Neutral Citation Number: [2022] EWHC 1221 (Admin)

Case No: 2465/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2022

Before :

MR JUSTICE HOLGATE

- -

Between :

THE QUEEN

-on the application of –

GOESA LIMITED **Claimant**

- and –

EASTLEIGH BOROUGH COUNCIL **Defendant**

-and-

SOUTHAMPTON INTERNATIONAL AIRPORT LIMITED **Interested Party**

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- -

David Wolfe QC, Ashley Bowes and Peter Lockley (instructed by **Leigh Day**) for the **Claimant**
Paul Stinchcombe QC and Ned Helme (instructed by **Eastleigh Borough Council**) for the **Defendant**
James Strachan QC and Mark Westmoreland Smith (instructed by **Pinsent Masons LLP**) for the **Interested Party**

Hearing dates: 27 and 28 April 2022

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Approved Judgment

Mr. Justice Holgate:

Introduction

1. On 22 October 2019 Southampton International Airport Limited ("SIAL"), the Interested Party, submitted an application to the local planning authority ("LPA"), Eastleigh Borough Council ("EBC"), the defendant, for planning permission for a 164m extension of the existing runway at its northern end, an associated blast screen, and the reconfiguration and enlargement of the existing long stay car park.

2. On 25 and 26 March 2021 the application was considered by the defendant's Eastleigh Local Area Committee. They decided not to grant planning permission, rejecting the recommendation in a report by the case officer, Mr. Andy Grandfield, the Executive Head for Planning and Economy at EBC. Consequently, under the defendant's constitution the application had to be considered by the full Council. That meeting, which took place on 8 and 9 April 2021, lasted some 20 hours. The members had the benefit of a detailed, careful report prepared by Mr. Grandfield which was some 238 pages long. The full Council voted by 22 to 13, with one abstention, to grant permission subject to the completion of an agreement under s.106 of the Town and Country Planning Act 1990 ("TCPA 1990").

3. The s.106 agreement was completed on 3 June 2021 and the decision notice granting planning permission was issued on the same day.

4. The process leading up to the meeting of the full Council was protracted. The application was for "EIA development" under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No 571) ("the EIA Regulations"). It was therefore accompanied by an Environmental Statement ("ES") and was the subject of consultation in accordance with those regulations. The ES assessed the effects of the future operation of the airport with and without the proposed development. The forecasts used in that assessment assumed the continued trading of Flybe, which had generated over 90% of the airport's passengers during the period 2016 to 2018. However, in March 2020 Flybe went into administration and all of its operations at the airport ceased.

5. In July 2020 SIAL submitted an Environmental Statement Addendum. This relied upon the same approach to projecting future operations as in the original ES, but SIAL also provided a Sensitivity Test with reduced projections of future passenger numbers, both with and without the proposed development.

6. In January 2021 SIAL submitted a second Environmental Statement Addendum ("ESA2") which relied upon the reduced Sensitivity Test projections as the most likely scenarios for assessing the significant effects of the proposed development.

7. There were four rounds of public consultation between 2019 and 2021. EBC received around 8,000 representations, some in favour of the proposal and others against. The objectors included adjoining local authorities, Southampton City Council and Winchester City Council.

8. The claimant, GOESA Limited, was incorporated on 11 May 2021, after the meeting of the full Council. In his witness statement, Mr. Justin Turner QC, one of the directors,

explains that the company was set up as a legal entity to pursue this claim for judicial review to have the planning permission quashed, to represent a number of residents who oppose the expansion of the airport and to provide a vehicle for the collection and use of funds. Over 300 residents in the area have pledged money to support the claim.

9. Mr. Turner was in contact with another group known as Airport Expansion Opposition Southampton (or "AXO"). On 13 April 2021 he sent a letter to the Secretary of State for Housing, Communities and Local Government (now Levelling Up, Housing and Communities) asking him to call in the application for determination by himself under s.77 of the TCPA 1990. Generally, that procedure would involve the holding of a public inquiry by an Inspector who would report to the Secretary of State with a recommendation as to how the application should be determined.

10. Mr. Turner did not receive a response. On 14 May 2021, Leigh Day, the solicitors acting for Mr. Turner (and now the Claimant) wrote to the Secretary of State saying that they understood from a statement on EBC's website dated 16 April 2021 that the defendant had voluntarily agreed to refrain from issuing a decision notice until the Secretary of State had decided whether or not to call in the application. However, they were concerned that it might be argued from that statement that the agreement would not be binding beyond the middle of May 2021. They therefore asked that "the position is put on a formal footing" by the Secretary of State issuing a direction under article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595) ("DMPO 2015"). Under article 31 the Secretary of State could restrict the grant of planning permission on SIAL's application until he decided whether or not to call in the application.

11. On 17 May 2021 the Planning Casework Unit ("PCU") of the Ministry responded that it had an "agreement with Eastleigh Borough Council that it will not issue the decision notice on the above application, until the Secretary of State has completed his consideration of the application". EBC says that there was no such agreement. The Secretary of State did not issue any article 31 direction in relation to the application.

12. On 18 May 2021 Leigh Day wrote to the Chief Executive of EBC enclosing the correspondence it had had with the PCU and asking the Council to give an undertaking by 4pm that day in the following terms: -

> "In light of the Secretary of State's position, please confirm that the Council undertakes not to issue a Decision Notice unless and until the Secretary of State has made a decision as to whether or not to call in the application".

13. EBC did not respond by that deadline. Instead, on 27 May 2021 the Head of Legal Services replied: -

> "The local planning authority is in contact with the Secretary of State about the determination of this application and has agreed to the informal request to delay issuing the decision. You will of course appreciate that I am not able to provide the undertaking as requested."

14. Seven days later, on 3 June 2021, the s.106 agreement was completed and the planning permission granted. On the same day, EBC's website published the following announcement:

> "The Planning Casework Unit (PCU) at the Ministry of Housing, Communities & Local Government (MHCLG) had advised that they have received several requests for the Secretary of State to consider call-in of this planning application. In April, officers within the PCU asked the Council to delay the issuing of the Decision Notice to provide the Secretary of State time to assess the case and decide whether or not to call in the application for a public inquiry. The Council agreed to, and abided by, this informal request and advised PCU Officers mid-May that the Council intend to issue the decision by the end of May. The Council had not received a request from the Secretary of State to not issue the decision and had not received further correspondence from officers within the PCU by the end of May and has now issued the decision notice to grant planning permission for the runway extension."

15. On 18 August 2021 I ordered that the papers in the case be served on the Secretary of State and that he should indicate whether he intended to apply to be joined as an interested party and/or to file any submissions. The order explained that the Secretary of State could make submissions to assist the court on the claimant's allegation that EBC had failed to await his decision on whether to call in the application before issuing the planning permission.

16. On 3 September 2021 the Government Legal Department wrote to the court to say that the Secretary of State would not apply to be joined as a party and would not make any submissions.

17. Following the hearing of a renewed application, Lang J granted permission to apply for judicial review on grounds 1, 3, 4 and 6. On 24 March 2022 the judge allowed some amendments of the Statement of Facts and Grounds and refused others.

The Grounds of Challenge

18. As amended, the Claimant advances the following grounds of challenge:

> **Ground 1 –** The decision was unlawfully made in breach of a legitimate expectation not to issue the planning permission until the Secretary of State had fully had time to decide whether or not to call in the application and cause a public local inquiry to be held.
>
> **Ground 3** – By making no assessment of the cumulative effects of GHG emissions in combination with other projects, the Defendant breached its duty under the EIA Regulations, and/or failed to take into account an obviously material consideration.

> **Ground 4** – The defendant misinterpreted the policy at paragraph 11(d) NPPF, leading it unlawfully to apply the "tilted balance" in favour of the grant of permission, but without it making the necessary prior finding that the "most important policies for determining the application" were out of date.
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> **Ground 6(a)** – The defendant unlawfully took into account an immaterial consideration, namely that refusing planning permission would lead to the loss of the airport.
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> **Ground 6(b)** – The defendant proceeded upon an insufficient evidential basis before concluding that the airport would be operating below its break-even point without expansion.

Ground 1

Statutory Framework

19. It is well established that a mere resolution to grant planning permission by a LPA does not itself constitute a planning permission for the purposes of ss.58(1)(b) and 70(1)(a) of the TCPA 1990. Planning permission is not granted until a decision notice is given to the applicant (*R v Yeovil Borough Council ex parte Trustees of Elim Pentecostal Church* (1971) 23 P & CR 39 and *R v West Oxfordshire District Council ex parte Pearce Homes Limited* [1986] JPL 523). It follows that the LPA is free to revisit its resolution to grant permission and to change its mind about the terms of the permission, or even to revoke that resolution, at any time before the decision notice is given (see also *King's Cross Railway Lands Group v London Borough of Camden* [2007] EWHC 1515 (Admin)). Where a new material consideration or change of circumstances arises after a resolution to grant is passed, but before a decision notice is issued, the LPA *may* become under a legal obligation to reconsider its resolution to grant (*R (Kides) v South Cambridgeshire District Council* [2003] 1 P & CR 19).

20. The same principles apply where a LPA passes a resolution to grant permission subject to the prior execution of a s.106 obligation to secure specified objectives. It may often be necessary for the terms of an obligation to be negotiated and drafted in some detail after the passing of that resolution. If no such obligation is entered into in accordance with the terms of the resolution, it would be unlawful for the LPA to proceed to grant planning permission unless the authority resolved to alter those terms appropriately.

21. Where an application is made for planning permission, it is submitted to, and is generally determined by, the LPA (ss.62 and 75 TCPA 1990). However, s.77 gives the Secretary of State a broad discretion to issue directions requiring a specific application for planning permission (or applications more generally) to be referred to him instead of being dealt with by the LPA. This power of call-in may be exercised before or after the LPA has resolved to grant planning permission, but cannot be exercised once a LPA has granted planning permission by issuing a decision notice.

22. This interregnum between a resolution to grant permission and the issuing of a decision notice once any necessary s.106 obligation has been executed, provides a further opportunity during which the Secretary of State may exercise his power to call in the planning application for determination by himself.

23. The current criteria which guide the exercise of the power to call in were set out in a written ministerial statement dated 26 October 2012. Generally, the Secretary of State will only consider using this power where planning issues of more than local importance are involved. Such cases could include, for example, proposals which in his opinion may:

    - conflict with national policies on important matters;
    - have significant long-term impact on economic growth and meeting housing needs across a wider area than a single local authority;
    - have significant effects beyond their immediate locality;
    - give rise to substantial cross-boundary or national controversy;
    - raise significant architectural and urban design issues; or
    - involve the interests of national security or of foreign Governments;

    As the Court of Appeal observed in *R (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2014] 1 WLR 929 at [19], the long established policy is that most applications should be dealt with at local level, so that the default position, departed from only rarely in practice, is not to call in applications.

24. The Secretary of State may exercise the power of call-in of his own motion. For example, under the Town and Country Planning (Consultation) (England) Direction 2021, where a LPA proposes not to refuse an application for development within certain categories, it must consult the Secretary of State by sending him information about the application and the planning officer's report, and may not grant planning permission during the following 21 days, unless within that time the Secretary of State notifies the authority that he does not intend to call in the application. Where the Secretary of State considers the 21 day period insufficient for him to decide whether or not to call in the application, he may issue an article 31 direction so as to give himself more time to reach a decision on call-in. It was not suggested that that direction applied in the present case.

25. Article 31(1) of the DMPO 2015 gives the Secretary of State an additional power, namely to issue a direction restricting the grant of planning permission by a LPA, either indefinitely or for a specified period. In the light of the decision in *Save*, I do not think that the Secretary of State has any common law obligation to give reasons in relation to a decision on whether or not to exercise that power.

26. A third party may also ask the Secretary of State to consider exercising his power to call in an application. However, an informal request of that nature is not to be treated as a formal application which has to be determined by the Secretary of State. In *Save Britain's Heritage* the Court of Appeal stated that a decision on whether or not to exercise the power under s.77 is not a substantive decision. It does not go to, or determine, the merits or demerits of a planning application. It does not affect the substantive rights of anybody. Instead, it is a procedural decision as to who should deal with the planning application, the LPA or the Secretary of State ([19]). The Secretary of State is under no general common law duty to give reasons for a decision on whether or not to call in an application ([19] and [22] – [30]).

27. In the present case, the Secretary of State did not exercise his power to issue an article 31 direction preventing the grant of planning permission by EBC while he decided whether to call the matter in. Instead, he sought to enter into an agreement with EBC delaying the issuing of the LPA's decision. This reflected an internal practice within the PCU and the Ministry.

28. The court was told that this internal practice has not been published. However, it was described in a witness statement by Mr. Simon Carpenter, a Senior Planning Manager in the PCU dated 11 September 2019, which was filed in *Royal Borough of Kensington and Chelsea v Mayor of London* (CO/3044/2019). Once a request is received from a third party, the PCU contacts the LPA to ascertain when it is likely to be determined. The PCU's practice is to allow the LPA to decide whether to grant planning permission before considering the request for a call-in. "In order to safeguard the Secretary of State's position an undertaking is sought from the case officer that the local authority will not issue the decision notice until the Secretary of State has decided whether call-in is warranted. If the case officer is unwilling or unable to provide this assurance, an article 31 holding Direction is placed on the application".

29. On 9 December 2021 Lang J ordered the Secretary of State to file a witness statement in the current proceedings stating whether, and to what extent, the standard procedures for handling requests to call in planning applications during the period April to June 2021were as described by Mr. Carpenter.

30. As a result, a witness statement by Mr. Andrew Lynch, Head of Planning Casework in the PCU was filed. He noted that where a request for a call-in is made after a LPA has resolved to grant permission, an article 31 direction might need to be issued very quickly. He confirmed that the standard procedures remained the same, save in one respect. At the time of Mr. Carpenter's statement, a case officer had to seek authorisation from the Head of Planning Casework before issuing an article 31 direction. By the time the PCU was dealing with the request to call in SIAL's application the procedure had changed, in that all proposals to issue an article 31 direction were reviewed by the Secretary of State's private office or other Ministers. Either the private office or a Minister would decide whether an article 31 direction should be issued. Where possible, the private office would be given 72 hours in which to respond. In some cases where a swifter response was necessary, for example where a request for a call in was made at a late stage or the LPA had not given an undertaking, PCU officials would liaise directly with the private office.

31. The fact that an article 31 direction needed to be authorised by the Head of the PCU, or subsequently by the Secretary of State's private office or a Minister, reflects the rarity of the use of the call-in power, as was acknowledged in *Save.*

Legal Principles on legitimate expectation

32. A claim to a legitimate expectation can be based upon a promise (or representation) made by a public authority provided that the promise was "clear, unambiguous and devoid of relevant qualification" (*R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Limited* [1990] 1 WLR 1545, 1569; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2009] 1 AC 453 at [60]). If the promise (or representation) was not made directly to the claimant, then the claimant should show that he fell within a class of persons entitled to rely upon it, or that it was

reasonable for him to rely upon it without more (*Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 638; *R v Jockey Club ex parte RAM Racecourses Limited* [1993] 2 All ER 225 at 236h-i).

33. Mr David Wolfe QC, who together with Dr. Ashley Bowes and Mr. Peter Lockley appeared for the Claimant, submitted that the claimant was entitled to rely upon the statement on EBC's website dated 16 April 2021 (set out at [45] below) as giving it a legitimate expectation that the Council would not issue a decision notice before the Secretary of State had decided whether to call in the application. The Claimant did not see EBC's letter to the Secretary of State dated 15 April 2021 before the decision notice was issued. But Mr. Wolfe says that the claimant's case proceeds on the basis that the Council's statement on its website is consistent with that letter.

34. Mr. Wolfe put ground 1 in the alternative. If the claimant was not entitled to rely upon the statement on the website without more, and so had to raise the matter directly with EBC (see the *RAM* case at p.239e), it did so. In this context, Mr. Wolfe relied upon the email from Leigh Day to EBC dated 18 May 2021, enclosing Leigh Day's letter to the PCU dated 14 May 2021, the PCU's reply dated 17 May 2021 and EBC's reply to Leigh Day dated 27 May 2021.

35. At the hearing Mr. Wolfe stated that the claimant was no longer seeking to rely upon a second alternative basis for ground 1. This was an alleged practice on the part of LPAs in England that when requested by the PCU, an authority would either give an undertaking not to grant planning permission until the Secretary of State had decided whether to call in the application, or would expressly refuse to do so, so that the Secretary of State could consider issuing an article 31(1) direction; furthermore, where an authority gave an undertaking it would not issue a planning permission without giving the Secretary of State notice of its changed position.

36. Both the defendant, represented by Mr. Paul Stinchcombe QC and Mr. Ned Helme, and SIAL, represented by Mr. James Strachan QC and Mr. Mark Westmoreland Smith, had submitted that no evidence had been produced to support the existence of any such practice, whether on the part of EBC or local authorities more generally. I agree. Furthermore, in his fourth witness statement, Mr. Grandfield contradicted the claimant's assertion that EBC had taken part in any such practice.

37. At all events, it is common ground that if a promise satisfies the tests for a legitimate expectation to arise, the claimant is not required to show that he relied upon that promise to his detriment (*Bancoult* at [60]).

38. But the courts will not give effect to a legitimate expectation if it would require a public authority to act contrary to the terms of legislation (*R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115). Similarly, a promise by a public body cannot amount to a legitimate expectation if that body has no power to do that which it has promised (*R (Bloggs 61) v Secretary of State for the Home Department* [2003] 1 WLR 2724).

Whether EBC made the clear and unequivocal promise for which the claimant contends

39. On 13 April 2021 the PCU sent an email to Mr. Grandfield stating that it had received several requests for a call-in and asking when EBC anticipated being in a position to

issue the decision notice. If EBC was intending to issue the decision notice *imminently*, the authority was asked to tell the PCU as soon as possible whether EBC would be content not to issue the decision notice "until the Secretary of State has decided whether to call in the application". Plainly, the timing of the decision notice was a central consideration. On the same day Mr. Grandfield replied that the Council had resolved on 9 April 2021 to grant permission subject to a s.106 agreement and that he anticipated the latter being completed "no earlier than" 19 May. That gave the Secretary of State at least 5 weeks to consider whether to call in the application. Mr. Grandfield therefore made it plain that the decision notice would not be issued imminently, giving a direct answer to the specific question that the PCU had put to him.

40. Despite that clear answer from EBC, on 14 April the PCU sent another email asking Mr. Grandfield whether EBC would agree in writing "not to issue a decision until the Secretary of State has fully assessed the case". Unlike the email of the previous day, that request was no longer linked to whether a decision letter was imminent. Unfortunately, however, the PCU gave no indication to EBC as to the timescale which might be involved. But the PCU did confirm that it had "all the information we need to get the assessment under way" and that it would contact EBC again if it needed any more information. The court was told that the PCU did not make any further request for information before EBC granted the planning permission, over 7 weeks later.

41. Mr. Grandfield responded on the same day at 9.02pm saying that a formal letter would be sent, but in the meantime his email stated that EBC "will not issue a decision until the Secretary of State has fully had time to assess the case". But it is relevant to note two questions raised by Mr. Grandfield. First, was the Secretary of State in effect imposing a "holding direction" under article 31 of the DMPO? Second, what would be the timescale for the lifting of any holding direction or the making of a formal decision on whether or not to call in the application? Given EBC's responsibility to determine the application which had been made to it as the LPA, the issues of timescale and delay were plainly important matters to the authority.

42. At 10.02am the next day, 15 April 2021, Mr. Grandfield sent a formal letter to the PCU under cover of an email, but without having received a response from the PCU. Mr. Wolfe rightly accepted that in determining whether the authority gave an unequivocal promise to the Secretary of State which could found the alleged legitimate expectation, the court should focus on the letter itself. The emails from Mr Grandfield the evening before and that morning should be treated as entirely consistent with, and not adding to or detracting from, that formal response. The letter stated:

> "I am writing further to your email dated 13 April and supplementary email dated 14 April seeking a written agreement that the Council would not issue a decision until the Secretary of State has fully assessed the case.
>
> The planning application received a resolution to approve at Full Council on 10 April 2021 subject to the completion of the S106 Agreement. It is anticipated that the Agreement would be completed by week commencing 17 May 2021. The Council had envisaged issuing the decision within 48 hours of completion of the Agreement.

> I am aware that the Secretary of State can delay the grant of planning permission until he has decided whether to call-in an application, by what is sometimes called a holding direction. This power is set out in Section 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.
>
> I confirm that the Council are agreeable to delaying the issuing of the decision on this planning application to allow the Secretary of State time to consider the case.
>
> For sake of clarity, can you confirm if this is a formal holding objection at this stage? I appreciate it will take some time to review the case but are you able to offer any timescales for the lifting of the holding objection or a formal decision on whether to call in the application?"

43. The letter made it clear that the s.106 agreement was expected to be completed by the week beginning 17 May 2021 and that EBC had envisaged issuing the planning permission within 48 hours of that completion. Those timings were in line with the "anticipation" in the email sent on 13 April 2021 that the s.106 agreement would be completed no earlier than 19 May 2021.

44. The general practice is that a planning permission is not issued before the completion of any necessary s.106 agreement; but once that agreement is completed, planning permission is often issued on the same day, and if not, soon thereafter. The letter of 15 April 2021 accurately set out the promise that the PCU had asked EBC to give. It is clear that the promise given by the Council was not in the same terms. EBC only said that they would delay issuing the decision notice "to allow the Secretary of State *time* to consider the case". The letter did not promise to delay the decision notice for as long as it should take the Secretary of State to decide whether to call in the application. It did not specify how much time beyond the anticipated completion of the s.106 agreement EBC was prepared to allow. That is hardly surprising given that Mr. Grandfield had not yet received a response to the questions he had asked in his email to the PCU of the previous evening. Indeed, he repeated those questions.

45. On 16 April 2021 EBC published this update on the part of its website dealing with SIAL's planning application:

> "The Planning Casework Unit (PCU) at the Ministry of Housing, Communities & Local Government have advised that they have received several requests for the Secretary of State to consider call-in of this planning application. Officers within the PCU have asked the Council whether we would voluntarily agree to not issue the Decision Notice until the Secretary of State has assessed the case and decided whether or not to call in the application for a public inquiry.
>
> The completion of the S106 Legal Agreement will not be completed until the middle of May and as such the Council have agreed to this informal request."

Mr. Wolfe said that this announcement should be read as being consistent with EBC's letter to the PCU dated 15 April 2021. He did not contend that it departed from, or added to, that letter.

46. In my judgment, EBC's announcement on 16 April 2021 did not contain any clear, unequivocal representation that the decision notice would not be issued until the Secretary of State had decided whether to call in the application, irrespective of the length of time that might take. It is also important to note the words "as such" in the last sentence of the announcement. Like the letter dated 15 April 2021, the announcement was silent on the length of time for which the decision notice would be delayed beyond the middle of May. Again, it was reasonable for EBC to approach the matter in that way, given its statutory responsibilities for determining the application and the absence of any indication of a timescale from the PCU.

47. On 22 April 2021, a week after EBC's letter, the PCU replied thanking Mr. Grandfield for providing written "confirmation that your Council has agreed not to issue a decision notice on the above planning application until the Secretary of State has fully considered the requests to call in the application for his own determination". For the reasons I have already given, EBC had made no such promise and the PCU was wrong to read the communications from the Council in the way they did. That misinterpretation of what EBC had said did not alter the correct, objective meaning of the language used in the Council's statements. I also note that the PCU's response stated that no article 31 direction had been issued and that no estimate could be given for the time needed for the Secretary of State to reach a decision on call-in.

48. On 23 April 2021 Mr. Grandfield wrote to the defendant's Chief Executive enclosing the email from the PCU. He said that he did not wish the matter to "remain open-ended", referring to the absence of any time estimate from the Ministry on their decision. He also said that, depending on the progress made with the s.106 agreement, he would write to the PCU in the second week of May, as the Council wished to issue the decision notice by 21 May 2021. The Chief Executive replied saying that he would contact the local MP to say that EBC had not been given a timescale by the PCU and that the Council would like the matter settled as soon as possible.

49. At 3.22pm on 14 May 2021 the PCU contacted Mr. Grandfield for an update on the preparation of the s.106 agreement which had originally been due for completion in the week commencing 17 May 2021: -

> "I am just contacting you to check the progress with the S106 on the above application. The application is still under consideration by the Secretary of State, therefore we wish to confirm that your agreement in your letter of 15 April 2021, not to issue a decision notice until the Secretary of State has completed his consideration still stands. We would be grateful if you could reply as soon as possible confirming your council's position"

I note two things about this email. First, it repeated the PCU's misunderstanding of EBC's letter of 15 April 2021. Second, and somewhat strangely, it asked for a confirmation which would not have been necessary if the PCU had thought the letter of

15 April 2021 bore the meaning which they attributed to it. At all events, there can be no misunderstanding of what was said by Mr. Grandfield in reply.

50. Mr. Grandfield responded 20 minutes later: -

> "The S106 is progressing well and whilst it will not be ready by 19 May as initially thought, I do think that we will have it ready for competition (sic) no later than the end of the month. In my letter I confirmed that the Council are agreeable to delaying the issuing of the decision on this planning application to allow the Secretary of State time to consider the case.
>
> Working with the applicant I would expect to be in a position to, and aim to issue, the decision by the end of May 2021. This is some 6 weeks after we initially agreed to delay the issuing of the decision, which I would expect to have provided sufficient time for consideration of the scheme by the Secretary of State."

51. This email accurately restated what had been said on behalf of EBC in the letter dated 15 April 2021. The council had allowed the Secretary of State "time" to consider the case. Mr Grandfield did not give the confirmation which the PCU sought. Instead, he explained that the s.106 agreement would be completed by the end of May 2021 and the Council would be able to issue, and aimed to issue, the planning permission at that stage, that is by 31 May 2021. He stated that by then the Secretary of State would have had some 6 weeks since EBC's letter of 15 April 2021, which he would have expected to be sufficient time for a decision on whether or not to call in the application. In my judgment, Mr. Grandfield made it plain to the PCU that EBC was not agreeing to any further delay beyond 31 May 2021.

52. The court was informed that the Ministry did not reply to Mr. Grandfield's email at any time before the planning permission was issued on 3 June 2021, nearly 3 weeks later. In particular, there was no response from the PCU before the end of May 2021. The Secretary of State did not indicate to the Council that he needed more time beyond that date to consider whether to direct a call-in. It should have been obvious to the PCU that EBC was not agreeing to defer issuing the decision notice beyond 31 May. If the Secretary of State wished to have more time to consider the s.77 issue, he ought to have realised that the only option available to him was to issue an article 31 direction before the end of May 2021. He did not do so.

53. The court was shown some internal communications between senior officers of EBC and its Leader around 25 and 26 May. Officers thought it advisable to act cautiously by telling PCU once again that the Council was about to issue the decision notice on the application, partly because PCU had misquoted the letter from Mr. Grandfield of 15 April 2021 and partly because of public perception. The Leader of the Council disagreed, saying that this was a matter of "political risk" which he was prepared to take. The latter is not, of course, a matter for this court.

54. There is no need for me to set this internal material out in detail. It does not affect the answer to the legal question whether on a true, objective interpretation of the letter sent by EBC to the PCU on 15 April 2021 (and also the public announcement made on 16 April 2021) the Council had made a clear, unequivocal promise or representation as

contended for by the claimant. In any event, Mr. Grandfield's email of 14 May 2021 made the Council's position perfectly clear. It would issue a decision by the end of May 2021 and was not agreeing to any delay beyond the date. The ball was then in the Ministry's court to issue an article 31 direction, but it did nothing about it. I understand that officers might have wished to give advice to the Leader erring on the side of abundant caution. But in my judgment, there was no need in late May 2021 for the Council to reiterate what it had plainly said on 14 May 2021, to which the PCU had made no response.

55. On 3 June 2021 Mr. Grandfield wrote to the PCU referring to his email of 14 May. He pointed out that he had not received any further correspondence from the Ministry in the intervening 3 weeks and enclosed the decision notice "in accordance with my email dated 14 May 2021". On 7 June 2021 the Ministry thanked the Council for its letter and simply noted its contents. Nothing else was said.

56. The remaining part of ground 1 concerns the correspondence that Leigh Day had with the PCU and then with EBC between 14 May 2021 and 27 May 2021. I have summarised this material in paragraphs 10 to 13 above. In view of my analysis of EBC's letter of 15 April and the public announcement of 16 April 2021, Leigh Day were entirely correct to send a letter on behalf of their client on 17 May 2021 asking the Secretary of State to issue an article 31 direction. The PCU's response relied upon an agreement that it purported to have with EBC. That could only have been referring to the letter dated 15 April 2021, but the PCU did not provide a copy of that letter (or the emails received) to Leigh Day. For the reasons I have given, the letter, like the announcement in the Council's website, did not contain anything like the promise alleged by the PCU in its response to Leigh Day on 17 May 2021.

57. Not surprisingly, Leigh Day wrote to EBC on 18 May 2021 in the terms we have already seen. There can be no doubt about the meaning of EBC's response on 27 May 2021. The Council refused to provide the undertaking requested by Leigh Day not to issue a decision notice unless and until the Secretary of State has decided whether or not to call in the application. It merely said that it had agreed to the informal request "to delay issuing the decision", without saying for how long, or in what circumstances, that delay would continue. The claimant did not pursue the matter further.

58. In these circumstances, there is no basis for the Claimant to contend that EBC gave a promise not to issue a decision notice until the Secretary of State had decided whether or not to call in the application, let alone a clear, unequivocal promise to that effect which was devoid of relevant qualification.

59. For these reasons alone, ground 1 must be rejected. However, I will also deal with other arguments put before the court.

Would the alleged legitimate expectation be inconsistent with the statutory code?

60. It is common ground between the parties that the legitimate expectation for which the claimant has contended involves an open-ended commitment by EBC to defer granting planning permission in accordance with its resolution until the Secretary of State decided whether to call in the application. The claimant's case proceeds on the basis that EBC made a promise which was not subject to any time limit or deadline for that decision.

61. Mr. Strachan QC submitted that a promise of that nature would have been inconsistent with the statutory code under which both EBC and the Secretary of State had to operate.

62. The starting point for my analysis is that planning legislation is generally regarded as creating a comprehensive code (*Pioneer Aggregates Limited v Secretary of State for the Environment* [1985] AC 132, 141-2).

63. SIAL's proposal fell below the threshold for being treated as a nationally significant infrastructure project (s.23 of the Planning Act 2008) and therefore had to be the subject of an application to EBC for planning permission, and not to the Secretary of State for development consent.

64. As the LPA, the defendant had a statutory obligation to determine the application unless and until the Secretary of State issued an article 31 direction or made a decision under s.77 to call in the application (see *Bovis Homes (Scotland) Limited v Inverclyde District Council* [1982] SLT 473; *R (Billings) v First Secretary of State* [2006] JPL 693).

65. Where the Secretary of State issues a direction under s.77(1) that an application be referred to him for determination, the LPA must refer that application to him (s.77(3)). The LPA cannot of its own motion transfer an application for planning permission to the Secretary of State because, for example, it considers that the matter should be determined by the central planning authority.

66. A LPA is obliged to determine a validly made application, either by granting it (with or without conditions) or by refusing it (s.70(1)), unless it exercises one of the powers in s.70A to s.70C to decline to determine an application. But those powers did not apply here.

67. By article 34 of the DMPO 2015 the LPA is under an obligation to issue a decision notice, or a notice that the application has been referred to the Secretary of State under s.77, within the time limits specified. An applicant's remedy for non-compliance with that time limit (or any extension thereof agreed in writing) is to appeal under s.78(2) of the TCPA 1990 against a deemed refusal of planning permission. If no appeal is brought within the relevant time limit, it is to be noted that the LPA's duty to determine the application still continues (see e.g. the *Bovis* case). The duty is a hardy animal.

68. Once a LPA passes a resolution to grant planning permission, and any pre-conditions in that resolution for the grant of permission are met, the authority has no function left to perform other than to issue the decision notice, unless the Secretary of State requires the authority to refer the matter to him for determination under s.77. The TCPA 1990 does not confer any express power upon a LPA to defer issuing the decision notice to enable the Secretary of State to consider calling in the application.

69. A local authority has a power under s.111 of the Local Government Act 1992 to do anything which is incidental to the discharge of any of its functions, but that does not include doing something which is merely "incidental to the incidental" (*McCarthy & Stone (Developments) Limited v Richmond Upon Thames London Borough Council* [1992] 2 AC 48).

70. Where a LPA chooses to reconsider the merits of its earlier decision, or decides to revisit an application because of a material change in circumstances, or a new

consideration arises which was not previously taken into account, the authority delays the issuing of a decision notice as part of a continuing process of determining the merits of the application for itself, which, of course, is the authority's function. But when a LPA purports to agree with the Secretary of State to defer issuing a decision notice for a significant period of time, simply so that he may consider whether to call in the application, it does no such thing. The only purpose is to enable the Minister to decide whether he will determine the merits of the application. By definition, the LPA is not continuing to determine those merits for itself. The function of making the procedural decision whether the application should be called in belongs exclusively to the Secretary of State. The LPA has no role to play in the making of that decision.

71. In my judgment it undoubtedly follows from this analysis that it would be *ultra vires* for a LPA to give an irrevocable undertaking or promise that it will not issue a decision notice granting permission until the Secretary of State decides whether to call in the application, without any limit as to time. A public authority cannot enter into any undertaking or agreement incompatible with the due exercise of its duties (*Birkdale District Electric Supply Company v Southport Corporation* [1926] AC 355, 364; *De Smith's Judicial Review (8th Ed)*, para. 9-022 *et seq*). An agreement by a LPA to defer issuing a decision for a short period which could be considered *de minimis* would be a different matter.

72. I would add for completeness that, although the claimant did not rely upon the general power of competence in s.1 of the Localism Act 2011, that provision could not overcome this incompatibility with the LPA's duty to determine the application.

73. Planning legislation does provide a solution for a situation where the Secretary of State wishes to prevent a LPA from granting planning permission while he considers whether to call in the application. He has a broad power to issue an article 31 direction. It is a transparent and public procedure. The use of that simple procedure avoids the uncertainty which can arise, as in the present case, over the meaning and effect of exchanges of emails and letters, whether they give rise to any binding legitimate expectation and, if so, the nature of that expectation. It hardly seems desirable for the interests of an applicant, the LPA and potentially other public bodies and many members of the public, whether for or against the proposal, to be affected by such legal uncertainty. As the evidence from the Secretary of State shows, an article 31 direction can be issued rapidly where that is thought to be appropriate.

74. The claimant has not gone so far as to suggest that any undertaking or assurance given by EBC was irrevocable. It accepts that the authority could have terminated the undertaking by giving reasonable notice to the Secretary of State that it intended to issue a decision notice granting permission. But I very much doubt whether revocability would overcome the LPA's lack of *vires* in the first place to enter into a promise to delay issuing the decision notice without any limit as to time. The legal position does not seem to me to be any different where a LPA gives an undertaking to the Secretary of State to delay issuing a decision notice which is simply silent on the issue of timescale.

75. In my judgment, it follows that the particular undertaking which the PCU asked EBC to give, and which the claimant says was given, was inconsistent with planning legislation, and in particular the LPA's duty to determine the planning application

before it, and so it would have been legally incapable of giving rise to a legitimate expectation. On this freestanding basis also, ground 1 must be rejected.

Fairness

76. The claimant's reliance upon legitimate expectation also faces further difficulties. As Bingham LJ (as he then was) pointed out in *MFK* at pp.1569-1570, the doctrine of legitimate expectation is rooted in fairness. "But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen". Here, there are different types of interest to consider and many of them.

77. Any promise given by the defendant as LPA was given to another public body, the Secretary of State, for the sole purpose of enabling him to consider whether to call in the application. Any such promise simply related to the procedure for the determination of the application, not its merits. Indeed, the LPA had already reached its determination on those merits. I readily appreciate that those who oppose a proposal are, in a very real, practical sense, interested in the outcome of a decision by the Secretary of State on whether to call in a planning application. But that is a different matter. Parliament has decided not to give those who oppose a proposal a right of appeal against a LPA's decision to grant planning permission. The Secretary of State's power of call in under s.77 is not to be treated as akin to an appeal process (*R (Adlard) v Secretary of State for the Environment, Transport and Other Regions* [2002] 1 WLR 2515 [35]-[36]. [39]-[40] and [48]-[49], and *Save* at [20] – [21]. In any event, there is also the expectation of the party who applied for planning permission of obtaining a formal consent giving effect to the LPA's determination of his planning application.

78. Even if fairness is considered more broadly by looking beyond the strictly procedural aspect, there are a very wide range of competing interests in play. A proposal of the present kind will attract a wide range of representations, from different local authorities with different responsibilities, other public bodies and statutory consultees, and members of the public. A spectrum of representations will have been submitted by many parties, which will include the views of both those who support and those who object to the proposal, such as views about policy, harm to residential amenity and the environment, and employment and socio-economic benefits. Quite apart from those who participate in the process by making representations, whether for or against, there is the "unrepresented" general public as a whole (*Bushell v Secretary of State for the Environment* [1981] AC 75, 102). The public has an interest in planning control being exercised through the determination of the application, having regard to relevant planning considerations, whether to protect the environment against harm or to promote the benefits of the proposal. Parliament has entrusted the determination of planning applications in the public interest, and the resolution of these competing interests, to a LPA operating at a local level, subject exceptionally to the call-in procedure under s.77 (see Dyson LJ (as he then was) in *Adlard* at [49]).

79. The promise upon which the claimant has sought to rely is only relevant to a *procedural decision* by the Secretary of State on whether exceptionally he should determine a planning application rather than the LPA. When seen properly in the context described above, it is difficult to see why the principle of fairness should entitle any one member of the public or party interested in the *outcome of a planning application* to bring

proceedings to enforce a promise by the LPA to delay the issuing of a permission so that the Secretary of State could make that procedural decision.

80. But even putting those concerns to one side, there is a further difficulty. As Mr. Strachan pointed out, there is no such thing as a technical breach of the rules of natural justice or fairness. Generally, it must be shown that a claimant has suffered substantial prejudice because of the unfairness (*George v Secretary of State for the Environment* (1979) 77 LGR 659; *Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [49].

81. Even if, contrary to my judgment, EBC did break an unequivocal promise it gave to the Secretary of State and publicised on its website, the only *legal* consequence is that the Secretary of State was unable to direct that the application be called-in *if* he were to reach the conclusion that that was the appropriate course to take. However, the Secretary of State has not made any complaint, whether administrative or by bringing a claim for judicial review or participating in these proceedings, about EBC's issuing of the decision notice granting planning permission. Even though the court invited the Secretary of State to consider making an application to be joined as an interested party or to make submissions to assist the court, he declined to do so. There is no evidence, for example, that by 3 June 2021 the Secretary of State still needed more time to complete his consideration of whether to direct a call-in or, if he did not, what conclusion he had reached on whether to exercise his powers under s.77. Perhaps he had decided, or was coming to the view, that the application should not be called in. There may be a simple explanation why the Secretary of State has decided not to take part in these proceedings, but we do not know and we cannot speculate. It is unsatisfactory that there should be such uncertainty on matters which could easily have been addressed.

82. On the material before the court, it would have been impossible to conclude that the Secretary of State has suffered any substantial prejudice. On that basis it is difficult to see how the claimant or any member of the public can show that they have been prejudiced by EBC's action. This difficulty results from the Secretary of State's silence.

83. However, although I see much force in Mr Strachan's submission that the claimant has not shown how the principles of fairness have been breached, my conclusion that ground 1 fails does not rest on this part of the argument.

Conclusion

84. Ground 1 must be rejected.

Ground 3

85. The claimant submits that EBC failed to assess the cumulative effects of greenhouse gas ("GHG") emissions from the proposed development at Southampton together with proposals for developing Bristol, Stansted and Leeds Bradford airports. Mr. Wolfe said that this ground is solely concerned with whether EBC failed to comply with the EIA Regulations. He accepted that the alternative basis pleaded under ground 3, that EBC had failed to take into account an "obviously material consideration" added nothing to the argument based on the EIA Regulations.

The EIA Regulations

86. Regulation 18(1) required the application for planning permission to be accompanied by an ES.

87. Regulation 18(3) provides: -

> "(3) An environmental statement is a statement which includes at least—
>
> (a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;
>
> (b) a description of the likely significant effects of the proposed development on the environment;
>
> (c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
>
> (d) a description of the reasonable alternatives studied by the developer, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;
>
> (e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and
>
> (f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected."

In this case sub-paragraph 18(3)(f) is of particular relevance.

88. Regulation 18(4) states that an ES must:

> "(b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment;"

89. Schedule 4 lists categories of information to be included in an ES pursuant to regulation 18(3)(f). Paragraph 1 refers to a description of the development. Paragraph 3 refers to a description of the baseline scenario, the current state of the environment and an outline of its likely evolution in the absence of the proposed development.

90. Paragraph 4 of Schedule 4 refers to a description of the factors specified in regulation 4(2) "likely to be significantly affected by the development", which includes "climate"

and GHG emissions. Similarly, regulation 4(2) requires the overall EIA process, which includes the ES and consultation responses (see regulation 4(1)) to include "the direct and indirect significant effects" of the proposed development on *inter alia* "climate".

91. Paragraph 5 of Schedule 4 refers to a description of "the likely significant effects of the development on the environment resulting from" *inter alia*: -

> "(e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;
>
> (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change"

92. Regulation 26(1) required EBC to reach a reasoned conclusion on the "significant effects of the proposed development on the environment".

"Other existing and/or approved projects"

93. Mr. Wolfe emphasises paragraph 5(e) and (f) of schedule 4 to the EIA Regulations and submits that GHG from the proposed development at Southampton Airport should have been assessed not just in isolation but also cumulatively with like effects from "other existing and/or approved projects".

94. Unfortunately, the claimant's approach to this legislation was confused. Paragraph 52c of the claimant's skeleton suggested that the cumulative exercise should have been carried out in relation to other airports "pursuing development projects". Mr. Wolfe accepted that this vague allegation should be restricted to the three airports referred to in [85] above. But then paragraph 49 of the skeleton argued that the ES was defective because it had failed to assess the effects of GHG emissions from the development proposed at Southampton airport "together with other *consented* projects". In response to that contention EBC and SIAL pointed out that the improvements proposed to Bristol, Stansted and Leeds Bradford airports had not been consented by 3 June 2021, the date when EBC granted the planning permission under challenge. For example, in the case of Stansted the result of a public inquiry was still awaited and an inquiry into the Bristol proposal was not due to take place until July 2021.

95. Paragraph 5(e) of Schedule 4 to the EIA Regulations only refers to the assessment of cumulative effects with "other existing and/or approved projects". "Approved" and "consented" are plainly synonymous. During the hearing the claimant began to argue that "existing" did not refer to a completed project, because such a scheme would have been "approved" and would form part of the baseline scenario. Instead, the claimant submitted that "existing" refers to a proposed project which has not yet been approved. The claimant sought to gain support for this view from Advice Note 17 issued by the Planning Inspectorate on assessment for Nationally Significant Infrastructure Projects. But I also note that the guidance allows for assessment of effects to vary according to the level of "certainty" attributed to a project. That approach to assessment does not assist the court to interpret the phrase "existing projects" in paragraph 5(e) of schedule

4. If anything, it would suggest that the application of that language depends upon the use of judgment by the decision-maker in individual cases.

96. The phrase "other existing and/or approved projects" was introduced as an amendment to Directive 2011/92/EU made by Directive 2014/52/EU. The 2011 Directive had only referred to cumulative effects. Presumably the amendment in the 2014 Directive was meant to clarify the scope of the requirement. However, the court was not shown any contemporaneous material which might have been admissible to explain why the amendment was made or its intended scope.

97. EBC and SIAL argued against the approach contended for by the claimant, pointing out that it would require the assessment of inchoate projects which, although proposed in some form, might never be approved. EBC cited *Commercial Estates Group Limited v Secretary of State for Communities and Local Government* [2014] EWHC 2089 (Admin) for the reference at [21] to guidelines issued by the European Commission in 1999. But that suggested that "reasonably foreseeable actions" should be taken into account within a timescale of up to 5 years. In addition, guidance from the Department of Communities and Local Government was referred to at [22] which suggested that regard should be had to the cumulative effects of two *proposals* being considered around the same time. Guidance of this nature raises questions rather than supplies answers.

98. I see strengths and weaknesses in the arguments of each party. I also agree with Mr. Stinchcombe that this point should not be determined by the court without full argument. This is unfortunate given that it was predictable that this issue would be relevant. Fortunately, it is unnecessary for the court to invite further submissions and to delay the determination of the claim in order to resolve this issue. For the purposes of this judgment I will assume, without deciding, that the three specific airport proposals mentioned in [85] above are capable of falling within paragraph 5(e) of schedule 4 to the EIA Regulations. Ground 3 fails in any event for reasons explained below.

Judicial review principles in relation to EIA

99. A convenient starting point is regulation 18(4)(b) which requires an ES to include the information "*reasonably required* for reaching a reasoned conclusion on the significant effects of the development on the environment" (emphasis added). As Lindblom LJ stated in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 18 at [67]:-

> "An equally robust principle is that an environmental statement is not expected to include more information than is reasonably required to assess the likely significant environmental effects of the development proposed, in the light of current knowledge"

100. It is well-established that issues as to whether an effect is significant and the adequacy of any assessment of significant effects are matters of judgment for the decision-maker, in this case the local planning authority. Such judgments are only open to challenge in the courts applying the conventional "Wednesbury" standard. In this regard the parties cited *R (Blewett) v Derbyshire County Council* [2004] Env. L.R. 29

and *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [142] to [145].

101. In *R (Finch) v Surrey County Council* [2022] EWCA Civ 187 at [15(7)] Sir Keith Lindblom SPT summarised the principles, drawing together the main authorities: -

> "(7) Establishing what information should be included in an environmental statement, and whether that information is adequate, is for the relevant planning authority, subject to the court's jurisdiction on conventional public law grounds (see the judgment of Sullivan J. in *R. (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29, at paragraphs 32, 33 and 41). The applicable standard of review has consistently been held to be the "Wednesbury" standard (see the judgment of the Supreme Court in *R. (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd.* [2020] UKSC 52; [2021] PTSR 190, at paragraphs 142 to 145 ; the judgment of the Court of Appeal in *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, at paragraphs 136 to 144 ; the judgment of Coulson L.J. in *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179; [2021] PTSR 359, at paragraphs 53 to 55 ; the judgment of Laws L.J. in *Bowen-West*, at paragraphs 27 to 46; and the judgment of Lang J. in *R. (on the application of Friends of the Earth) v North Yorkshire County Council* [2016] EWHC 3303 (Admin); [2017] Env. L.R. 22 – otherwise known as Frack Free Ryedale – at paragraphs 21 to 23). The "Wednesbury" standard of review in its modern application has been elucidated by the Divisional Court (Leggatt L.J. as he then was, and Carr J. as she then was) in *R. (on the application of the Law Society) v The Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 W.L.R. 1649 (at paragraph 98)."

102. In addition, the court should allow a substantial margin of appreciation to judgments based upon scientific, technical or predictive assessments by those with appropriate expertise (*R (Mott) v Environment Agency* [2006] 1 WLR 4338 and *R (Plan B Earth v Secretary of State for Transport* [2020] PTSR 1446 at [176]-[177]. There is no suggestion that the local authority lacked the appropriate expertise. They were advised by experienced senior officers who assessed the technical material provided by experts.

A summary of the assessment

103. In his third witness statement Mr. Grandfield explained how he and the authority followed the "Environmental Impact Assessment Guide to: Assessing Greenhouse Gas Emissions and Evaluating their Significance" published by the Institute of Environmental Management and Assessment ("IEMA"). Section 6.1 acknowledges that "all projects create GHG emissions that contribute to climate change". The document advises that in the absence of any "significant criteria or a defined threshold" in this area, all GHG *might* be considered to be significant.

104. Box 4 discusses targets based on scientific projections:

> "Science-based targets are defined as GHG reduction targets which have been created based on scientific projections and global carbon budgets. These targets aim to mitigate the greatest effects of climate change by limiting GHG emissions within a certain cumulative threshold"

A quantified carbon budget for a project "can then be compared against an existing carbon budget (global, national, sectoral, regional, or local – as available), to identify the percentage impact the project will contribute to climate change". The greater the project's carbon budget, the greater its significance".

105. The IEMA states that given ongoing research on how to measure significance and the approach of treating all GHG emissions as potentially significant, "it is down to the practitioner's professional judgment on how best to contextualise a project's GHG impact". Section 6.2 also states that a project's GHG or carbon impact should be "contextualised against sectoral, local or national carbon budgets" to provide a "sense of scale".

106. The net zero obligation for 2050 is now enshrined in s.1 of the Climate Change Act 2008 (as amended). The statutory framework, including national carbon budgets leading up to 2050, were summarised by Lindblom LJ in *R (Packham) v Secretary of State for Transport* [2021] Env. L.R. 215 at [83] – [85] and by the Supreme Court in the *Friends of the Earth* case at [39] – [47]. No issue arises in relation to that legislation and so that analysis need not be repeated here.

107. Chapter 13 of the ES submitted by SIAL relied upon this guidance from the IEMA. Paragraph 13.2.47 stated that the significance of the emissions resulting from the proposal had been compared with UK carbon budgets, the UK aviation emissions forecasts and emissions for Eastleigh Borough, using also the experience of determining the significance of other projects. The authors stated:-

> "As climate change impacts are global in nature, it is not possible to link a specific proposed development with a specific environmental impact, as such the sensitivity of receptors is not used to assess significance"

Mr. Wolfe, rightly in my judgment, accepted that proposition. For the same reason he made no complaints about the ultimate decision in this case not to compare GHG emissions from the project with any local measure based upon Eastleigh.

108. The ES published in November 2019 related the projected GHG emissions from the proposal to the UK's third, fourth and fifth carbon budgets and the UK aviation forecasts for 2030, 2040 and 2050. The GHG emissions resulting from the development would represent between 0.04% to 0.14% of the carbon budgets and 0.82% to 1.25% of the various aviation targets. At paragraph 13.6.9 the ES judged the emissions from the operation of the development to be moderately adverse and significant. That comparison related GHG emissions from the Southampton Airport proposal to UK measures, but the UK aviation forecasts included contributions from other airports. The

operational GHG emissions from Southampton were estimated to be 42m tCO_2e over the period 2021-2140, or 350,000 tCO_2e a year (para. 13.6.6 and table 13.10).

109. In January 2021 SIAL submitted ESA2 and a Supplemental Planning Statement ("SPS"). In this update the Southampton percentages of the national comparators were slightly lower than those presented in the original ES.

110. At paragraph 5.2.2 of the SPS the promoters relied on the Government's Aviation Strategy "Making Best Use of Existing Runways" ("the MBU"). The level of growth predicted in the updated projections in ESA2 fell below the level of growth assumed for Southampton Airport in the national aviation forecasts in the MBU. The latter had projected that Southampton would reach 3.5 million passengers per annum ("mppa") (see para. 355 of the officer's report). ESA2 estimated growth in the number of passengers to 3.351 mppa by 2037 (tables 5.1 and 6.2). It is also significant that the s.106 agreement dated 3 June 2021 has imposed a cap on the operation of the airport effectively limited to 3mppa, below the level upon which the MBU had been based.

111. The MBU was published on the same day as the Government's Airports National Policy Statement ("ANPS"), the legal challenge to which was ultimately rejected by the Supreme Court in the *Friends of the Earth* case. The ANPS supports the construction of a third runway at Heathrow. It also supports making best use of existing runways at other airports, but leaving such proposals to be judged on their individual merits by the relevant planning authority. The Government accepts that in the light of the Airports Commission's views on the need for more intensive use to be made of existing infrastructure, other airports may be able to justify the need for such proposals in addition to the third runway at Heathrow.

112. To ensure that the Government's policy in the MBU was compatible with climate change commitments, the Department for Transport's aviation model was used to produce forecasts to 2050 looking at the impact of allowing all airports to make best use of their existing runways (paras. 1.12 and 1.13 of the MBU). The forecasts allowed not only for best use of existing airports, but also the expansion of Heathrow. The MBU states that the Government is "supportive" of other airports making best use of their existing runways subject to proper consideration of all relevant considerations, or in other words the individual merits of each case (paras. 1.25 to 1.29).

113. The officer's report set out with great care and clarity climate change legislation and policies and the environmental information before the LPA (paras. 120-136, 348-384, 852-883 and 926-931). It is unnecessary for me to summarise here the officer's analysis. I need only refer to certain points.

114. The officer's report correctly took into account the fact that the fifth carbon budget and the MBU had been based upon the previous national target in the 2008 Act to reduce net UK GHG emissions by 80% by 2050 (paras. 132 and 369). Furthermore, the fifth carbon budget did not include emissions from international flights. But because of the need to take such emissions into account in planning for 2050, (a) that budget had been set at a level leaving headroom for the aviation sector and (b), a "planning assumption" had been used of 37.5m tCO_2e for emissions from international aviation in 2050. That assumption too was based upon the "80% target" (paras. 368 and 372).

115. As a result of the Paris Agreement (November 2016), the Climate Change Act 2008 was amended in June 2019 to refer to the net zero obligation. The officer's report summarised the implications arising from that change for aviation-related development. It drew attention to the proposals of the Climate Change Committee ("CCC") for the sixth carbon budget and their policy recommendations (paras 375 to 380). In particular, the officer referred to the recommendation that there should be no net expansion of UK airport capacity unless the sector is on track to outperform significantly its net emissions trajectory and can accommodate the additional demand. However, the officer went on to note that the status of the CCC's report was to provide advice to Government and that the latter's response was still awaited (paras. 379-380). The officer's report proceeded on the basis that the sixth budget, when eventually set, would reduce the target for UK carbon emissions yet further and so Southampton's percentage of those emissions would be bound to increase (para. 868).

116. In his conclusions, the officer considered that in the light of the more ambitious recommendations from the CCC for the sixth carbon budget, the Government's policy would be likely to change. But he said that it was "challenging" to judge the impact of aviation emissions from the proposal because there was "something of a policy gap", that is in Government policy (para. 879). The report considered whether it would be appropriate to defer consideration of the application, but advised members against taking that course because the policy position was likely to continue to evolve for some time (para. 880). Mr. Wolfe confirmed that the claimant does not challenge that approach. It follows that there is no legal criticism of the fact that EBC based its decision to grant permission upon the UK targets, aviation forecasts and Government policies in place in April 2021, but also allowing for the likelihood that the policy approach was likely to become tighter in a manner which had yet to be defined.

117. The officer's report essentially accepted the assessment in the ES and ESA2 of the impact of the proposal on climate change and gave "significant weight" to that impact (paras. 881 and 883). At paragraphs 928 and 931 the officer judged that the scale of the impact relative to UK budgets and targets was such that the proposal would not prejudice the ability of the Government to meet its carbon reduction targets.

The claimant's criticisms

118. The claimant advances ground 3 on the basis that the members of the Council followed the advice on climate change given in the officer's report.

119. In summary, the claimant submits that the "contextualisation exercise" conducted in the ES and accepted by EBC was, as a matter of law, insufficient to discharge the obligation in the EIA Regulations to assess impact on climate change taking into account cumulative effects: -

(i) The UK aviation forecast was 39.3m tCO_2e in 2050, which exceeded the planning assumption of 37.5 m tCO_2e in that year;

(ii) The benchmarks used pre-dated the change in the UK's target to net zero by 2050;

(iii) The statement that the proposal would add about 1% GHG emissions to the level projected in the aviation forecasts to 2050 did not address the issue

whether that addition is compatible with achieving those forecast levels or can be "afforded" by the UK, taking into account also contributions from proposals for the three other airports;

(iv) Reliance upon the MBU does not overcome those criticisms because there was no evidence before EBC as to whether (a) emissions from the proposal would be in line with MBU assumptions for Southampton Airport and (b) growth at the other three airports would remain in line with MBU forecasts.

Discussion

120. I will begin with the criticism of the "contextualisation approach". There is no dispute that EBC followed the guidance published by the IEMA. The claimant says that that is not determinative as to whether EBC complied with the EIA Regulations. Plainly that is correct, but there is an air of unreality about the claimant's criticisms.

121. The issue for the court is whether EBC breached the EIA Regulations, the focus of which is to require the authority to reach conclusions on the likely significant effects of a proposed development on the environment. It is common ground that the impact of GHG emissions on climate change does not involve specific environmental impacts linked to specific receptors. Such emissions are relevant to a global impact. This case has not been concerned with any impact below the level of the UK's contribution to that global impact.

122. The IEMA rightly pointed out that no criteria or thresholds had been set by which to measure the "significance" of the GHG emissions from a particular proposal. Furthermore, no one has suggested that there was any guidance for assessing the acceptability (or what the claimant sometimes called "affordability") of that contribution, whether expressed as a percentage of national budgets or targets *or otherwise*. In other words, acceptability is for the judgment of the decision-maker. As a matter of principle there is nothing unlawful in a decision-maker using benchmarks he considers to be appropriate in order to help arrive at a judgment on those issues. The statutory carbon budgets are one example. A decision-maker *may* also decide to use national sectoral figures. Thus, in the present case EBC had regard to national aviation targets (which allowed for a third runway at Heathrow and expansion elsewhere) and also the planning assumption. In my judgment it is impossible to say that EBC made any "Wednesbury" error in following that approach.

123. There is simply no legal merit in the complaint that expressing project emissions as a percentage of a national budget or target does not enable a decision-maker to decide whether those emissions are compatible with achieving that benchmark or whether those emissions are "affordable". It is noteworthy that the claimant did not suggest in its consultation responses to EBC, or in submissions to this court, what alternative criterion would be compliant with the EIA Regulations to help the court assess its criticisms of the legality of EBC's approach. The EIA Regulations focus on assessing the *significance* of an environmental effect. As Mr. Stinchcombe and Mr. Strachan submitted, that legislation does not deal with the *acceptability* of an effect identified by environmental information. That is a matter of judgment for the decision-maker, not a hard-edged point of law. On the basis of current policy and law it is permissible for a planning authority to look at the scale of the GHG emissions relative to a national target and to reach a judgment, which may inevitably be of a generalised nature, about the

likelihood of the proposal harming the achievement of that target. There was nothing unlawful about the inevitably broad judgment reached in the present case (see [117] above).

124. There is also nothing in the criticisms made by the claimant of the use of national aviation forecasts. EBC also had regard to the "planning assumption" and the carbon budgets, the fact that they had all been based on the 80% target and that national targets would become more restrictive, albeit to an extent which remained unknown when the full Council met. The Claimant confirmed that no challenge is made to the officer's advice, acted on by the authority, not to defer the decision. Accordingly, EBC cannot be criticised for not having regard to the sixth carbon budget approved after its meeting. In any event, the authority plainly had regard to the direction of travel in Government policy.

125. The claimant is wrong to assert that there was no evidence before EBC as to whether the emissions from the project were in line with the assumption in the MBU for Southampton Airport. As I have explained, there was. The complaint turns out to be a more sophisticated point about how the assessment was carried out: that it was expressed in terms of passenger numbers rather than, for example, the possibility of the facility attracting larger planes which would fly further. It does not appear that this point was raised by any party with EBC. It is a technical point which falls within the *Mott* margin of appreciation accorded to a planning authority. Even without recourse to that margin, the court was not shown any material capable of establishing a "Wednesbury" error.

126. The claimant does not dispute that the MBU forecasts made allowances for expansion at Stansted, Bristol and Leeds Bradford. In my judgment, it follows that an allowance was made by EBC for cumulative effects in conjunction with those facilities. In my judgment that was one appropriate way in which the overall or global effect could be assessed. Given that we are dealing with a contribution to a global impact assessed against national targets, satisfaction of the EIA Regulations did not require that GHG contributions from the expansion of the three other airports could only be taken into account by being added to the contribution from the expanded Southampton Airport, before being compared to a national benchmark. In order to judge whether the Southampton proposal is likely to adversely affect the achievement of national targets and policy it sufficed that expansion of those three other airports was taken into account in the national figures used in the MBU.

127. The narrower point pursued by the claimant is that no assessment was made as to whether the impact of current proposals at the three other airports was in line with the assumptions made in the MBU about the expansion of those airports. In this area of predictive assessment (see *Mott*) it was entirely a matter of judgment for the decision-maker as to how far to go in assembling information for making its decision, what lines of enquiry to pursue, and how far to go in any such enquiry (*R (Khatun) v Newham London Borough Council* [2005] QB 37; *R (Hayes) v Wychavon District Council* [2019] PTSR 1163). No material has been put before the court to show whether there was any relevant difference and if so whether it was one which was significant, whether in favour or against the claimant's argument. The claimant's case is at best speculative. It comes nowhere near establishing that EBC's decision was irrational or otherwise flawed by a "Wednesbury" error of law.

128. For the above reasons ground 3 must fail.

Raising new points

129. But there is a further consideration which is troubling. The court was told that the claimant (or rather those it represents) did not raise any of the points now taken under ground 3 during the extensive consultation exercises conducted by EBC over some 3 years. This is yet another example of what Coulson LJ referred to in *R (Gathercole) v Suffolk County Council* [2021] PTSR 359 as an "after-the-event" challenge alleging the inadequacy of EIA. The absence of any contemporaneous complaint about the adequacy of the ES is itself an indication of the unrealistic and unpersuasive nature of the subsequent legal challenge ([1] and [56]-[57]).

130. Mr. Wolfe introduced in his reply two letters sent to the authority by AXO (see [9] above). A letter dated 7 April 2021 said in one sentence that the proposal was inconsistent with the net zero obligation in the Climate Change Act. It added that a cumulative assessment should take into account the current expansion plans of other UK airports, referring to Stansted, Bristol and Leeds Bradford and that was it. As I have said, that aspect was taken into account by EBC.

131. The other letter from AXO referred to the CCC's report on the sixth carbon budget, which was taken into account by EBC and, as I have said, is not relied upon by the claimant as a basis for legal challenge in any event. The letter then appeared to suggest that EBC should consider the GHG impacts of airport expansion throughout the country without indicating how an individual planning authority should do that. That broader argument is not relied upon by the claimant. In any event, EBC, acting as a LPA, did take into account the MBU which did address airport expansion throughout the country. At the end of the day, the key point is that neither letter from AXO raised the criticisms which the claimant now seeks to raise as legal grounds of challenge in these proceedings.

132. The issue of the extent to which a new point may be taken in public law proceedings was addressed in *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2017] PTSR at [77]-[79]. The court said at [77]:-

> "In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the inspector or decision-maker. But it is necessary to examine the nature of the new point sought to be raised in the context of the process which was followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, one factor which weighs strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the inspector might have called for more information): see eg the *Newsmith Stainless Ltd* case [2001] EWHC Admin 74 at [13]–[16]; *HJ Banks & Co Ltd v Secretary of State for the*

> *Environment* [1997] 2 PLR 50; *R (Tadworth and Walton Residents' Association) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 972 (Admin) at [95]; *Kestrel Hydro v Secretary of State for Communities and Local Government* [2015] LLR 522, paras 66–67; and *Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government* [2015] JPL 1083, para 49."

Similar considerations arise in a challenge by judicial review to a planning decision by a LPA.

133. As we have seen, the process of EIA includes not only the production by the developer of an ES identifying significant effects, but the consultation process with statutory bodies and members of the public, such as those in the present case represented by the claimant. That consultation provides an opportunity for consultees and objectors to explain why they consider the ES to be inadequate. If the LPA agrees it may exercise the power under regulation 25 of the EIA Regulations to notify the applicant that further information be provided. This power is to be used specifically in order to satisfy the requirements of regulation 18(2) and (3). The further information will then form part of the "environmental information" taken into account by the LPA when it reaches its decision on whether or not to grant planning permission in accordance with regulation 26. For obvious reasons, the object and structure of the statutory scheme is to encourage the identification of weaknesses or deficiencies in an ES *before* the decision on consenting is taken, rather than afterwards. This approach is similar to that described in *Barker Mill*: points which give rise to the need for further fact-finding should have been raised before an application is determined and should not be raised for the first time subsequently, unless there is good reason for that to happen. The importance of efficiency in determining planning applications, and the involvement of potentially many competing interests, as well as the broader public interest, only serves to reinforce this thinking.

134. This approach is also in line with principles governing the exercise of the court's discretion, even when a breach of a principle of EU law occurs. As Lord Carnwath JSC stated in *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 at [54]:-

> "it is clear that, even where a breach of the EIA Regulations is established, the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice"

and at [58]:-

> "In making that assessment it should take account of the seriousness of the defect invoked and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive."

135. On the facts of that case Lord Carnwath said this at [60]:

> "It is notable also that Mr Champion himself, having been given the opportunity to raise any specific points of concern not covered by Natural England before the final decision, was unable to do so. That remains the case. That is not to put the burden of proof on to him, but rather to highlight the absence of anything of substance to set against the mass of material going the other way"

136. However, because this aspect of the case was not the subject of full argument, I do not base my rejection of ground 3 upon the fact that it involves matters not raised by participants in the consultation process. But these issues may need to be considered in another case.

Ground 4

Paragraph 11(d) of the NPPF

137. Paragraph 11(d) of the NPPF states: -

> "Plans and decision should apply a presumption in favour of sustainable development.
>
> …….
>
> For decision-taking this means:
>
> (c) ……
>
> (d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole"

138. Where this policy is engaged, it is said to create a "tilted balance", that is a balance which is weighted towards the grant of planning permission unless either limb (i) or limb (ii) is satisfied. Ground 4 is concerned with the legality of EBC's decision that paragraph 11(d) was engaged in this case because "the policies which are most important for determining the application are out-of-date".

139. In *Paul Newman New Homes Limited v Secretary of State for Housing Communities and Local Government* [2021] PSTR 1054 Andrews LJ said in relation to this part of paragraph 11(d) of the NPPF ([43]): -

> "The [first] "trigger" for the application of the tilted balance is "where the policies which are most important for determining

> the application are out-of-date". That necessarily involves an evaluation by the decision-maker of which of the relevant policies in the local plan are the most important, and whether they accord with current national policy. As the judge and the inspector both found, a policy is not out-of-date simply because it is in a time-expired plan: Mr Lockhart-Mummery rightly did not seek to contend otherwise"

Notwithstanding the reference to "policies" in the plural in paragraph 11(d), the tilted balance may apply where there is only one policy in the plan which the decision-maker judges to be important for the determination of an application (*Paul Newman* at [45] to [47]).

Local plan policies

140. The statutory development plan comprised just the "saved policies" of the Eastleigh Borough Local Plan (2001-2011). Paragraph 336 of the officer's report listed the policies judged to be most "relevant". More recently, on 31 October 2019, EBC had submitted the draft Eastleigh Borough Local Plan 2016-2036 to the Secretary of State for independent examination. That plan was expected to be adopted in mid to late 2021.

141. The claimant submits that the authority applied the tilted balance in paragraph 11(d) solely on the ground that one policy was out of date because it did not accord with national policy. The claimant's complaint is that EBC failed to address the first question identified by Andrews LJ, namely which of the development plan policies should be considered to be "the most important for determining the planning application". Accordingly, it is said that EBC erred in law by misunderstanding paragraph 11(d) in that respect. The claimant accepts that this complaint turns on how the issue was dealt with in the officer's report.

142. Before turning to that report, it is helpful to set out the way in which the claimant says the matter should have been approached. The claimant says that there are three policies of the local plan which EBC should have assessed for their importance in relation to the determination of SIAL's planning application, namely 1.CO, 2.CO and 115.E.

143. Policies 1.CO and 2.CO appear in Chapter 1 of the local plan, which is to do with the countryside. Paragraph 1.3 of the plan explains that all land outside the defined urban edge is classified as "countryside". Not surprisingly, Southampton Airport is located outside the urban edge and for that reason is treated as countryside.

144. Policy 1.CO appears in the section of Chapter 1 of the local plan dealing with countryside protection (see the heading to paragraph 1.2). Policy 1.CO states: -

> "1.CO Planning permission will not be granted for development
>
> outside the urban edge unless:
>
> i. it is necessary for agricultural, forestry or horticultural purposes and a countryside location is required; or

> ii. it is for an outdoor recreational use or is genuinely required as ancillary to such a use and does not require the provision of buildings, hardstanding or structures which, are of a form, scale or design which would demonstrably harm the character of the locality; or
>
> iii. it is essential for the provision of a public utility service or the appropriate extension of an existing education or health facility and it cannot be located within the urban edge; or
>
> iv. it meets the criteria in the other policies of this Plan.
>
> The extension of private gardens into the countryside will not be permitted".

145. Policy 1.CO is indeed a broad countryside protection policy. Not surprisingly it does not purport to deal specifically with specialist forms of development, such as an airport. A proposal complies with the policy if it satisfies one or more of the criteria (i) to (iv). They are expressed as alternatives. So, for example, it suffices that that the proposal meets the criteria in other policies of the local plan (criterion (iv)).

146. Policy 2.CO appears in the section of the plan dealing with strategic gaps. Paragraph 1.4 explains that these are areas of land between major settlements which perform the specific function of protecting the individual identity of those settlements and preventing coalescence between them. There are two strategic gaps in the plan area. Most of the airport falls within the gap between Eastleigh and Southampton.

147. Policy 2.CO states: -

> "2.CO Planning permission will not be granted for development which would physically or visually diminish a strategic gap as identified on the proposals map."

148. Chapter 7 of the local plan deals with "The Economy". Policy 115.E is a dedicated policy dealing with proposals to do with the airport. It states: -

> "115.E Development proposals within the Southampton International Airport Special Policy Area, as shown on the proposals map will be permitted subject to all the following criteria being met:
>
> i. they are necessary for the improvement of operational efficiency, operational and passenger safety and passenger convenience at the Airport;
>
> ii. they would not physically or visually diminish the Eastleigh – Southampton strategic gap;
>
> iii. they incorporate appropriate safeguards to ensure that the amenity of local residents and the users of the Itchen Valley Country Park are not adversely affected;

> iv. they include provision where appropriate for the improvement of Southampton Airport Parkway railway station; and
>
> v. they do not involve any effective extension of the runway."

Discussion

149. Policy 115.E is plainly important as a site-specific policy for proposals within the "special policy area". It requires *all* of criteria (i) to (v) to be met. Criterion (ii) replicates the policy test in policy 2.CO. One of the exceptions to the general countryside policy in policy 1.CO is criterion (iv): that is the proposal "meets the criteria in the other policies of this plan". That would include policy 115.E. In addition, criterion (i) in policy 115.E reflects the principle in criterion (i) of policy 1.CO that a development should require a location in the countryside. Plainly, the airport is already located in the countryside and so the apposite question here is whether a proposal is necessary for the improvement of the airport in one or more of the respects listed in criterion (i). I therefore agree with Mr. Stinchcombe that policies 1.CO and 2.CO are reflected in policy 115.E. If the criteria in policy 115.E are satisfied then there is no conflict with policies 1.CO or 2.CO.

Discussion

150. The claimant's challenge under ground 4 relates to paragraph 391 of the officer's report, which reads: -

> "Criterion (v) of saved policy 115.E lacks flexibility and is out of step with the NPPF aims set out in para. 104(e-f), and therefore this criterion is deemed out of date. In the context of this application, officers consider that the out-of-datedness of policy 115.E means that the Council should apply the presumption in favour of sustainable development under paragraph 11(d) of the NPPF and assess the proposed development on that basis."

151. No criticism is made by the claimant of the officer's judgment that criterion (v) of policy 115.E lacked flexibility and did not accord with the NPPF. That is hardly surprising. Criterion (v) is a blanket provision that treats any "effective extension" of the runway as falling outside the scope of policy 115.E and therefore automatically a breach of policy 1.CO. That would be so even if the proposal otherwise satisfied all of the other criteria (i) to (iv) in policy 115.E.

152. The claimant's criticism is that the officer's report, and paragraph 391 in particular, did not make an explicit assessment of what development policies were the most important for determining the application, or specifically that policy 115.E(v) was the most important.

153. The claimant accepts that this issue was a matter of judgment for EBC.

154. The court should not read an officer's report with undue rigour but with reasonable benevolence (*R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR

1452 and [42(2)]). In addition, where an officer's report refers to the relevant provisions of a policy, the court will infer that he has complied with it, absent a positive indication to the contrary. It is not for the decision-maker to show that he has complied with the policy (*R (Palmer) v Herefordshire Council* [2017] 1 WLR 411 at [7]).

155. In this case paragraph 388 of the officer's report accurately set out paragraph 11(d) of the NPPF, in particular the tests that fell to be applied.

156. In paragraph 920 of his report the officer stated that policy 115.E is "an important policy in the context of this application". Mr. Wolfe submits that the word "an" implied that the officer considered that there were other important policies. But there is nothing in the report, read fairly and as a whole, to indicate that. Rather to the contrary, paragraph 920 of the report went on to say that "a range of other adopted policies are also relevant to this application". They included 1.CO and 2.CO. I therefore agree with Mr. Stinchcombe and Mr. Strachan that the officer's report did not treat policies 1.CO and 2.CO as important policies for the purposes of paragraph 11(d) of the NPPF.

157. Mr. Wolfe relied upon paragraph 398 of the officer's report as indicating that the proposal breached policy 2.CO, which would go to the issue of whether the proposal conflicted with the development plan as a whole (see para. 401 of the report). He suggested that this supported the view that policy 2.CO was an important policy for the purposes of paragraph 11(d) in this case.

158. I note that Mr. Wolfe's argument involves his acceptance that a decision-maker is entitled to take into account how a particular policy applies to the proposed development when judging whether it is important for determining the application. As a matter of principle, I see nothing wrong in that approach. But I am *not*, of course, saying that it is an approach which a decision-maker is legally *obliged* to take. Paragraph 11(d) does not say how "importance" is to be assessed. It is a broad matter of judgment left to the decision-maker. Paragraph 11(d) is not akin to a legal rule or principle. It is a policy for practical use in decision-making (see Dove J in *Wavendon Properties Limited v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2077 at [58]).

159. Thus, a decision-maker can legitimately discount a policy as not being important for the purposes of paragraph 11(d) in the case before him, because in his judgment it would not be breached and therefore would not be important for his determination of the application. I see no reason why paragraph 11(d) should be treated as requiring a decision-maker to assess whether policies are important for the decision *in that case* without having any regard to how he judges the proposal stands in relation to those policies. In some cases that could be a very theoretical, unrealistic exercise. Decisions on the application in practice of paragraph 11(d) must be left to the expertise and good sense of experienced Inspectors, officers and members of planning committees.

160. Here it is important to remember what was said by Sir Geoffrey Vos C (as he then was) in *Mansell*: -

> "[62] In the course of the argument, one could have been forgiven for thinking that the contention that the presumption in favour of sustainable development in the NPPF had been misapplied in the planning officer's report turned on a minute

> legalistic dissection of that report. It cannot be over-emphasised that such an approach is wrong and inappropriate. As has so often been said, planning decisions are to be made by the members of the Planning Committee advised by planning officers. In making their decisions, they must exercise their own planning judgment and the courts must give them space to undertake that process.
>
> [63] ……. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied."

That important message is still not being heeded.

161. The present case illustrates the point. Paragraphs 826 and 827 of the officer's report considered in more detail the application of countryside policies to this proposal, in particular policy 2.CO: -

> "826. The runway extension and blast screen would be approximately 200 metres from public views. The runway extension comprises a flat strip of tarmac and the blast screen is small and seen against the existing backdrop of planting and boundary fence. As such, these structures are not considered to harm the openness of the site and would not result in either a significant physical or a significant visual diminution of the Eastleigh-Southampton Gap.
>
> 827. In summary, whilst having a degree of urbanisation, overall, the proposal would result in minimal visual diminution of the gap or the green setting to Eastleigh Town. Appropriate landscaping will reduce this impact further. The Proposed Development aligns with the landscape features and characteristics of Area 4 as identified in the Council's Landscape Character Assessment. While the development is not fully compliant with saved policies 1.CO, 2.CO and 18.CO, the level of non-compliance and the level of harm is limited. On balance therefore, subject to all other matters being acceptable, it is considered a refusal would not be justified on the grounds of non-compliance with these policies."

162. The judgment reached in paragraph 826 was that the proposal did not materially conflict with the criterion in policy 2.CO. In those circumstances, the officer (and by the same token the councillors) did not need to say expressly that that policy was not considered to be important for the purposes of determining the application. It was rather obvious.

163. The content of paragraphs 826-827 reminds us of the need to read an officer's report or an Inspector's decision letter as a whole. Such experts often have to address a wide range of considerations and to strike a planning balance. It is essentially a matter for them as to how they structure their document and the order in which they address

topics. There is no legal principle which requires a paragraph in one part of a report or decision letter to be read without any regard to what the same author says in a later paragraph, possibly, as here on the very same topic. The author's first passage is likely to have been included in the report with the subsequent passage or conclusion in mind, certainly by the time the document was finalised.

164. At one stage the claimant appeared to suggest that EBC had failed to consider whether policy 115.E(v) was *the* most important policy for determining the application, as opposed to the other limbs of 115.E. Here again we are seeing "minute dissection" by the claimant of the application of paragraph 11(d) of the NPPF and of the officer's report.

165. It is helpful to put paragraph 11(d) into context. In *Newman*, Andrews LJ confirmed at [46] that a basket of policies (or single policy) need not be *sufficient in themselves* for deciding whether or not planning permission should be granted in order to qualify as the most important policies for the purposes of paragraph 11(d). But I would add that there may be cases where a single policy is determinative of an application and therefore, by definition is the most important policy.

166. Furthermore, the judgment as to what is or are the most important policy or policies does not involve an objective question of law such as the interpretation of a policy (which might be susceptible to only one answer). Instead, it is a subjective judgment about what are the most important policies for deciding the application in question, and *not* all applications which might engage those policies.

167. This case involved a decision about an application essentially for the extension of the runway. Policy 115.E was critical to the outcome. This proposal conflicted with policy 115.E because of criterion (v). That criterion was something of a "showstopper". It is therefore wholly understandable that the officer's report should have effectively treated that criterion as the most important policy. There was no need for that to be spelt out in order to satisfy the legal approach in *Palmer*. It is obvious that that was the officer's judgment. Judicial review is not concerned with awarding marks for the draftsmanship of an officer's report.

168. I have reached the firm conclusion that there is no positive indication in the officer's report to suggest that he failed to consider which policies were important for the purposes of paragraph 11(d). To my mind it is obvious that he addressed the question in the specific context of the application before EBC.

169. For all these reasons ground 4 must be rejected.

Ground 6(a)

170. The claimant submits that there was no evidence before EBC that the airport would close if the application were to be refused. Mr. Wolfe then relies upon the evidence in paragraphs 13 and 14 of the witness statement of Mr. Turner to submit that a brief statement made during the debate of the full Council by each of 8 councillors who voted in favour of the proposal, showed that they made their decision "by reference to airport closure as an important consideration". He submits that that approach was based on no evidence. Indeed, that approach conflicted with statements made on behalf of SIAL and the clear advice given by Mr. Grandfield to members.

171. The courts have approached complaints of this nature with circumspection. Relevant principles are well-established and need not be set out at length here. I would refer to: -

R v London County Council ex parte London and Provincial Electric Theatres [1915] 2 KB 466, 490-1

R v Poole Brough Council ex parte Beebee [1991] 2 PLR 27

R x Exeter City Council ex parte Thomas & Co Ltd [1991] 1 QB 471

Kings Cross Railway Lands Group v London Borough of Camden [2007] EWHC 1515 (Admin)

R (Bishop's Stortford Civic Federation) v East Hertfordshire District Council [2019] PTSR 1035

R (Tesco Stores Limited) v Forest of Dean District Council [2014] EWHC 3348 (Admin)

R (Hawksworth Securities plc) v Peterborough City Council [2016] EWHC 1870 (Admin).

172. As was stated by Simon Brown J (as he then was) in the *Exeter* case at p.483H: -

> "One must accordingly consider the general tenor of their [the councillors'] discussion rather than the individual views expressed by committee members, let alone the precise terminology used"

173. The discussion on the future viability of the airport took place in the context that the airline Flybe had recently ceased to operate there. The officer's report addressed the issue of viability in the absence of the proposed runway extension in paragraphs 490-1 and 963: -

> "490. The Flybe fleet of aircraft favoured the smaller plans (Dash 8 and Embraer) which had a capacity for 78 and 86 seats, which in turn allowed Flybe to dominate passenger flights from Southampton. The geographical limitations (land topography) and the length of the runway restricts opportunity for larger planes carrying more passengers from using Southampton to the same extent. Whilst some small aircraft still operate from Southampton the frequency and quantity of flights is significantly less, even with the backfilling of some routes. Without a runway extension that could accommodate the larger aircraft favoured by other airlines, the predicted increase in passenger numbers remains low; forecast to be 1.01mppa (22,676 ATMs) in 2027 and 1.027mppa (22,904 ATMs) by 2037.
>
> 491. This represents a significant reduction in overall passenger numbers compared to 2018 and the Airport has provided

> evidence that this falls below the 1.1-1.2mppa needed for the airport to breakeven. Below this figure the Airport would need to consider alternative funding in order to be able to operate viably. The Council's Head of Economy and Business has reviewed the document "SIAL profit and loss forecasts based on passengers per annum (Pax)" and the "Southampton International Airport Limited Annual report and financial statements for the year ended 31 December 2019 and considers the breakeven point a reasonable conclusion to reach. The Annual Report shows the Airport as a going concern; it made losses in 2019 attributed to decreased passenger traffic, particularly international traffic (20%). It is clear though that, despite losses, the site is strongly underpinned by committed shareholders.
>
> 963. ESA2 has demonstrated that without the runway extension, passenger numbers would not grow to much more than baseline, at 1 million passengers per annum, less than the number of passengers for the Airport to "break even" without sourcing funding from elsewhere. The Airport is a principal piece of infrastructure within the Borough and in a highly sustainable site located close to the railway station (99 steps) and within easy access to Eastleigh, Southampton and the wider Solent region. Strategic planning of the Borough's economic development is focused close to the airport and its existence is a key element of a healthy local and sub regional economy."

174. Mr. Wolfe does not criticise those passages in the officer's report. They identified a risk to the viability of the business. They did not suggest that the airport would close if the application for permission were to be refused.

175. In his first witness statement Mr. Grandfield quotes the oral advice he gave members during the meeting of the full Council (paragraphs 42-44). He made it clear beyond any doubt that SIAL was not asking EBC to proceed on the basis that the airport would not continue to operate unless the application was approved.

176. Two senior officers of SIAL also spoke at the meeting. Their contributions are quoted at paragraphs 45 to 46 of Mr. Grandfield's statement. The company said that without the extension to the runway the business would not be viable and would not break even until 2037 according to their projections. The company added that, in those circumstances, it would have "some very difficult decisions to make". The company did not claim that the airport would close if the application was refused. One councillor asked the Airport's Operations Director specifically about that. He explicitly stated in his reply that the company had not said that the Airport would close. He also reiterated that a non-viable business would require some "tough decisions…to be taken" (para. 50 of Mr. Grandfield's statement).

177. Councillors also put questions to Mr. Grandfield. He made it crystal clear that there was no suggestion that the airport would close if the application were to be refused. Instead, if the application was rejected, the airport would find it very difficult to get to a break even point, and in those circumstances the business would not be viable and the

company would have to consider alternative funding or a different business model. He stated plainly that it was a matter for the members to decide how much weight to give to the viability issue (paragraphs 48-49 of Mr. Grandfield's statement).

178. Mr. Grandfield added (paragraph 53 of his statement) that the quotations from councillors relied upon by the claimant came from a debate lasting some 2 hours. The overall length of the meeting was some 20 hours.

179. Mr. Wolfe rightly accepted that the case put forward by SIAL on viability raised a number of issues for members to consider. First, there was the risk to the future financial performance of the airport if the runway was not extended. Second, there was the consequential risk of the airport company having to make difficult decisions about its operations. Although SIAL did not wish to claim that the airport would close, it obviously did make clear to EBC the financial and operational vulnerability of the airport business if the planning application were to be refused. Third, this discussion involved projections into the future and the obvious uncertainty about future economic conditions. Fourth, although SIAL did not say that rejection of the application would result in them closing their airport, it is also plain that they did not give an assurance that the airport would undoubtedly continue to trade. This was an issue about future risk.

180. In my judgment, it would not have been immaterial or irrational for a councillor to be concerned about the economic risk to the financial future of the airport which could include a future *risk of closure*. There was evidence before the LPA to support that concern. Furthermore, financial risk and vulnerability involve matters of degree, for example, as to the extent of any harm to the business and its timing. Ultimately these are matters of judgment.

181. I have carefully considered the quotations set out in Mr. Turner's witness statement. There is no need for me to repeat them here.

182. In my judgment ground 6a must fail. First, the quotations selected by the claimant relate to 8 councillors and come nowhere near establishing the "general tenor" of the discussion by the full Council, so as to show that there was a general view that the airport would close if the application was refused.

183. Second, 36 councillors attended the meeting. When the debate had finished and the voting took place, 22 members voted in favour of granting permission, 13 against and one abstained. The claimant, having carefully considered the tapes or transcripts of the meeting, has identified only 8 councillors who voted in favour of granting permission and whose statements are said to support ground 6a.

184. Third, I agree with Mr. Stinchcombe that, on the authorities, it is inappropriate for the claimant to ask the court to take a small number of quotations from a meeting of councillors, *a fortiori* one lasting 20 hours, and to infer that they would have voted the other way had they disregarded the closure issue. Statements made during a lively debate are not to be treated as analogous to the reasoning in a decision letter drafted in an office. The court has not been shown all the contributions made by those councillors and cannot realistically be expected to gauge how each of them weighed the various issues. The exercise which the claimant invited the court to accept has nothing to do

with assessing the general tenor of the debate. But as I explain below the claimant's exercise was flawed in any event.

185. Fourth, I agree with Mr. Stinchcome that the quotations selected by the claimant for at least 3 out of the 8 councillors do not refer to the airport closing. Comments about the preservation of jobs at the airport, and the risk to aviation services connecting the Channel Islands cannot be used to infer that those members thought the airport would close if the application were refused. They are consistent with a concern about economic risk to financial performance and to *level* of service. Another quotation simply involved a councillor repeating views expressed by a member of the public without it being suggested that he endorsed those views. Accordingly, even if it be assumed for the sake of argument that the 4 councillors remaining out of the 8 quoted by Mr. Turner would have voted the other way if they had disregarded the closure issue, there would still have been 18 votes in favour of granting the resolution and 17 against, so the resolution would still have been passed (see para. 56 of his skeleton).

186. Fifth, I also agree with Mr. Stinchcombe that at least one other quotation in Mr Turner's statement is consistent with the speaker simply being concerned, permissibly, about a future "risk of closure". For example, one councillor is recorded as having said "the airport needs the extension to survive". The word "survive" does not connote a conclusion that if permission was refused the airport would close down. "Survival" could easily have been used to refer to a *risk* of the airport not being sustainable in the long term, or to a concern about a major difference in the level of operations.

187. Sixth, the quotations provided by the claimant come nowhere near establishing that the speakers concerned went against the clear advice they were given by the officer (see *Mansell* at [42(2)]. The evidence which has been provided to the court only serves to demonstrate that an exercise of this kind is inappropriate in a claim for judicial review.

188. For all these reasons ground 6a must be rejected.

Ground 6b

189. The claimant challenged the advice given in paragraphs 491 and 963 of the officer's report that without the runway extension the airport would not reach its break-even point of 1.1 to 1.2mppa. In fact, that advice had two components: (a) a projection of passenger numbers if the runway were not to be extended and (b) the estimation of the breakeven point for the airport business. The claimant made no challenge in relation to point (a). SIAL submitted an expert report on projections of passenger numbers which were assessed by EBC's economic development officer and found to be reliable (para. 324 of the officer's report).

190. Ground 6b is only concerned with point (b), the estimation of the break even point.

191. Mr. Wolfe referred to the statement of the Supreme Court in *R (Association of Independent Meat Suppliers) v Food Standards Agency* [2019] PTSR 1443 at [8] that the grounds of unlawfulness in claims for judicial review include the reaching of a "decision which is irrational or has no sufficient evidential basis". I do not read that statement as extending the scope of judicial review so as to allow the court, for example, to consider the merits of the evidence before the decision-maker. The context in which that statement appears was to do with irrationality and the "Wednesbury" standard of

review. If the Supreme Court had been intending to alter the principles of judicial review, it would have done so in explicit terms and explained why that course was being taken.

192. The reference to sufficiency of evidence is consistent with the "Wednesbury" principle and irrationality. It is for the decision-maker to decide how far to go in requiring evidence or information to be provided (see [127] above). That decision can only be reviewed applying the "Wednesbury" standard. Unless the decision-maker has taken into account a legally irrelevant consideration, essentially the issue boils down to whether he acted irrationally (see *Friends of the Earth* [2021] PSTR 190 at [116] – [121]). So, absent some other public law error, the issue of whether there was no sufficient evidence before the decision-maker is to be understood as asking whether no decision-maker could rationally consider that the evidence available to him was sufficient.

193. In summary, the complaint about the evidence on the break-even point is that the table supplied by SIAL, which showed where that point lies, had not been approved or validated by an independent accountant or expert and the inputs to the table had not been explained.

194. This ground is so lacking in any merit that detailed discussion is unnecessary.

195. Whether the table was independently validated or not was entirely a matter for EBC, unless their view could be said to be Wednesbury unreasonable. It was not.

196. I found the table easy enough to follow. It begins with inputs from audited accounts for 2019. Projections from this data were made for subsequent years taking into account the estimates of future passenger numbers. As I have said ground 6b does not involve any challenge to the projections of passenger numbers. As in almost any business, some costs are largely fixed and so are relatively insensitive to passenger numbers. Other figures are sensitive to the level of passenger traffic. The differences are plain to see in the numbers. EBC's Economic Development Officer was satisfied with the reasonableness of the data (para. 324 of officer's report).

197. It was a matter for EBC as to how far to enquire into the figures put before them. The members had the benefit of the advice given in the officer's report. It is impossible to say that EBC acted unreasonably by not requiring any additional independent input to the exercise or further explanation. This was a matter for the authority both as regards the extent of the information they received and the weight they chose to put upon the exercise.

198. For all those reasons, ground 6b must be rejected.

Conclusion

199. The claim for judicial review is dismissed. I thank the parties respective legal teams for the helpful way in which the case was presented.