appeal DL, given that:
    a. In refusing permission in January 2020, the Council had reversed its own resolution, taken in November 2018, to grant permission subject to conditions and to the agreement of a planning obligation (Heads of Terms of which were approved by the Committee at that time). This resolution was taken in

accordance with the recommendation of Officers, as set out in a comprehensive Officer Report ("OR") [IP/31-47] running to no fewer than 120 pages. Officers advised at that time that the development accorded with the development plan, complied with the principle in favour of sustainable development and the policies in the NPPF, complied with national aviation policy in the Aviation Framework and MBU, and that there were no other material considerations that would outweigh this policy compliance.

b. In May 2019, the local elections led to the previous administration at the Council being replaced by a new "Residents4Uttlesford" ("R4U") administration. Between May 2019 and January 2020, the R4U administration was repeatedly advised in a series of further ORs [IP/ 48-72, 73-83, 84-95], informed by legal advice from no fewer than three experienced planning Counsel and leading Counsel, that there was no lawful basis for revisiting the original resolution to grant permission, and that there were no new material planning considerations which might justify such a *volte face*. Instead, Members were urged to proceed to grant planning permission in accordance with the original resolution and without further delay. Members were also explicitly advised by Officers of the very real risk of a substantial award of costs against UDC, in the event that the Committee proceeded to refuse permission for the reasons it ultimately gave, contrary to all legal and professional advice received.

c. Despite the clear and repeated warnings and exhortations of its professional advisers, the Committee chose to ignore all of the professional advice received by it and proceeded to refuse permission for reasons which were demonstrably not substantiated by the evidence and which were hopelessly vague and unclear, as the Panel held in ordering UDC to pay the full costs of an appeal which, it judged, should never have been necessary.

d. By the time of the Inquiry UDC had performed a further *volte face*. Its case at the Inquiry, as expressed by its expert planning witness (Mr Hugh Scanlon, Director of Infrastructure at Lichfields) in his proof of evidence, following an extensive analysis of the planning balance, was that the planning balance favoured the grant of permission and that the appeal should be allowed [IP/ 123-155]

4. The Panel agreed, concluding in light of all the evidence it had heard and in the exercise of its judgment that the planning balance fell "overwhelmingly in favour of the grant of permission" and that the limited harm arising in respect of air quality and carbon emissions was "far outweighed by the benefits of the proposal and do not come close to indicating a decision otherwise than in accordance with the development plan.": DL 158 [CB/30].

5. Also conspicuously absent from UDC's lengthy SoFG is any acknowledgement that:
    a. While the annual passenger throughput would increase by 8mppa, compared to the 35 mppa currently permitted at Stansted, the proposals before the Panel (and before UDC in January 2020) involved no increase in the aggregate number of aircraft movements permitted at the airport (274,000) pursuant to planning permission granted in 2008. This was particularly relevant in relation carbon impacts, because it is (self-evidently) aircraft movements rather than passengers which are the principal source of aviation carbon.
    b. The noise envelope will be materially reduced as part of the development. The effect on noise (one of the four reasons for refusal) of granting permission was therefore a benefit of the scheme, and this was agreed by UDC's noise witness.
    c. The "very significant" economic and employment benefits of this development were also not disputed by UDC, which did not call evidence on this issue nor seek to cross-examine STAL's witnesses.

6. Overall, the SoFG is a barely disguised attempt to re-run the merits of the case which UDC ran unsuccessfully at the inquiry. This is not the purpose of a s288 challenge, as the familiar authorities cited below make clear. Despite a great deal of obfuscation, the grounds of challenge disclose no arguable error of law and they are entirely without merit. In short, and for the reasons set out in more detail below:
    a. **Ground 1**. The Panel's analysis of the policy framework for the determination of this appeal is unimpeachable. The starting point was that both UDC and STAL agreed that the development complied with an up-to-date development plan and benefitted from the presumption in favour of sustainable development under paragraph 11 of the NPPF. The Panel correctly held that the making best use policy ("MBU") [CB/383-437] was a recent expression of Government policy, which has not been withdrawn, and with which the proposal complied.

None of this was contested by UDC, who chose not to cross-examine STAL's main witness on national aviation policy, Mr Hawkins. The conclusion that the scheme receives very strong support from national aviation policy was an unexceptionable exercise of planning judgment. Far from "ignoring" UDC's arguments about the "direction of travel" of climate change "policy" and its implications for MBU, the Panel dealt with these arguments fully, but it correctly rejected them as being misconceived: see, in particular, DL 24-25 [CB/8].

b. **Ground 2**: The imposition of planning conditions is an exercise with which the highly experienced Panel was extremely familiar. The six policy tests in NPFF paragraph 55 were the subject of extensive debate during the course of evidence, were set out and addressed in interim legal submissions by STAL and UDC [CB/207-219], [CB/191-206], [CB/220-224], and also in the parties' closing submissions [CB/270-277], [CB/355-359]. The Panel made clear its reasons for concluding that UDC's proposed "condition 15" was both unnecessary and unreasonable. The application of those policy tests was a matter of planning judgment, which is not open to challenge in these proceedings. In any event, condition 15 *is* patently unreasonable and unlawful, applying well-established legal principles. The Panel could not sensibly (or rationally) have arrived at any other conclusion than that this condition should be rejected.

c. **Ground 3**: The discretion to award costs is, *par excellence*, a matter for the Tribunal which heard the evidence. The Courts will only interfere with this exercise in exceptional circumstances: see ***Golding v Secretary of State for Communities and Local Government*** [2012] EWHC 1656 (Admin). In this case, the judgment as to whether UDC's conduct was unreasonable and had led to wasted costs was for the experienced Panel, which reached its decision after hearing eight weeks of evidence and submissions. This decision was also wholly unsurprising, given the Panel's conclusion on the merits of the appeal and UDC's abandonment of its defence of the RfR on appeal. The characterisation of the costs award as "spiteful" (SoFG para 9) is bizarre and unwarranted. This kind of language has no place in pleadings before the Court on a statutory planning challenge under s288.

7. For these reasons, each of the grounds of challenge is unarguable and permission should be refused.

8. Moreover, even if there was any merit in any of the grounds of challenge, it is unarguable that the Panel would have reached any different decision, bearing in mind its unchallenged conclusions on the appeal, and permission should be refused for this reason also: see ***Simplex GE (Holdings) Ltd v Environment Secretary*** [2017] PTSR 1041. Even taken at their highest, none of the arguments now aired by UDC comes close to upsetting the Panel's assessment that the merits of this development proposal are overwhelming and that the planning balance falls decisively in favour of granting permission, nor its judgment that this appeal should never have been necessary in the first place.

FACTUAL BACKGROUND

The policy context

The development plan

9. As noted above, it was common ground between STAL and UDC that the development complied with the policies of the Uttlesford Local Plan 2005 ("ULP"), which comprised the development plan, and that relevant policies were up-to-date for the purposes of paragraph 11(c) of the NPPF.

10. The agreed starting point for the determination of the appeal was thus that the development benefitted from the presumption in favour of the development plan, unless other material considerations were of sufficient weight to outweigh this presumption.

National aviation policy

11. As the Panel correctly held, this is set out (insofar as relevant to the current appeal) in the Aviation Policy Framework (2013) [CB/484-569] and the policy statement Beyond the Horizon; The Future of UK Aviation: Making Best Use of Existing Runways ("MBU") (June 2018) [CB/661-670].

12. The APF pre-dates the Airport Commission's final report (June 2015), recommending a third runway at Heathrow. It identified at that time that making best use of existing

runway capacity was an important part of the Government's strategy in the short term. In the longer term, however, the Government recognised that this would not be sufficient to address the UK's capacity challenges.

13. In July 2017, following publication of the AC's final report, the Government published "Beyond the Horizon: The Future of UK Aviation; A Call for Evidence", seeking views on its "proposed policy" to support airports making best use of existing runway capacity. The AC report identified a pressing requirement for more intensive use of existing airport capacity, which could not await publication of the Government's final Aviation Strategy [IP/ 107-108].

14. MBU was published in June 2018, on the same day as the Airports National Policy Statement ("ANPS"), published under section 5 Planning Act 2008 [CB/570-660]. As the DL correctly explained at para 16, the ANPS provides the policy basis for a third runway at Heathrow and is an "important and relevant" consideration for the purposes of section 105(1)(c), in considering other development consent applications in the South East of England. It does not apply to planning applications to make more intensive use of existing infrastructure, which fall below the threshold for qualifying as a nationally significant infrastructure project ("NSIP") under section 23 Planning Act 2008, such as the current application: see DL16 [CB/6-7] (and (c/f the Manston decision, referred to at fn 6 to the DL).[1] As paragraph 1.42 of the ANPS makes clear, the Government's policy on making best use applications was instead to be considered "in the context of developing a new Aviation Strategy."

MBU

15. The opening paragraphs of MBU explain the provenance of the policy document, as summarised above.

[1] Contrary to SoFG, para 100, the Panel was plainly fully aware of the distinction between the ANPS and MBU and that only the former was designated as a national policy statement for the purposes of section 5 Planning Act 2008. The interrelationship between the ANPS and MBU was a point raised by SSE (not UDC) at the Inquiry and it was comprehensively dealt with in STAL's Closing Submissions at paras 47-55.

16. Paragraph 1.5 of MBU refers back to the Aviation Strategy Call for Evidence and the Government's indication that it was "minded to be supportive of all airports who wish to make best use of their existing runways, including those in the South East."

17. The MBU "policy statement" is set out at paras 1.25-1.29. Para 1.29 of MBU states, in bold text:

"… the government is supportive of airports beyond Heathrow making best use of their existing runways."

18. Contrary to SoFG para 106, MBU is plainly not "tentative" as to the policy support conferred on MBU proposals. On the contrary, the policy establishes clear in principle support for airports making best use of existing runway capacity. This removes highly complex questions of national aviation need from the matters which a Local Planning Authority faced with a MBU proposal below the NSIP threshold is required to consider.

19. However, as the policy makes clear, the assessment of local environmental impacts remains squarely within the province of the Local Planning Authority and the policy does not purport to pre-determine the weight to be given to these local impacts:

"1.26… As part of any planning application airports will need to demonstrate how they will mitigate against local environmental issues, taking account of 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 to local, rather than national government, to consider each case on its merits."

20. The reference to "local" environmental issues refers back to paragraphs 1.22-1.24 of MBU. These provide:

"1.22 The government recognises the impact on communities living near airports and understands their concerns over local environmental issues, particularly noise, air quality and surface access. As airports look to make the best use of their existing runways, it is important that communities surrounding those airports share in the economic benefits of this, and that adverse impacts such as noise are mitigated where possible.
1.23 For the majority of local environmental concerns, the government expects these to be taken into account as part of existing local planning application processes.
1.24 As part their planning applications airports will need to demonstrate how they will mitigate local environmental issues, which can then be presented to, and considered by, communities as part of the planning consultation process. This ensures that local

stakeholders are given appropriate opportunity to input into potential changes which affect their environment and have their say on airport applications."

21. Paras 1.9 and 1.10 are also relevant. Under the heading "Role of Local Planning", para 1.9 states:

"... For the majority of environmental concerns, the government expects these to be taken into account as part of existing local planning application processes. It is right that decisions on the elements which impact local individuals such as noise and air quality should be considered through the appropriate planning process..."

22. By contrast, the next section of MBU is entitled "Role of national policy". This section deals with the carbon emissions associated with MBU proposals, which are plainly not a local impact. It states, in terms, that carbon emissions from MBU proposals should be considered at a national (rather than a local) level:

"1.11 There are, however, some important environmental elements which should be considered at a national level. The government recognises that airports making best use of existing runways could lead to increased air traffic which could increase carbon emissions.

1.12 We shall be using the Aviation Strategy to progress our wider policy towards tackling aviation carbon. However, to ensure that our 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...

1.13 The forecasts are performed using the DfT UK aviation model which has been extensively quality assured and peer reviewed and is considered fit for purpose and robust for producing forecasts of this nature."

23. MBU therefore draws a clear and explicit distinction between local environmental impacts, such as noise, air quality and surface access, which remain within the province of the Local Planning Authority; and carbon emissions, which are plainly a national (or even international) issue, and which therefore fall to be considered at a national rather than a local level.

24. MBU remains in force as a recent statement of Government policy. It has not been withdrawn or qualified by any subsequent statement by the Government. Indeed, its status has recently been reaffirmed: see para.80 below.

UDC's determination of the application

25. The sorry saga of the Council's handling of this application was explored in detail in evidence with each of UDC's expert witnesses, no witness from the Council's Planning Committee having been called to defend UDC's decision. It was also addressed in STAL's Opening Submissions [IP/ 3-30], its Closing Submissions [CB/279-360] and in its application for costs [CB/361-382]. The Court is referred to these documents for a full account of the background to this appeal.

26. The application was submitted in February 2018. In considering the application, the Council's planning officers consulted independent experts in the fields of noise and air quality; statutory consultees were also fully consulted. None of these objected to the development nor suggested that permission should be refused.

27. There was also no suggestion from any statutory consultee or expert that the Environmental Statement ("ES") accompanying the application (which ran to 4 volumes) was inadequate and no request for "further information" was made under Regulation 25 Town and Country Planning (Environmental Impact Assessment) Regulations 2017. The ES assessed the environmental impacts of the scheme as being "negligible".

28. As outlined above, the application submitted in February 2018 was the subject of a comprehensive OR recommending approval. The Committee accepted this recommendation in resolving to grant permission in November 2018, subject to completion of a s106 agreement.

29. The s106 agreement and decision notice were on the cusp of being signed, in April 2019, when through a series of requisitions for extraordinary general meetings ("EGMs") opposition Councillors succeeded in delaying the issue of the decision notice until after the 2019 local council elections. As explained above, those elections resulted in the replacement of the previous administration with the current R4U administration. It was this change of administration which led to the Council performing a complete *volte face* in its approach to this application and deciding to refuse permission, contrary to all legal and professional advice (c/f SoFG, para 14).

30. Between May 2019 and January 2020 elections, the Council's planning officers sought advice from experienced Leading and Junior Counsel (Stephen Hockman QC, Christian Zwaart and Philip Coppel QC), all of whom advised the new administration that there was no proper basis to refuse to issue the permission and that there were no material changes in circumstance sufficient to warrant a change of course from that set by the November 2018 resolution. This advice was circulated to Members and was also summarised in a series of ORs prepared during this period [IP/ 48-72, 73-83].

31. In the OR produced in advance of the second EGM in June 2019 [IP/73-83], Officers also warned Members explicitly that serious costs consequences were likely to follow in the event that they persisted with their plan to reverse the November 2018 resolution without any proper planning basis for doing so. Having set out the relevant guidance and the approach to awarding costs in planning appeals, and having warned Members of the scale of any likely costs award, the Council's s151 Officer advised Members that:

> "18. In light of the legal advice received, it is… the strong advice of the s151Officer that the Council releases the officers from the instruction to withhold the decision notice and removes any impediment to discharge by officers of Recommendation (2) of the Planning Committee."

32. At the Committee meeting in January 2020, Members had before them a further OR [IP/ 84-95], which advised that there were no grounds for deeming the s106 Agreement to be inadequate and no new material considerations which might justify reaching a different decision to that resolved upon by the Committee in November 2018.

33. At the January 2020 Committee meeting, Members were again urged to issue the decision notice and to grant permission. Instead, permission was refused for the four RfR, as set out at paragraph 18 of the SoFG, without any re-evaluation of the planning balance being undertaken, and without any consideration being given to the mitigation proposed in the s106 Agreement painstakingly negotiated with Officers nor whether conditions might be imposed to overcome the Committee's concerns: see STAL costs submissions at paras 25-29 [CB/366-367]. The merits of these RfR had been considered and rejected by Officers in the series of ORs referred to above, on the basis (in summary) that Members had misunderstood the policy and legal framework for the

decision (see the noise RfR and the carbon RfR), and that the RfR were not substantiated by the evidence, as set out in the ES and endorsed by all statutory consultees and professionals, as to the negligible environmental impacts of the development.

34. STAL was left with no choice but to appeal the decision. STAL submitted its appeal under s78 of the 1990 Act in July 2020.

35. In light of the time that had elapsed since the original ES was prepared, an environmental statement addendum ("ESA") was prepared and published in October 2020. It maintained the same assessment methodology, but updated the forecasting years to take account of the time that had elapsed since the original ES and to reflect the emerging effects of the COVID pandemic. It confirmed, however, that the assessment of the negligible environmental effects of the development was materially unchanged.

The Council's position on appeal

36. The Council's Statement of Case ("SoC") was submitted on 16 September 2020 [CB/111-147]. This largely followed the themes contained within the RfR but elaborated on these in great detail over 30 pages to include a host of alleged deficiencies and additional requests for information and detail, which had either been resolved long before the decision was taken or had never previously been raised by the Council at all.

37. However, by December 2020 UDC's position had transformed once again. Having conducted an exhaustive survey of the planning balance in his proof of evidence running to 120 pages, the Council's expert planning witness, Mr Scanlon, concluded that, based on the environmental impacts as assessed, the planning balance favoured the approval of the scheme and the appeal should be allowed [IP/123-155].

38. In other words, by the time of the Inquiry the Council's newly appointed expert witnesses had come full circle to the position endorsed by its highly experienced planning officers in their comprehensive OR in November 2018.

39. During the course of evidence, all four of the Council's expert witnesses accepted that the development was acceptable in principle, subject to the imposition of suitable conditions: see STAL costs submissions, para 75 [CB/379]. Nonetheless, UDC chose not to amend its statement of case nor to withdraw any of the RfR and it continued to contest the appeal.

40. UDC's proposed "condition 15" also emerged for the first time in December 2020 [CB/174-181]. This condition is explored further in response to ground 2 below. This proposed a mechanism whereby STAL would be required to return to UDC to seek its further approval, following the grant of permission, for any additional increments of capacity above the 35mppa currently permitted (limited, at UDC's discretion, to a maximum increase of 1mppa for a period of two years or more), to be assessed against whatever policies were in force at the time of the application for additional capacity. In other words, STAL would be prevented from utilising the additional 8mppa permitted under the consent at all, without first obtaining UDC's (multiple) further approvals.

41. Condition 15 was considered and rejected by Mr Andrew, STAL's planning witness, in his Rebuttal Proof of Evidence [IP/119-122]. The Panel expressed its serious reservations about the lawfulness of this condition during the opening session of the Inquiry. For the reasons set out in its legal submissions [CB/207-219] and further in response to ground 2, below, condition 15 is obviously unlawful, applying well-established legal principles.

42. Nonetheless, UDC continued to resist the appeal on the basis that permission should be granted subject to its proposed "condition 15", and a great deal of time was spent at the Inquiry dealing with this condition, both in evidence and legal submissions. This evidence and submissions were all before the Panel when it reached its decision.

The costs application

43. The context for STAL's costs application is set out in some detail in its submissions on costs and in its final reply to UDC's costs response. The Court is referred to these documents for a full account of this background.

44. The impression that UDC seeks to convey, that it was ambushed by a last-minute costs application, which it could not reasonably have anticipated or prepared for (see SoFG para 72 onwards: "The last hour of the Inquiry: the costs application") is wholly misleading. On the contrary:

    a. STAL first drew attention to the fact that it considered UDC's decision to refuse permission to have been "unreasonable" in its SoC in July 2020 [CB/87, CB/96]

    b. STAL's planning witness, Mr Andrew, dealt at length in his proof of evidence dated December 2020 with the Council's unreasonable conduct and its handling of the application, and his evidence was replete with references to the unreasonableness of the Council's conduct and to the wording of the PPG on costs [IP/ 109-118].

    c. UDC's proofs of evidence submitted in December 2020 clearly anticipated the need to respond to a prospective costs application, and its witnesses dealt in terms with the alleged reasonableness of the Council's decision in January 2020: see STAL costs submissions at para 5 and fn 4 [CB/362].

    d. In its opening submissions [IP/3-30], STAL put UDC on notice that it would be making a costs application at the close of the evidence, if the evidence justified it. By this time, of course, UDC's case had fundamentally changed from that set out in its SoC. As STAL put it:

    > "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."

    e. During the course of evidence, each of UDC's witnesses was cross-examined in relation to the Committee's handling of the application and the January 2020 decision. UDC's experts continued to maintain, right up to the close of the evidence, that the original decision had been a reasonable one and that its *volte face* was justified on the basis of allegedly new information in the ESA. UDC had also raised a complex new planning condition (Condition 15) for the first

time in December 2020 and was relying upon this to continue to resist the appeal: this new condition also had to be the subject of cross-examination and submissions, by both STAL and UDC.

f. At the close of the evidence, and having reviewed UDC's case as it now stood, as well as the evidence of SSE, STAL confirmed that it would be making an application for a full award of the costs of the appeal against UDC, but that it would not be making an application for costs against SSE. The costs application was duly made in writing following the parties' closing submissions, in the usual way.

45. Unsurprisingly, the Panel did not accept UDC's complaint that it had been caught off guard by a costs application, which STAL had flagged up at the outset of the Inquiry and which had been addressed extensively in evidence by both STAL and UDC. Indeed, the Inspector, Mr Boniface, who listened to all of the evidence during the course of the 30 sitting days, expressed his view at the close of the proceedings that much of UDC's case had been directed at defending a potential application for costs: see STAL costs submissions at para 5 [CB/362].

46. The Panel generously acceded to UDC's request for four weeks in which to respond in writing to the costs application. Far from being disadvantaged by this procedure, UDC produced a 55-page written submission responding to the application for costs [CB/383-437], supported by a bundle of documents including further witness statements. STAL replied within 14 days [IP/155-190].

Further representations following the close of the Inquiry

47. At the time when MBU was published, the most recent carbon budget was the fifth carbon budget, which runs from 2028-2032. Emissions from international aviation and shipping ("IAS") were not formally included in the first to fifth carbon budgets but were instead accounted for via a "headroom" or "allowance" made when setting the carbon budget, set at 37.5MtCO2.

48. On 20th April 2021, following the close of the Inquiry, the Government announced that IAS would be included in the 6th carbon budget ("6CB"), in line with the advice of the Committee for Climate Change ("CCC"). This was described as "an important part of

the government's decarbonisation efforts that will allow for these emissions to be accounted for consistently." [CB/438-444] The Government also announced a new interim target to achieve a reduction in emissions of 78% by 2035.

49. The Government also made clear, however, that its acceptance of the CCC's advice did not mean that it would be adopting each and every one of the CCC's policy recommendations in relation to the 6CB:

"The government will look to meet this reduction target through investing and capitalising on new green technologies and innovation, whilst maintaining people's freedom of choice, including on their diet. That is why the government's sixth Carbon Budget of 78% is based on its own analysis and does not follow each of the Climate Change Committee's specific policy recommendations."

50. The Panel invited further representations from the parties in response to this announcement. In its response [IP/191-194], STAL highlighted that the carbon budgeting process has always taken account of emissions from IAS via the "headroom" or "allowance" made when setting the level of the budget. The inclusion of these emissions in the 6CB was therefore a technical accounting change, rather than indicating any substantive change in the Government's approach. STAL also noted that the latest announcement does not imply any change in the Government's approach to tackling IAS emissions, which remains to address these emissions through the international framework in the first instance, under the leadership of the International Civil Aviation Organisation ("ICAO").

The Panel's decisions

51. The Appeal DL and the Costs DL are dated 26 May 2021. The Appeal DL was reissued on 21 June 2021 to enable a minor formatting error to be corrected (which had resulted in the names of certain interested parties being aligned with organisations they did not represent) in the list of appearances.

52. In the Appeal DL, the Panel held as follows:

    a. It had been demonstrated without doubt that the development would not result in unacceptable adverse aircraft noise. Overall, the effect on noise would be beneficial: DL 56 [CB/13]

b. The development would not have an unacceptable effect on air quality.

c. The additional carbon emissions arising from the development were "very small" in relative terms: DL 94 [CB/19].

d. The development would have a major beneficial effect on public health and wellbeing through generation of employment and training opportunities and provision of leisure travel, as well as a minor benefit from a reduction in the number of people exposed to night-time air noise: DL 106 [CB/21].

e. There would be no adverse impacts on biodiversity or ecology: DL 108 [CB/21]. The development would not alter the airport's rural context nor affect nearby heritage assets: DL 105 [CB/21].

f. The evidence fell "far short" of demonstrating that there would be an unacceptable impact on highway safety or severe cumulative impacts on the road network. The development would have no significant effects in terms of surface access. Highways England and Essex County Council did not oppose the scheme: DL 112 -115 [CB/22-23].

g. None of the other matters raised by third parties would amount to reasons to justify withholding permission and these were not supported by UDC: DL 121 [CB/24].

h. 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. Proposed condition 15 was neither necessary nor reasonable: DL 142 [CB/27].

i. The scheme conforms with the development plan and receives very strong support from national aviation policy. It would deliver significant employment and economic benefits as well as improvements in overall health and noise conditions: DL 156 [CB/30].

j. There would be some limited harm arising in respect of the air quality and carbon impacts of the development due to increased emissions but this was "far outweighed" by the benefits of the scheme and the planning balance "overwhelmingly" favoured the grant of permission: DL 158 [CB/30].

53. In the Costs DL, the Panel held that:

a. The reasons for refusal promulgated by the Council were "unquestionably vague and generalised": Costs DL17 [CB/40].

b. The issues relied upon at appeal… "could not reasonably have been expected to alter the favourable planning balance". Attempts to substantiate the RfR on appeal were "not convincing": Costs DL17 & 20 [CB/40-41].

c. Equally unconvincing was UDC's attempted reliance on the ESA to justify its change of position, as this identified only marginal changes in the assessment of effects from the ES: Costs DL 20 [CB/41].

d. Condition 15 was an unnecessarily onerous and misconceived condition which had occupied much time at the Inquiry and which "patently fails to meet the relevant tests": Costs DL 21 [CB/41].

e. The strength of evidence in favour of the proposal was such that the application should clearly have been granted planning permission by the Council. Its reliance on a perceived direction of travel in policy or emerging policy that may never come into being in the form anticipated was not a sound basis for making planning decisions. As such, "the appeal should not have been necessary.": Costs DL 22 [CB/41].

54. Accordingly, the Panel allowed the appeal and granted planning permission for the Development and it ordered UDC to pay the full costs of the appeal.

LEGAL PRINCIPLES

S288 challenges

55. The principles governing s288 challenges are extremely well-established: see ***Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government*** (*Leading Planning Cases*) as approved in ***St Modwen Developments Ltd v SSCLG*** [2017] EWCA Civ 643 per Lindblom LJ at para 6:

Planning decision making

56. The starting point for planning decision making is section 70 Town and Country Planning Act 1990 and section 38(6) Planning and Compulsory Purchase Act 2004. These establish that decisions are to be taken in accordance with the development plan, unless material considerations indicate otherwise.

57. Where development complies with an "up-to-date" development plan, as here, it will also engage the presumption in favour of sustainable development under paragraph 11 of the NPPF.[2]

58. In ***Bushell & Anor v Secretary of State for the Environment*** [1981] A.C. 75, the House of Lords held that the role of a planning decision makers when considering the merits of a specific development proposal is to apply national policy. It is not to revisit the merits or validity of national policy. Lord Diplock held, at 98A-B, that:

> "Policy in the sense of departmental decisions to pursue a particular cause of action" is a topic "which is unsuitable to be the subject of an investigation as to its merits at an inquiry at which only persons with local interests affected by the scheme are entitled to be represented."

59. In ***Bushell***, Lord Diplock analysed the types of decision which might properly be described as Government policy for this purpose. He held, at 98B-C, that a departmental decision to construct a nationwide network of motorways was:

> "… clearly one of government policy in the widest sense of the term. Any proposal to alter it is appropriate to be the subject of debate in Parliament, not of separate investigations in each of scores of local inquiries before individual inspectors up and down the country upon whatever material happens to be presented to them at the particular inquiry over which they preside."

60. The same principle applies in relation to attempts to challenge the methodology underpinning Government policy through the local inquiry process:

> "whether the uniform adoption of particular methods of assessment is described as policy or methodology, the merits of the methods adopted are, in my view, clearly not appropriate for investigation at individual local inquiries by an inspector whose consideration of the matter is necessarily limited by the material which happens to be presented to him at the particular inquiry which he is holding. It would be a rash inspector who based on that kind of material a positive recommendation to the minister that the method of predicting traffic needs throughout the country should be changed and it would be an unwise minister who acted in reliance on it." [per Lord Bushell at 100B-C, emphasis added]

The imposition of planning conditions

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[2] This is the policy exercise which the Court was considering in ***Paul Newman Homes Ltd v SSHCLG*** [2021] Civ 15 at paras 44-45, cited by UDC at para 90 of the SoFG. The Court was not there considering the proper approach to the assessment of development proposals against extant national policy.

61. Section 70(1) of the 1990 Act confers a broad discretion on Local Planning Authorities to grant planning permission "… either unconditionally or subject to such conditions as they think fit." This provision applies equally to an Inspector an appeal, by virtue of section 79(4).

62. In ***R. (on the application of London Borough of Hillingdon Council) v Secretary of State for Transport, Secretary of State for Housing, Communities and Local Government v High Speed Two (HS2) Limited*** [2020] EWCA Civ 1005, the Court of Appeal restated the three limbed test (the "Newbury" test), which a planning condition must satisfy in order to be lawful. It went on to find that a condition which stated that planning approval would be valid only after archaeological investigations were undertaken and if those investigations did not discover anything of archaeological significance would fail the tests of necessity and reasonableness, and would be unlawful:

"88. More recently in Alison Hook v Secretary of State for Housing, Communities and Local Government and Surrey Heath Borough Council [2020] EWCA Civ 486 the Court was concerned with the validity of a planning condition within the context of Section 70 TCPA 1990 and whether a condition restricting occupancy of a building under a planning permission to an agricultural worker was consistent with the principle that a planning condition must fairly and reasonably relate to the development permitted. The Court helpfully summarised the law on planning conditions more generally (in paragraph 33): "It is settled law that, to be valid, a planning condition must satisfy three basic requirements. First, it must be imposed for a "planning" purpose and not for any ulterior purpose. Secondly, it must fairly and reasonably relate to the development permitted by the planning permission. Thirdly, it should not be so unreasonable that no reasonable planning authority could have imposed it (see the speeches in the House of Lords in Newbury District Council v Secretary of State for the Environment [1981] 1 A.C. 578 ; the judgment of Lord Hodge in Elsick Development Company Ltd. v Aberdeen City and Shire Strategic Development Planning Authority [2017] UKSC 66; [2017] P.T.S.R. 1413 , at paragraphs 43 to 46; and the judgment of Lord Sales in R. (on the application of Wright) v Resilient Energy Severndale Ltd. and Forest of Dean District Council [2019] UKSC 53 , at paragraphs 32 to 42)."

89. In our judgment, applying the test set out above, such a condition would fall foul of the second and third basic requirements: (i) the condition is integral to the validity of the approval which is intended to confer a permit to conduct the development works, but at the time the condition is imposed the authority does not know whether the development works are to be " permitted " and therefore it cannot fairly and reasonably relate to it (second basic requirement); and (ii) it is irrational and unreasonable for an authority to be compelled to give what is intended to be a definitive approval to a request but also subject it to a condition that requires the authority to consider later whether the approval should have been granted in the first place (third basic requirement)." [emphasis added]

The award of costs in planning appeals

63. The discretion to award costs is conferred by section 250(5) Local Government Act 1972.

64. In ***Golding v Secretary of State for Communities and Local Government*** [2012] EWHC 1656 (Admin) the Court "wholly endorsed" the following commentary in the Planning Encyclopaedia concerning the wide discretion conferred on an Inspector with regard to the award of costs:

"The decision whether or not to make an award of costs was pre-eminently a discretionary matter and the Inspector who actually heard the evidence was in the best position to judge. Only very rarely would it be proper for a Court to strike down such an exercise of discretion."

65. See, further, ***Hunston Properties Ltd v Secretary of State for Communities and Local Government*** [2014] J.P.L. 240 at paragraph 41, where the Court endorsed this commentary.

RESPONSE TO GROUNDS OF CHALLENGE

GROUND 1: Allegedly incorrect interpretation of "national aviation policy" by the Panel

(1) The policy framework for the determination of the appeal

66. As noted above, the starting point is the agreed conformity with an up-to-date development plan. This engaged the statutory presumption in s38(6) and the presumption in favour of sustainable development. The balance was therefore strongly tilted in favour of the grant of permission, based on the agreed position of the two main parties.

67. Plainly, national aviation policy was also a highly relevant material consideration. In this regard, it was common ground between UDC and STAL as set out in the general statement of common ground ("SoCG") signed by both parties, that current Government aviation policy relevant to the determination of this appeal comprised the APF and MBU [ref].

68. It was also common ground, as confirmed by UDC's own planning witness in his proof of evidence [IP/122-154] (paras 9.51-9.52) that the appeal proposals sought to make best use of the existing runway, and that the proposal was in accordance with MBU.

69. The Panel's conclusion that the proposal receives "very strong support from national aviation policy" and that this "weighs very strongly in favour of the grant of permission" was therefore an entirely legitimate exercise of its planning judgment (c/f SoFG para 87), which reflected the agreed position between the main parties.

70. In reaching this assessment:

    a. The Panel did not accord MBU a "status" it does not have, as alleged at SoFG, para 103. There was ample evidence before the Panel which confirmed that MBU forms part of the forthcoming Aviation Strategy, not least the advice of a senior DfT official that it did [ref]. But in any event, the Panel was required to apply extant Government policy, not to form its own assessment of whether the policy should be treated as "significant" or not: see ***Bushell***, above.

    b. Nor did the Panel ignore the arguments being made by UDC (and SSE) as to a perceived "direction of travel" in relation to climate change/ carbon emissions and the implications for MBU. However, for the reasons set out below, those arguments were fundamentally misconceived and the Panel was right to reject them for the reasons it gave.

(2) The "direction of travel" argument

71. Having correctly identified and analysed the relevant national aviation policy context, the Panel went on (at DL 19- 25) [CB/7-8] to address UDC's argument – as now revisited before the Court - that the development was incompatible with the "direction of travel" on climate change/ carbon emissions, in light of the amendment to s1 Climate Change Act 2008 to reduce greenhouse gas emissions by 100% (rather than 80%, when benchmarked against the agreed baseline level) by 2050 and the Committee for Climate Change's advice on the 6CB; and that the carbon modelling underpinning MBU was no longer sound as it pre-dated the net zero amendment (see SofG para 111).

72. UDC's complaints about the Panel's analysis of this issue are fundamentally misconceived, for several reasons.

73. First, UDC's complaint that the Panel "took no account of" these arguments is simply wrong. At DL24, the Panel noted the amendment to s1 of the CCA 2008, as well as the

new "interim" target of 78% by 2035, and that these post-dated MBU. The Panel went on to find, however, at DL24-25 [CB/8], that:

"24… Notwithstanding these changes, MBU has remained Government policy. There are any number of mechanisms that the Government might use to ensure that these new obligations are achieved which may or may not involve the planning system and may potentially extend to altering Government policy on aviation matters.

25. These are clearly issues for the Government to consider and address, having regard to all relevant matters (not restricted to aviation). The latest advice from the Committee on Climate Change (CCC) will be one such consideration for the Government but it cannot currently be fully known to what extent any recommendations will be adopted. The Government is clearly alive to such issues and will be well aware of UK obligations."

74. This analysis was undoubtedly correct. It reflected the evidence of STAL's carbon and aviation policy witnesses, Mr Neil Robinson and Mr Tim Hawkins, with whom the Panel agreed. As Mr Robinson emphasised in his evidence, in deciding how to get to net zero, the Government will need to look at emissions across the whole economy (of which aviation accounts for just 7%). It will then be a matter for the Government, taking account of advice from the CCC including its policy recommendations (which it may or may not decide to adopt) to decide how to balance emissions from competing sectors, and what level of IAS emissions to allow for in order to achieve an overall net zero outcome: see STAL Closing Submissions at para 200 [CB/333].

75. The Government is addressing these complex questions at a national level; and, first and foremost, at an international level, since emissions from IAS are an international issue. It is clearly no part of the role of LPAs (or Inspectors on appeal from LPAs) to seek to resolve these complex and wide-ranging decisions. As the Panel correctly noted, there are any number of ways in which the Government may seek to meet its 'net zero' obligation. It was not for the Panel to seek to pre-empt whether as yet unheralded changes to aviation policy, including MBU, might be amongst them.

76. Secondly, and as STAL submitted both in its Opening and Closing Submissions, the attack on MBU and the modelling underpinning it flies in the face of the well-established principles in ***Bushell***, above. In formulating MBU, the DfT has modelled the cumulative carbon emissions associated with Stansted, and all airports in the UK, making best use of existing runway capacity and has concluded that these are

compatible with the UK's climate change obligations. MBU makes clear, therefore, that carbon emissions from MBU applications, including at Stansted, have been assessed at a national level in determining that such applications should be supported in principle, and the policy does not invite reconsideration of this assessment at a local level and on a case-by-case basis.

77. Thirdly, and as explored in evidence (see STAL Closing Submissions at para 216 [CB/339-340]), the policy documents emanating from the Government since MBU provide no support whatsoever for UDC's "direction of travel" argument. Not one of these documents (including the April 2021 press statement which the Panel considered at DL 86) provides any indication whatsoever that the Government intends to move away from MBU or from aviation growth. Instead, the clear and consistent message is that the Government intends to focus on green investment and technological innovation in order to meet the challenges of net zero; and that it considers aviation growth to be compatible with these challenges.

78. Although post-dating the decision, the real "direction of travel" of climate change and aviation policy has recently been confirmed by the Government in publishing the Transport Decarbonisation Plan, on 14 July 2021 [IP/ 197-208]. In his written statement to Parliament of the same date [IP/ 195-196], the Rt Hon Grant Shapps MP confirmed the Government's intention:

"… to tackle the challenges of decarbonising the aviation and maritime sectors head on. Today, we are also launching a Jet Zero consultation that commits the aviation sector to a net zero emissions target by 2050 and sets out our approach and principles to achieve this. The consultation focuses on the rapid development of technologies in a way that maintains the benefits of air travel and maximises the opportunities that decarbonisation can bring for the UK."

79. Consistent with this objective, and with STAL's submissions and evidence at the Inquiry, the Transport Decarbonisation Plan sets out a series of commitments designed to "decarbonise aviation" through investment in new technology, zero emission flight infrastructure R&D and sustainable aviation fuels. The Plan does not alter or amend one iota of MBU policy and it makes no reference to "demand management" or other interventions by the planning system.

80. On the same day, the Government published the consultation document "Jet zero: our strategy for net zero aviation" [IP/209-257]. This is unequivocal in its support for aviation growth combined with technology led efficiencies. Thus, para 3.41 confirms that:

'…even if the sector returns to a pre-COVID-19 demand trajectory, as we have assumed in our analysis, we currently believe the sector can achieve Jet Zero without the Government needing to intervene directly to limit aviation growth'. Moreover, at para.4.1, there is express and up to date confirmation that "Our trajectories also indicate that aviation net zero can be met by 2050 with future capacity assumptions consistent with MBU policy and the ANPS."

81. Thus, UDC's "direction of travel" argument was also not supported by the evidence and it was fundamentally misconceived. Far from reducing the weight that can be given to MBU, the "direction of travel" of climate change policy is entirely consistent with MBU, as STAL argued at the inquiry and as the policy announcements post-dating the Panel's decision confirm.

(3) Alleged misreading or misinterpretation of MBU

82. Nor did the Panel "misread" or "misinterpret" MBU, as alleged at para 112 of the SoFG. UDC's insistence that MBU requires local planning authorities to assess for itself the carbon impacts of small scale MBU proposals flies in the face of the clear wording of the policy, which draws a clear distinction between local impacts (i.e. noise, air quality, surface access) and environmental impacts which take effect at a national level (i.e. carbon), and which "should be considered at a national level" [CB/666].

83. As explained in STAL's Closing Submissions (see para 179-180) [CB/328] the Panel also had before it evidence from a senior official in the DfT, which confirmed that carbon emissions from MBU proposals are not a matter for local authorities (or Inspectors on appeal) to consider when assessing small scale MBU proposals.

84. The Panel's finding that MBU "differentiates between the role of local planning and the role of national policy" and that "some important environmental elements should be considered at a national level, such as carbon emissions" [CB/8] accurately reflects the wording and intent of the policy. As Mr Hawkins explained in evidence (see STAL closing submissions at para 178) [CB/327-328], MBU "narrows the range of issues for LPAs to consider to local environmental impacts only." It is a cumulative impact

assessment or "stress test" of small scale (less than 10mppa) MBU proposals. The reference to "all relevant considerations, particularly economic and environmental impacts" at para 1.29 of MBU must plainly be read in light of the clear distinction between local and national impacts, as set out in previous paragraphs.

85. The Panel did not therefore "wrongly refuse to countenance… the express limitations of and reservations in "national aviation policy". The in principle support conferred by MBU is not limited or qualified by consideration of the carbon impacts of a (non-DCO) proposal: on the contrary, MBU preauthorises the carbon impacts of these developments and therefore takes this highly complex issue away from individual local authorities. The Panel's conclusion that "carbon emissions are predominantly a matter for national Government and the effects of airport expansion have been considered, tested and found acceptable in MBU" [CB/29] was entirely correct.

(4) The carbon emissions associated with this development are negligible

86. On the uncontested evidence before the Panel, the additional carbon emissions generated by this development will be in the region of just 0.09MtCO2 at 2050: see STAL closing submissions at para 227 [CB/343]. In fact, and as the Panel held at DL 89, the relative increase in carbon emissions is likely to be even less, because in the event that permission was not granted, STAL would still seek to maximise its permitted total of 274,000 ATMs, reducing the incremental "gap" still further: see DL 89.

87. As the Panel held, even if the allowance for IAS was reduced from 37.5MtCO2 in the future, in line was the CCC's more optimistic advice about the potential for mitigation measures to reduce emissions from aviation, particularly through take up of sustainable aviation fuels ("SAF"), the additional emissions from this development would equate to just 0.39% of this reduced headroom. This was conceded by UDC's carbon witness to be a "tiny fraction for a non-DCO development under MBU" (see STAL Closing Submissions, para 228 [CB/343-344]).

88. Even taking UDC/ SSE's "direction of travel" argument at its highest, therefore, the Panel could be confident that the grant of permission for this development would not compromise the Government's ability to meet its climate change commitments in the future.

89. The Panel's conclusion that limited harm would be caused by this negligible increase in emissions was a lawful exercise of planning judgment. This conclusion stands independently of the Panel's findings as to the policy support conferred by MBU. Even if ground 1 had any merit, there is simply no prospect that this very limited harm would outweigh the "very significant" benefits of the scheme identified at DL 156, which were not – and are not – contested by UDC.

90. For all these reasons, ground 1 is clearly unarguable and permission should be refused.

GROUND 2: ALLEGEDLY INCORRECT APPROACH TO CONDITION 15

91. Paragraph 55 of the NPPF establishes the six policy tests that must be satisfied in order for a planning condition to be imposed:

> "Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects."

92. These tests were considered in evidence and legal submissions but they would have been extremely familiar to highly experienced Panel of planning experts in any event. All six tests must be satisfied in order for a condition to be imposed. If one test is failed, the condition is unlawful and fails the policy tests in NPPF para 55.

93. Clearly, the application of these tests requires professional planning judgment, which was duly applied in this case. Absent irrationality, the Court will not interfere with the exercise of this judgment. This ground of challenge does not come close to demonstrating that this high test has been met.

94. The Panel addressed condition 15 at para 142 of the DL [CB/27]. Its starting point was that, in light of its conclusion that the impacts of the development were acceptable based on the evidence and forecasts before it, there was no basis for imposing this condition. The condition therefore failed the first policy test of "necessity" and could not be imposed for this reason alone.

95. The Panel's reasons for concluding that the condition was not "necessary" were clearly explained and were plainly correct in light of its conclusion (not contested by UDC)

that the environmental impacts of the development were acceptable based on the evidence before it.

96. The Panel went on to find that the condition was also unreasonable, on the basis that it would "be likely to seriously undermine the certainty that a planning permission should provide that the development could be fully implemented" and that "the appeal must be determined now on the basis of current circumstances": see DL 142 [CB/27].

97. The Panel's reasons for concluding that condition 15 was unreasonable were clearly explained at DL 142 [CB/27-28]. It is irrelevant that these reflect the submissions made by STAL (c/f SoFG, para 123(5)), with which the Panel clearly agreed (see paras 18-20 of STAL's response to condition 15 [CB/212-213], and para 273 of its Closing Submissions [CB/358], relying upon the dicta of the Court of Appeal in ***Connors v SSCLG*** [2017] EWCA Civ 1950 at para 90).

98. As with the Panel's assessment of the proposed condition against the policy test of "necessity", its assessment of the reasonableness of condition 15, based on the evidence heard by it during the course of the Inquiry, is not a proper basis for a section 288 challenge.

99. In any event, it is obvious that condition 15 is unlawful, for all the reasons set out in STAL's legal submissions, and particularly in light of the very recent decision of the Court of Appeal in ***HS2***, above, which makes clear that a condition which seeks to revisit the principle of the grant of consent at a later date will be unnecessary and unreasonable and will fail the ***Newbury*** tests.

100. UDC had – and still has – no answer to these insuperable legal objections to its proposed condition 15. Nor, unsurprisingly, was it able to identify any precedent for imposing a condition of this kind.

101. For all these reasons, the Panel's approach to UDC's proposed condition 15 cannot be faulted. This ground of challenge is hopeless and unarguable.

GROUND 3: ALLEGEDLY "UNPRINCIPLED" COSTS AWARD

102. As the authorities cited above make clear, the Court will only interfere in a decision to award costs in exceptional circumstances. The SoFG do not come close to establishing that any such exceptional circumstances exist here. Instead, ground 3 is simply an attempt to re-run UDC's costs defence before the Court, dressed up as an irrationality/ reasons challenge.

103. The Costs DL was the product of the process summarised above. UDC's attempt to argue that this procedure was in some way unlawful is hopelessly misconceived. In short:

a. UDC's submissions seek to ascribe to the PPG a status which it plainly does not have. As explained above, the discretion to award costs derives from statute, not from the PPG. The PPG is not a "policy on costs" (c/f SoFG para 127). It is guidance to be taken into account by decision makers when considering whether to make an award of costs. A decision-maker is not bound to follow this guidance and it will always have to be applied with regard to the circumstances which pertain in each individual case, which will be many and various.

b. Quite apart from the fact that the PPG is guidance only, the PPG does not require costs applications to be made at any time before the close of proceedings. There is no pre-determined point at which a costs application must be made, nor a final choice made as to whether or not an application will in due course be made, save that the application must be before the close of the public element of the proceedings (and, even then, it is open to an Inspector to depart from these timings, provided no unfairness arises). This guidance is plainly there to ensure an opportunity for the subject of the application to respond or for appropriate arrangements to be made to facilitate the making of such a response.

c. The guidance encourages applications to be made "as soon as possible" but the only requirement is for a costs application to be made before the close of proceedings. UDC's argument is contradicted by its own submissions at SoFG, para 141.

d. As well as ignoring both the status and the wording of the PPG, UDC appears to be operating under a fundamental misconception as to the purpose of the costs regime. The costs guidance applies throughout the processing of a planning application, through its determination and on to any appeal. It is intended to bring discipline to the conduct of the parties at all stages. Any party behaving

unreasonably at any stage during the proceedings, in a way which leads to wasted expenditure by another party, is at risk of an award. Inspectors have the express power to make an award of costs quite irrespective of any applications which may be made by the parties. All parties are accordingly under a continuing obligation to adhere to the principles set out in the costs guidance in the PPG and to keep in mind that costs remain a sanction available to the parties (and the Inspector) right up to the closing day of any appeal proceedings.

e. Inevitably, when a costs application is made which relates to the substance (ie merits) of a party's case, both the appropriateness in principle and the content of such an application will turn to a very large degree upon the evidence called by the party against which the application is being contemplated – including answers given in cross-examination.

104. In this case, STAL was in precisely the position described in sub-para 103e above, in particular because UDC's case was in a state of constant flux. The OR in Jan 2020, which preceded the RfR, had urged approval of the application, and there was nothing for STAL to go on for many months[3] other than the four hastily concocted RfR. By September, UDC had issued a SoC, with a whole series of new and detailed matters raised, with the prospect of more to come. Then, in December 2020, UDC served proofs of evidence which recommended that permission be granted but raised condition 15 for the first time, as well as relying on the ESA (required largely because UDC had taken so long to determine the application) to defend the reasonableness of its changed position. UDC maintained these arguments right to the end of the appeal process.

105. STAL could not finally determine the principle and scope of its application until UDC's final – and critically important – planning witness had given his evidence (in the final session of the inquiry).

106. UDC's attempt to argue that the procedure adopted by the Panel, which then allowed UDC four weeks to respond to the costs application made against it, was in

[3] The recording of the January 2020 Committee meeting failed and the minutes were not finally approved and published by the Council until nine months later, in September 2020 [IP/ 96-106].

some way unlawful is hopelessly misconceived. No error of law has been identified which could possibly lead to the product of this process being quashed.

107. The same is true of the complaints made at para 143(4)-(11) of the SoFG, purportedly relating to the "substance" of the decision. In reality, these amount to a barely disguised attack on the merits of the Panel's findings. In short:

a. The fact that the RfR were elaborated upon at great length in UDC's SoC, raising a host of new issues, cannot rescue the RfR, which were manifestly opaque and not substantiated by the evidence. The proof of this is in the outcome: the SoC was largely abandoned by the time of the appeal and UDC's witnesses were in no position to defend UDC's decision to refuse permission. Instead, they all accepted that the development was acceptable in principle and that permission should be granted subject to conditions.

b. The Panel gave its reasons for concluding that the RfR were vague and generalised at DL17 [CB/7]. These findings were quintessentially matters of judgment for the Panel.

c. The Panel was right to "single out" the carbon/ climate change RfR as being particularly egregious in this regard. Quite apart from the fact that this RfR was fundamentally misconceived (see ground 1, above), the Committee's resort to "general accepted perceptions and understandings of the importance of climate change and the time within which it must be addressed" as a basis for refusing planning permission demonstrates just how far adrift it came from the proper assessment of this proposal against the policies of the development plan and all material planning considerations, including national aviation policy.

d. Mr Scanlon's conclusion that the planning balance favoured the grant of permission and that the appeal should be allowed was set out for all to see in his proof of evidence [IP/ 123-155]. In any event, and for the reasons set out in relation to ground 2 above, condition 15 was patently unlawful and UDC's reliance upon this condition was plainly not a reasonable basis for continuing to resist the appeal.

e. The Panel addressed the Council's reliance on the ESA at paragraph DL 20 [CB/7-8]. Its conclusion that the ESA was not a sound basis for UDC's *volte face* was an entirely legitimate exercise of planning judgment. It was also

plainly correct, given that the ESA did not identify any material change in the assessment of the significance of the environmental effects of the development.

f. UDC's "direction of travel" argument was fundamentally misconceived, for the reasons set out in relation to ground 1, above. The Panel was right to find that concerns about hypothetical future policy changes were not a reasonable basis for making planning decisions.

g. It was a matter for the Panel's discretion as to whether UDC should be required to pay the full costs of the appeal. In light of the Panel's conclusions, a full award of costs was plainly merited here: had UDC not unreasonably refused to grant permission, no appeal would have been necessary and the costs associated with also responding to the issues raised by SSE and other third parties would never have been incurred. These costs flowed directly from UDC's unreasonable conduct in refusing permission in the first place and forcing a wholly unnecessary appeal.

108. Ultimately, there is nothing remotely surprising about the Panel's decision to make a full award of costs against UDC. UDC's wilful disregard of all the professional advice received by it, as subsequently endorsed by its own expert planning witness, and its abandonment of its own RfR at the appeal stage (subject only to its "condition 15" argument, which was patently misconceived and unlawful) have resulted in a lengthy appeal process, which the Panel concluded, in the exercise of its judgment and having heard extensive evidence and submissions over 30 days, should never have been needed. This is precisely the kind of unreasonable conduct which the costs regime is there to protect against.

109. This ground of challenge is therefore entirely without merit. As noted above, for UDC then to ask the Court to find that the costs award ordered by the highly experienced Panel was made out of "spite" is unwarranted and inappropriate.

DISCRETION

110. For the reasons set out above, none of the grounds of challenge is arguable. Moreover, even if there was any technical merit in any of the grounds of challenge, there is no prospect that the decision would have been any different, had any such error not occurred:

a. The planning balance was not a finely balanced assessment: it fell "overwhelmingly" in favour of granting permission.
b. There is no challenge to the finding that the development complies with the presumption in favour of the development plan and with the presumption in favour of sustainable development.
c. There is no challenge to the Panel's conclusions as to the very significant benefits of the scheme, as identified at DL 55.
d. There is no challenge to the Panel's findings with regard to noise, air quality, surface access, nor any other material considerations as set out in the DL.
e. There is no dispute that the development would add just 0.09MtCO2 of additional carbon by 2050, nor any challenge to the Panel's conclusion that only limited weight could be given to these emissions in the planning balance, which it arrived at independently of its assessment of the proposals against MBU.
f. In any event, very recent policy statements confirm that STAL's analysis of the "direction of travel" of climate change and aviation policy, which continues to support aviation growth, was entirely correct. There is not an iota of evidence that the Government intends to move away from MBU or that it could no longer be relied upon or given full weight in the assessment of this proposal.

111. Applying ***Simplex***, permission should be refused for this reason also.

CONCLUSION

112. For all the above reasons, the Court is respectfully asked to refuse permission and to dismiss the challenge. STAL also seeks its costs of preparing its Acknowledgement of Service and these Summary Grounds of Defence. A schedule is attached to these summary grounds.

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