Neutral Citation Number: **[2023] EWHC 2352 (Admin)**

Case No: CO/3570/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2023

Before :

MR JUSTICE DOVE

- -

Between :

KING ON THE APPLICATION OF JENNIFER DAWES	**Claimant**
- and –	
SECRETARY OF STATE FOR THE TRANSPORT DEPARTMENT	**Defendant**
And	
RIVEROAK STRATEGIC PARTNERS LIMITED	**Interested party**

- -
- -

Richard Harwood KC and Gethin Thomas (instructed by Harrison Grant Ring**)** for the **Claimant**
Mark Westmoreland Smith and Mark O'Brien O'Reilly (instructed by the Government Legal Department) for the **Defendant**
Michael Humphries KC and Isabella Tafur (instructed by BDB Pitmans LLP) for the Interested Party

Hearing dates: 5th and 6th July 2023

- -

Approved Judgment

This judgment was handed down remotely at 2pm on Friday 22nd September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE DOVE

The Honourable Mr Justice Dove :

Introduction

1. Manston Airport has been in aviation use since the First World War. It is located on the Isle of Thanet in East Kent. Following its use during the First World War it was still in an aviation use as an all-grass airfield at the outbreak of the Second World War in 1939. The material before the court explains that it was at Manston that Barnes Wallace designed and tested the bouncing bombs in preparation for the Dambusters raids, and that in the 1940s the runway at Manston was the longest and widest in southern England. It was built to assist the safe landing of badly damaged aircraft returning from Europe. In 1958 it became a joint RAF and civil airfield, and during the 1960s the airport hosted passenger services for chartered air travel. The ownership of Manston passed to the private sector in 1999. Whilst the airport was operating it handled freight alongside the movement of passengers prior to its closure in 2013.

2. On 17th July 2018 the interested party applied under section 37 of the Planning Act 2008 for a development consent order authorising the development and reopening of Manston Airport to operate as a dedicated air freight facility. The application was accepted for examination on 14th August 2018, following which four Inspectors were appointed to conduct the examination of the application. Following the receipt of their report, which is set out so far as relevant below, the defendant issued his decision on the application on 9th July 2020 granting development consent for the proposal. On 15th February 2021, following an application to this court, the decision to grant the development consent was quashed. The defendant then underwent a reconsideration process which is set out in greater detail below, before reaching a second decision on 18th August 2022. Again, the defendant concluded that development consent should be granted. That decision is challenged in the claimant's application for judicial review in this case.

3. The claimant's application is based upon two grounds. Firstly, the claimant raises a number of submissions in relation to the defendant's conclusions as to the need for the development by way of ground 1. Ground 2 is an argument related to climate change, and in particular that the defendant failed to reach a conclusion on the relevance of the sixth carbon budget ("CB6") in this case and, secondly, relied in reaching his decision upon the Decarbonising Transport Plan ("DTP") and the Jet Zero Strategy ("JZS") as the basis for concluding that the development would have a neutral impact upon climate change when those policy documents did not take any account of any activity at Manston.

4. I wish to place on record, as I did at the hearing of this matter, my thanks to all of the legal teams engaged in the preparation and presentation of this case. I am extremely grateful for their constructive and coherent oral and written submissions. The court was greatly assisted by the preparation of carefully edited and well-presented electronic bundles which tremendously assisted the preparation and conduct of the hearing.

The decision.

5. As will be clear from the identification of the nature of the grounds set out above, it is solely the decision-making process in respect of the questions of need and climate change which need to be highlighted for the purposes of this judgment. Starting with the information provided in support of the application, the interested party relied upon a report prepared by Azimuth Associates dated July 2018 to forecast freight and passenger volumes for the first 20 years of operation following the grant of consent. The methodology of the forecast commenced in volume 1 of the report with an analysis of demand in the South East of England. It addressed the extent to which that demand could be met, along with the quality of the opportunity for it to be met, at Manston Airport. Having concluded that Manston could "play a vital role in helping Britain's connectedness and trade with the rest of the world, and of making a substantial contribution to the future economic and social well-being of the UK" in volume 1, Azimuth Associates went on in volume 2 to what they described as a qualitative study of potential demand.

6. The essence of this qualitative analysis was that it was derived from 24 interviews with industry experts who, along with information from "other sources", identified potential demand for sectoral and geographic freight markets, passenger, and other aviation opportunities. The authors undertook a review of the potential range of aviation forecasting techniques and reached the following conclusion in respect of the most appropriate approach for Manston Airport:

> "2.22.3 Whilst econometric models have been the forecasting method of choice by the DfT, Airports Commission and the EU, these are generally used to forecast passenger air traffic for a country or region. As the ACI says, "Any airport wishing to apply an econometric forecasting approach is advised to begin by examining its historic traffic and survey data" (ACI, 2011, p. 25). This suffices at country level or for established airports where the past can be used to predict behaviour in the future. However, in the case of Manston Airport, closed for several years and lacking investment for many more, this approach is not appropriate. Any attempt to build an econometric model would have to establish criteria whereby a proportion of the total predicted UK air freight traffic was 'diverted' to Manston. However, deciding upon the proportion to divert to Manston raises significant problems.
>
> 2.22.4 Therefore, instead of providing a mathematical forecasting model, this review of the literature suggests a qualitative approach that aims to predict human and organisational behaviour. Indeed, the DfT (2014, p. 3) place a heavy reliance on an understanding of human behaviour in achieving realistic outputs. A qualitative approach that gathers the opinions of industry experts would allow areas of potential demand for Manston Airport to be identified. It is this type of approach that has been selected in the case of Manston Airport."

7. Azimuth Associates then set out in volume 2 of their report the methodology which they adopted, which was to identify and then interview a number of organisations who were then listed in the report along with the date of the interview and the means whereby

it was conducted. The nature of the interview was characterised as "semi-structured", and examples of the categories of interview question and their nature were set out in the report. The report went on to record that transcripts of the interviews had not been made available "due to the confidentiality of the interviews and the commercial sensitivity of the data collected." A summary of the responses to each of the interview questions by category is then set out in the report with quotes then being provided in relation to the various topics attributable to the interviewee concerned. Derived from the contents of the interviews, Azimuth then arrived at recommendations, firstly, in relation to the opportunities for Manston Airport to attract aircraft movements including those arising from the lack of available slots that other airports in the South East of England and the bumping of freight from passenger aircraft (so called "belly hold" carriage), security issues associated with outsized cargo and the speed of turnaround. They also recommended a number of markets which were identified through the research for which Manston Airport could be suitable. These included outsized freight, Formula 1 and luxury cars, live animals, perishable products, and time sensitive items, for instance for the aircraft industry and the oil and gas industry.

8. The recommendations contained in volume 2 of the report, following the qualitative analysis which Azimuth Associates considered the most reliable methodology, was then converted into a quantitative assessment of the volumes of freight and passenger traffic which could be expected for the first 20 years of operation at Manston Airport. Whilst it is not set out in detail within the report, in answers provided by the interested party to questions on need posed during the examination more detailed breakdowns were provided in respect of, for instance, particular market sectors and the assumptions which had been built into the forecast as to the number of aircraft movements and volumes of freight which were forecast to be moved from Manston Airport. The demand forecasts showed that the volume of freight movements in Manston Airport would increase over the course of time to a forecast of 17,000 freight movements in year 20. In addition, the forecasts evidenced around 1.4 million passengers using the airport by year 20 of its operation.

9. Turning to the question of climate change, accompanying the application the interested party provided an environmental statement dated July 2018 in which information on this topic was provided. The analysis presented the assessment of carbon dioxide emissions from a number of sources associated with the proposals, and in particular analysed the extent of those emissions arising from aviation activity. The conclusions of the environmental statement were that by year 20 the proposed development would give rise to 730.1 KtCO2 per annum but that such emissions only represented 1.9% of the total UK aviation carbon allowance of 37.5 MtCO2 for 2050. Further mitigation was required in order to reduce the carbon footprint of the proposed development as a whole focusing on other areas of its operation. The overall conclusion of the environmental statement was that the effect of the greenhouse gas emissions from the proposed development on the climate was properly to be regarded as "not significant".

10. The issues of need and the impact on climate change were both considered as part of the examination process, and the Examining Authority ("ExA") provided conclusions in their report in respect of these matters.

11. Firstly, in respect of need, the ExA identified that the forecasting of demand was a part of the assessment of need and set out a distillation of the Azimuth Associates report, along with a report from Northpoint which was submitted part way through the

examination, and which presented a top-down view of the freight market as supposed to the bottom-up analysis presented by the Azimuth report. They recorded other contributors to the examination, and in particular York Aviation, had been critical of the work undertaken by Azimuth Associates and concluded that "it is simply not possible to relate the proposed services to be operated with the responses by the interviewees". Furthermore, York Aviation contended that the forecasts "simply lack credibility". York Aviation presented analysis which they contended demonstrated that there would be no shortage of freight capacity in the UK prior to 2040, and that overspill from other airports could not provide a rationale for the development proposed.

12. The ExA made the following observations in respect of the interviews relied upon by Azimuth Associates:

> "5.6.57 While potentially useful and interesting, the fact that the transcripts have not been made available as part of the Azimuth Report due to the confidentiality of the interviews and the commercial sensitivity of the data collected limits the weight that can be given to them. Many of the interviewees also appeared to be local businesses of limited size or pro-business organisations for Kent.
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> …
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> 5.6.59 Such as it is, and on the basis of the evidence provided, the ExA cannot conclude that that academic and industry experts have validated the approach of the Azimuth Report. While noting the statement that further evidence was commercially confidential, without access to such evidence the ExA is unable to take this into account."

13. The ExA's conclusions in respect of, firstly, the interested party's evidence in relation to demand forecasting and secondly, the opportunity which Manston Airport presented in the light of the scope for use of belly hold freight carriage was set out by the ExA in their report in the following terms:

> "5.7.13 The Applicant's Azimuth Report [APP-085] is a comprehensive document but the weight that the ExA can place on its forecasts is reduced by the lack of interview transcripts available, and of the size and sample frame of many of the interviewees, when considering the size of the forecasts that are generated and there is little evidence that academic and industry experts have validated the approach of the Azimuth Report. Furthermore, there is little evidence that capacity available elsewhere such as at EMA, or the impact of the proposed Northwest Runway at Heathrow have been taken into account in the production of the forecasts.
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> 5.7.14 The Northpoint Report [REP4-031] provides a valuable alternative source to 'back up' the Azimuth Report. However, the limitations identified within its model, particularly those considering the scope for migrating between types of carrier and

> the impact of price (particularly when considering differences between belly hold and pure freight, and trucking) appear to the ExA to be substantial limitations in the case of the Proposed Development and a more detailed model assessing such variables was not available to the ExA.
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> …
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> 5.7.18 On the basis of the evidence provided, the ExA considers that the predominance of belly hold freight in the UK market as opposed to pure freight is to a large extent a by-product of the dominance of Heathrow in the UK aviation market. The effect of the size of Heathrow, and the vast range of destinations that are available from this hub airport have led to the strength of belly hold freight for UK purposes, particularly when coupled with the relative ease of access to the large hub airports and pure freight airports in northern Europe. Trucking is a necessary mechanism to complete this overall market pattern and allows access to the population and manufacturing capacity of northern Europe. In the ExA's view air freight would still primarily be attracted to the airports with the widest possible global networks for reasons of economies of scale.
>
> 5.7.19 It also appears logical to the ExA that belly hold freight would be significantly cheaper than pure freight and that this in itself also helps to explain the dominance of belly hold over pure freight, with much pure freight dedicated to express integrators who can charge more for express delivery times.
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> 5.7.20 The Applicant considers that Manston could act in a contemporary role to belly hold freight at Heathrow and integrator freight at EMA.
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> 5.7.21 However, the ExA's analysis of the predominance of belly hold freight in the UK (above) suggests that there is little complementary role to be had – while some oversized freight items may be too large or bulky for belly hold travel, the vast majority of general freight can be carried in belly holds."

14. The summary conclusions on the topic of capacity and demand for general air freight which the ExA reached were set out as follows:

> "5.7.23 The ExA is not convinced that there is a substantial gap between capacity and demand for general air freight within the Southeast at present. Capacity is available or could be available at other airports within the Southeast or at other airports within reach of the Southeast should the demand exist, and such capacity could largely be achieved relatively simply through permitted development rights or existing facilities.

> 5.7.24 The ExA is of the opinion that general air freight would continue to be well served in the UK with spare capacity at Stansted in the short term (to 2030) and the proposed Northwest Runway at Heathrow in the longer term, and that new integrators are more likely to wish to be sited in a more central location. If constructed and operated, then the Proposed Development could carry out a role within the market focused on perishables and oversized niche freight as previously, but it seems unlikely that tonnage achieved will be significantly more than previously handled. Without the proposed Northwest Runway at Heathrow more demand may be available but the ExA's conclusions relating to new integrators, that is that they would be more likely to base themselves in a more central location to their other logistical operations, remain valid.
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> …
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> Given all the above evidence, **the ExA concludes that the levels of freight that the Proposed Development could expect to handle are modest and could be catered for at existing airports (Heathrow, Stansted, EMA, and others if the demand existed). The ExA considers that Manston appears to offer no obvious advantages to outweigh the strong competition that such airports offer. The ExA therefore concludes that the Applicant has failed to demonstrate sufficient need for the Proposed Development, additional to (or different from) the need which is met by the provision of existing airports.**"

15. Turning to the issues concerning climate change the ExA assessed the impact of the development in respect of this issue and reached the following conclusions in respect of the proposal's implications:

> "6.5.70 Given the evidence presented, the ExA considers that climate change issues have been adequately assessed, and that the requirements of the ANPS, NPPF and 2017 EIA Regulations are met. The ExA's overall conclusion is that the construction and operation of the Proposed Development would avoid significant climate change effects in accordance with the ANPS and NPPF. Mitigation measures would be an integral part of the Proposed Developments adaptation to climate change and would be appropriately secured through the DCO and related documentation certified under Article 41.
>
> 6.5.71 However, the ExA concludes that given the direction of emerging policy that the Proposed Development's contribution of 730.1 KtCO2 per annum ie 1.9% of the total UK aviation carbon target of 37.5 Mt CO2 for 2050, from aviation emissions will have a material impact on the ability of Government to meet its carbon reduction targets, including

> carbon budgets. The ExA concludes that this weighs against the granting of development consent."

16. The overall recommendation of the ExA was that the defendant should not grant development consent. As set out above the defendant's first decision on this application, dated 9th July 2020, was to grant the development consent order applied for, disagreeing with the recommendation of the ExA. Ultimately, that decision was quashed on the basis that the defendant's reasoning in relation to his disagreement with the ExA's assessment of need was unlawfully inadequate. In respect of the question of climate change, the decision of 9th July 2020 involved an acceptance of the ExA's view that this was a matter which should be afforded moderate weight against the proposals in the planning balance. That was, however, a conclusion reached on the basis that consideration was still being given to matters including the TDP and JZS, and thus it was not considered appropriate to consider the detail of the issue further at the stage of reaching that decision.

17. Following the quashing of the decision of the 9th July 2020 it was necessary for the defendant to reconsider his decision on the development consent order application. Pursuant to rule 20 of the Infrastructure Planning (Examination Procedure) Rules 2010 (which is set out in greater detail below) the defendant wrote to all interested parties on 11th June 2021 providing a Statement of Matters for the purposes of the redetermination of the application. The matters about which the defendant consulted were stated to be as follows:

> "the extent to which current national or local policies (including any changes since 9 July 2020 such as, but not limited to, the re-instatement of the ANPS) inform the level of need for the services that the Development would provide and the benefits that would be achieved from the Development;
>
> whether the quantitative need for the Development has been affected by any changes since 9 July 2019, and if so, a description of any such changes and the impacts on the level of need from those changes (such as, but not limited to, changes in demand for air freight, changes of capacity at other airports, locational requirements for air freight and the effects of Brexit and/or Covid);
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> the extent to which the Secretary of State should, in his re-determination of the application, have regard to the sixth carbon budget (covering the years between 2033 – 2037) which will include emissions from international aviation; and
>
> any other matters arising since 9 July 2019 which Interested Parties consider are material for the Secretary of State to take into account in his re-determination of the application."

18. A deadline for the responses was set for 9th July 2021. The letter advised that the defendant had appointed an independent aviation assessor ("the IA") to advise the defendant on matters relating to the need for the development and produce a report summarising the IA's findings. It was explained that the assessor's report, along with all representations received, and any supporting information, would be made available

to the public as soon as possible after the 9th July 2021. The letter then went on to describe the future process in the following terms:

> "10. An opportunity to comment on the independent aviation assessor's report, the representations received and any supporting information will be given to Interested Parties. The Secretary of State will then consider the responses and information received in redetermining the application.
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> …
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> 12. Any correspondence received between 9 July 2020 and the date of this statement of matters has not been published on the National Infrastructure Planning website and as such will not be taken into account as part of the re-determination process. Where Interested Parties have submitted comments on the application between 9 July 2020 and the date of this statement of matters, and where they wish to have those comments treated as a formal representation in the re-determination process, the Secretary of State requests that Interested Parties resubmit their correspondence. The Secretary of State will then treat such resubmitted correspondence as a formal representation submitted to him in response to his statement of matters."

19. On 30th July 2021, following the issuing of the letter containing the Statement of Matters on 11th June 2021, the defendant issued a further letter in respect of the publication of responses to the Statement of Matters. This letter noted that the IA had been appointed, and that the IA draft report would be made public on the Planning Inspectorate's website in due course. It would take into consideration the evidence which was provided by parties in respect of the first round of consultation. The letter indicated that once the draft IA report had been published the defendant would initiate a further round of consultation, and that this second round of consultation would invite parties to submit representations on the draft report. That second round of consultation would also invite comments from parties on the representations which had been received in response to the first round of consultation which by the time of this letter had been published on the Planning Inspectorate's website. Parties were invited to submit any formal consultation response to the material that had been received in the first round of consultation to the defendant when the second round of consultation commenced. The letter also provided as follows:

> > "7. Correspondence received between the close of the First Round of Consultation and commencement of the Second Round of Consultation will be treated as "redetermination correspondence" and will be published as such at the end of the redetermination process."

20. The IA's draft report was published on 21st October 2021. In essence the conclusion that the IA reached was that there had been no significant or material change to either policy or the quantitative need case for the proposed development since July 2019 that would lead to a different conclusion being reached in relation to need from that which had been reached by the ExA.

21. On the same date that the draft IA report was published, the 21st October 2021, the defendant wrote a letter advertising the availability of the draft report on the Planning Inspectorate's website and inviting representations on the draft report from the applicant and any other party. The same letter also advertised the publication of all of the representations received in response to the first round of consultation, which had occurred on 30th July 2021, and invited further submissions from the applicant and any other party in relation to those first round consultation responses.

22. The letter recorded that the DTP and the consultation document in relation to the JZS had been published on 14th July 2021. Again, the defendant invited comments both from the applicant and any other party as to whether this material resulted in any change to whether the development would be consistent with the requirements of national policy. A number of specific requests of the applicant were made by the defendant which are not relevant to this case. A deadline was set for responses on 19th November 2021. The letter then repeated what has been set out above in respect of what was to be treated as "redetermination correspondence" which was only to be published at the end of the redetermination process.

23. The interested party contributed to the second consultation by making extensive representations and including within those representations a report dated 15th November 2021 by the International Bureau of Aviation ("the IBA"). The subject matter of the IBA report was the question of whether or not there was additional cargo capacity required in the South East of England. Addressing that issue required the IBA to engage with a number of questions bearing upon whether or not there was a lack of air cargo capacity in the UK, and the extent to which, for instance, use of Heathrow was capable of meeting future air cargo needs. The report addressed whether the air cargo market had changed as a result of the UK's departure from the EU and also the impact of the pandemic, and sought to address other issues beyond air cargo considerations such as local employment and net zero commitments. It is unnecessary to rehearse the details of the report for present purposes, but suffice to say that the conclusions of the report in respect of each of these questions was supportive of granting the development consent order applied for.

24. On 11th March 2022, the defendant wrote to the interested party in a letter which was effectively addressed to all of those concerned with the application. The letter recorded the consultation process which had occurred up to that point in time. It went on to make a request for further information in respect of certain discreet issues that are not the subject matter of this litigation. Finally, the letter addressed the question of redetermination correspondence in the following terms:

> "The Secretary of State has received correspondence on the Application between the end of the first round of consultation and the start of the second round of consultation and from the end of the second round of consultation and the date of this letter. As set out in the letter dated 30 July 2021, such correspondence will be treated as "re-determination correspondence" and will be published as such at the end of the re-determination process. Interested Parties who have submitted re-determination correspondence with any comments that they wish the Secretary of State to treat as a formal consultation response should re-submit those comments by 28 March 2022."

25. On 14th July 2022 a submission was provided to the minister in order to brief him in respect of the retaking of the decision on the application. The recommendation of the briefing was that the development consent order should be granted for the reasons set out in a draft decision letter which was annexed to the briefing. The briefing identified the consultation process which had taken place following the quashing of the earlier decision, and noted the advice of the IA that the ExA conclusion on the need for the development remained valid. The briefing note identified that there were a number of areas where the ministers' advisors disagreed with the ExA, and the IA. Paragraph 5 of the briefing provided as follows:

> "5. There are a number of areas where we disagree with the ExA and the IAA as per below:
>
> - **Resilience:** consideration and weight has now been given to the air freight capacity the Development will deliver and the resilience this would provide in unforeseen events and worldwide supply chain disruptions. (IAAR 5.2.6., DL paragraphs 119 - 123).
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> - **Aviation Policy:** the ExA and therefore the IAA have required the Applicant to demonstrate a level of need that is not required by the Making Best Use policy or any other aviation policy (ER 5.5.1 – 5.5.28 and Chapter 3, IAAR section 4, DL paragraphs 40 – 74).
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> - **Capacity:** the ExA and IAA took into account capacity at other airports that could be made available through in future. Such capacity is not material to this decision as there is no certainty such capacity will come forward in future (ER 5.6.1 – 5.6.45, IAAR 5.3, DL paragraphs 95 –102).
> - **Demand Forecasting:** proper weight has now been given to the Applicant's demand forecast report (the Azimuth Report) which was discounted by the ExA, and therefore the IAA, on the basis that commercial and other sensitive information was withheld (ER 5.6.46 – 5.6.124 & 5.6.146 – 5.6. 154, IAAR 5.2, DL paragraphs 81 - 94).
> - **Locational Factors:** the ExA and the IAA's conclusion that East Midlands Airport is better suited than the Development to provide air freight services is discounted on the basis that none of the relevant aviation policies requires an applicant to demonstrate that it is locationally better placed than other existing airports to deliver the services it seeks to provide (ER 5.6.125 – 5.6.145, IAAR 5.4, DL paragraphs 103-106)."

26. In relation to the question of airport capacity, and its relationship with the examination of the need for the proposal, the draft letter recorded in passages which changed between this draft decision and the final version of the decision, and which were controversial in the context of the arguments set out below, as follows:

> "97. On the matter of capacity being made available at airports elsewhere, the Secretary of State back sets that there is potential for all existing airports to expand in future to increase capacity. However, the Secretary of State is of the view that in considering whether there is a need for the capacity the development would provide, he is only able to attach very little weight to capacity through applications that have yet to come forward. This is

> because there is no certainty that such potential capacity will be delivered. For example, plans setting out growth aspirations may be modified or changed, or they may not come forward at all. Where planning permission is required, both the ANPS and the MBU policies are clear that they do not prejudge the decision of the relevant planning or authority responsible for decision-making on any planning applications. Such applications are subject to the relevant planning process and may not ultimately be granted consent by the decision-maker. In addition, the aviation sector in the UK is largely privatised and operates in a competitive international market, and the decision to invest in airport expansion is therefore a commercial decision to be taken by the airport operator. This means that while increasing demand for air freight services could potentially be met by expansion at other airports, those airport operators may not decide to invest in changes to their infrastructure to meet that demand. It is therefore not possible to say with any certainty whether capacity from plans setting out growth aspiration's will result in actual future capacity.
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> …
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> 102. The Secretary of State notes that the Examining Authority and the Independent Assessor consider that there is spare capacity at other airports. It appears that in concluding this, the Examining Authority and the Independent Assessor are relying in part on future plans and the potential for growth at other airports. As set out above, such capacity is not material to the Secretary of State's decision on this application. The Secretary of State accepts that there may be existing capacity at other airports such as Stansted and East Midlands Airport. However, the Secretary of State would point out that his focus is on the long term capacity gap identified in relevant aviation policy and forecasted to occur by 2030 (and beyond) in the southeast of England. The capacity demand up to 2030 is expected to be met through the Heathrow Northwest runway project and other airports intensifying the use of their existing runways. None of the aviation policies and aviation planning policies include a limit on the number of Making Best Use airport developments that might be granted, nor a cap on any associated increase in ATM's as a result of intensifying use at Making Best Use developments."

27. On 18th August 2022 the defendant issued his decision in respect of the application. The defendant accepted the recommendation contained within the ministerial briefing and granted consent for the development consent order. In paragraph 37 of the decision letter the defendant identified the role of need in the decision-making process in the following terms:

> "The Secretary of State notes, however, that the MBU policy states that a decision-maker, in taking a decision on an

> application, must take careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigations (MBU paragraph 1.29). The Secretary of State considers that the benefits expected from a proposed development would materialise if there is a need for that development. Therefore, in order to assess whether the expected economic benefits will outweigh the expected environmental and other impacts from this Development, the Secretary of State has considered need in the context of identifying the likely usage of the Development from the evidence submitted in the Examining Authority's Report, the Independent Assessor's Report and the representations submitted by Interested Parties during the redetermination process."

28. The three themes of the defendant's consideration of need were, firstly, the relevant national aviation planning policy, aviation policy and local policy; secondly, the capacity deficit identified in aviation policy; and thirdly, the demand forecasts. Part of the assessment of national policy was obtaining an understanding of "Beyond the horizon; the future of UK Aviation Making Best Use of Existing Runways ("the MBU policy")". The defendant determined that in the particular circumstances of this case the MBU policy applied. The defendants' conclusions in relation to the relationship between the proposal and relevant national aviation and aviation planning policies was expressed in the following terms:

> "71. Regarding the forecasts underpinning the MBU policy, the Secretary of State does not agree that an operational Manston Airport would be unforeseen growth because it was not specifically listed in these forecasts. The Secretary of State would point out that neither of the relevant aviation planning policies (the ANPS and the MBU policy) restricts growth at airports beyond Government's preferred Heathrow Northwest Runway option to only those listed in the forecasts or those not listed but captured by the ranges used in forecasting as is the case for smaller airports. The MBU Policy acknowledges that airports making best use of their existing runways could lead to increased carbon emissions, and that environmental concerns must be taken into account as part of the relevant planning application process. All MBU developments, regardless of whether they are listed in the forecasts or not, are required to assess the environmental impacts from the proposed development on its own and also in-combination with other existing or known projects. This includes the assessment of carbon impacts. It is then for the relevant planning authority to take into account these impacts in determining whether or not an application for a MBU development should be granted.
>
> 72. For the reasons above, the Secretary of State is satisfied that the principle of the Development is supported by relevant national aviation and aviation planning policies."

29. The defendant reached conclusions in relation to the demand and forecast assessment, which was a key part of the decision on the basis that it was one of the matters upon which he disagreed with the ExA. The defendant's conclusions in this respect were set out in paragraphs 89 – 94 of the decision letter in the following terms:

> "89. The Secretary of State accepts that there will always be a level of uncertainty in any demand forecast and agrees with the author of the Azimuth Report that assessing demand for freight is no easy matter [ER 5.6.53]. The Secretary of State notes that the approach taken by the Applicant relies on an in-depth understanding of the changes that are taking place within the sector in a way that does not miss any currently unmet demand. The Examining Authority concluded that the Applicant's forecasts seem ambitious in light of the historical performance of the airport [ER 5.7.4]. The Secretary of State considers that, given the circumstances noted in paragraphs 81 - 82 above, the qualitative approach taken in the Azimuth Report is preferable to the other forecasts considered by the Examining Authority. Given the dynamic changes that are currently taking place in the aviation sector as a result of the challenges and opportunities from the COVID-19 pandemic, the opportunities from the UK's emergence as a sovereign trading nation and the age of the available data allied with historic under investment, the Secretary of State, contrary to the Examining Authority [ER 5.7.4] and the Independent Assessor, places little weight on forecasts that rely on historic data and performance to determine what share of the market the Development might capture.
>
> 90. The Secretary of State notes that while the Examining Authority found the Applicant's Azimuth Report potentially useful and interesting, it gave it limited weight because the transcripts of interviews and other commercially sensitive or confidential information had not been made available [ER 5.6.57]. The Secretary of State notes that the Independent Assessor observed the reduced weight that the Examining Authority gave the Azimuth Report and made no further comment (IAA, page 4). While the Secretary of State agrees with the Examining Authority that the Azimuth Report is a comprehensive document, he disagrees with the Examining Authority that the lack of access to the information withheld by the Applicant reduces the weight that can be placed on it [ER 5.7.13]. The Secretary of State is of the view that withholding commercially and other sensitive information from the planning process is justified. The Secretary of State notes that Table 3 in Volume II of the Azimuth Report provides a list of the organisations and key market players it interviewed. A forecast of demand is included in Table 1 in Volume III of the Azimuth Report and a more detailed forecast was included in Appendix 3.3 of the Applicant's Environmental Statement. The Application was publicised and examined in the normal way and

> all Application documents and representations submitted during the examination were made publicly available such that there was opportunity for anyone not notified to also submit comments. The Secretary of State did not receive any representations that persuaded him that the conclusions of the Azimuth Report are incorrect.
>
> 91. The Secretary of State is aware that his Department's UK Aviation Forecasts 2017 does not model air freight in detail and therefore labelled it as an assumption. However, he is satisfied that the Azimuth Report, which is supported by the Northpoint Report and provides a top-down view of the air freight market and employs a scenario- based analysis [ER 6.6.60], demonstrates that there is demand for the air freight capacity that the Development seeks to provide. The Secretary of State has therefore afforded the Azimuth Report substantial weight in the planning balance.
>
> …
>
> 93. The Secretary of State accepts that there is uncertainty in how the aviation sector may look post-Brexit (IAA page 55) or post-Covid (IAA section, page 29), and agrees with the Independent Assessor's that even the most up-to-date data cannot be said to fully reflect how the sector may look going forward (IAA, page 29) However, it is because of this uncertainty that the Secretary of State places significant weight on the reopening and development of the site for aviation purposes, rather than losing the site and existing aviation infrastructure to other redevelopment.
>
> 94. Finally, the Secretary of State places substantial weight on the fact that there is a private investor who has concluded that the traffic forecasted at the Development could be captured at a price that would make the Development viable, and is willing to invest in redeveloping the site on that basis."

30. The defendant then went on to address the question of capacity for air freight. He noted the view of the ExA that they were not convinced that there was a substantial gap between capacity and demand for general air freight and considered that this need would continue to be well served in the UK with spare capacity in the short term at Stansted and longer term at Heathrow. He also noted the conclusion of the IA in respect of the availability of capacity elsewhere to address freight requirements. The conclusions which the defendant reached in respect of capacity were set out as follows:

> "97. On the matter of capacity being made available at airports elsewhere, the Secretary of State accepts that there is potential for all existing airports to expand in future to increase capacity. However, the Secretary of State is of the view that in considering whether there is a demand for the capacity the Development aims to provide, he is not able to attach weight to applications that

have yet to come forward. This is because there is no certainty that capacity from such applications will be delivered. For example, aspiration plans setting out future growth may be modified or changed, or they may not come forward at all. Where planning permission is required, both the ANPS and the MBU policies are clear that they do not prejudge the decision of the relevant planning authority responsible for decision-making on any planning applications. Such applications are subject to the relevant planning process and may not ultimately be granted consent by the decision-maker. In addition, the aviation sector in the UK is largely privatized and operates in a competitive international market, and the decision to invest in airport expansion is therefore a commercial decision to be taken by the airport operator. This means that while increase in demand for air freight services could potentially be met by expansion at other airports, those airport operators may not decide to invest in changes to their infrastructure to meet that demand. It is therefore not possible to say with any certainty whether indicative capacity set out in growth plans will result in actual future capacity.

…

100. The Secretary of State also received representations that referenced the Loadstar article dated 8 November 2021, International Air Transport Association ("IATA") data from 2019 and commentary on the inability of Heathrow to accommodate rising freight demand. The Secretary of State also notes that the IBA report also contends that reliance should not be made on capacity at Heathrow. Using 2019 and 2021 data, the IBA forecasts a return to pre-pandemic belly hold freight levels at Heathrow by 2023, and that 2019 data shows that belly hold capacity is dominant at Heathrow for meeting freight demand.

101. The Secretary of State disagrees with the reliance the Examining Authority places on capacity could largely be achieved through permitted development rights or existing airport facilities [ER 5.7.23]. As set out by the Examining Authority, permitted development rights for the extension or construction of a runway or passenger terminal is not permitted above a certain level, and should an Environmental Impact Assessment be required then permitted development rights would not apply [ER 5.6.38]. An airport operator is also required to consult the relevant Local Planning Authority(s) before carrying out any extension or construction works under permitted development rights [ER 5.6.39]. As with aspirational growth plans for expansion, the decision to increase capacity through general permitted development or existing facilities is a commercial decision to be taken by the airport operator, and the Secretary of State's in unable to place weight on capacity that

> airport operators have not indicated they intend to and are able to create through permitted development rights.
>
> 102. The Secretary of State notes that the Examining Authority [ER 5.6.45] and the Independent Assessor (IAA section 5.3) consider that there is spare capacity at other airports [ER 5.6.45]. It appears that in concluding this, the Examining Authority and the Independent Assessor are relying in part on aspirational growth plans and the potential for growth at other airports. Such capacity is not required to be taken into account by policy, and it is not in the Secretary of State's view otherwise obviously material to the Secretary of State's decision on this Application for the reasons set out above, principally the lack of any certainty that such potential capacity will ever come forward. To the extent that possible capacity is legally material, the Secretary of State gives no significant weight to it for the same reasons. The Secretary of State accepts that there may currently be existing capacity at other airports such as Stansted and East Midlands Airport. However, the Secretary of State's focus is on the long-term capacity gap identified in relevant aviation policy and forecasted to occur by 2030 in the Southeast of England. Even if the impacts from the COVID-19 pandemic and other recent events result in short-term fluctuations in demand as suggested by the Independent Assessor (IAA, p. 31, 39, 41, 42 and 56) and other Interested Parties, by their nature such short-term impacts would not give rise to certainty over the long-term demand forecast."

31. In terms of the matters material to the present case the defendant separately considered the question of climate change and commenced his consideration by setting out an understanding of the relevant policies in DTP and JZS in the following terms:

> "*Decarbonising Transport – A Better, Greener Britain*
>
> 139. The 'Decarbonising Transport – A Better, Greener Britain'19 ("the Decarbonising Transport Plan") was published on 14 July 2021 and follows on from 'Decarbonising transport: setting the challenge' published in March 2020 which laid out the scale of reductions needed to deliver transport's contribution to carbon budgets and delivering net zero by 2050. The Decarbonising Transport Plan sets out Government's commitments and the actions needed to decarbonise the entire transport system in the UK. It sets out the pathway to net zero transport in the UK, the wider benefits net zero transport can deliver and the principles that underpin Government's approach to delivering net zero transport. It states that the combining of projections for domestic and international aviation emissions through the inclusion of international aviation in the UK's sixth carbon budget in 2033 means that aviation emissions will continue to fall to 2050. The Decarbonising Transport Plan recognises that the technology pathway to zero emissions is not

yet certain for aviation (DTP, page 30) and accepts that where positive emissions remain in transport sectors, these will need to be offset by negative emissions elsewhere across the economy (DTP, 46). However, it also highlights that with the right investment and the emergence of new zero emission technologies it could be possible for achieving even deeper cuts in greenhouse gas emissions from aviation (DTP, page 46).

Jet Zero: our strategy for net zero aviation

140. The 'Jet Zero: our strategy for net zero aviation'20 ("Jet Zero") consultation document set out Government's Vision for the aviation sector to reach net zero aviation by 2050. The consultation ran from 14 July 2021 to 8 September 2021. A further technical consultation to help inform the final outcome of the Jet Zero consultation ran from 31 March 2022 to 25 April 202221. This consultation invited views on the 'Jet zero: further technical consultation' and the accompanying 'Jet zero: modelling framework' documents. These documents updated the evidence and analysis on the abatement potential and costs of four policy measures (proposed system efficiencies, sustainable aviation fuel, zero emissions flight and markets and removals) in the Jet Zero consultation. These documents also set out the results of modelling using the updated evidence for the four illustrative scenarios to UK net zero aviation by 2050 contained in the Jet Zero consultation document, and summarised the outcomes and overall impact of the new analysis on Government's strategy for achieving Jet Zero.

141. 'The Jet Zero Strategy: delivering net zero aviation by 2050'22 ("the Jet Zero Strategy") and the 'Jet zero consultation: summary of responses and government response'23 were both published on 19 July 2022. The Jet Zero Strategy states that Jet Zero can be achieved without Government intervention to directly limit aviation growth (JZS, paragraph 3.57). It sets out policies that will influence the level of aviation emissions the sector can emit, and maximise in-sector emissions reductions through a mix of measures that will ensure the UK aviation sector reaches net zero by 2050 (JZS, paragraph 3.1). These measures include: improving the efficiency of the existing aviation system; sustainable fuels; new technology; markets and removals; sustainable travel choices for consumers; and addressing non CO2 emissions (JZS, page 26). The Jet Zero Strategy also sets out how the aviation sector will achieve net zero aviation by 2050 and introduces a carbon emission reduction trajectory that sees UK aviation emissions peak in 2019, with residual emissions of 19.3 MtCO2e in 2050, compared to 23 MtCO2e residual emissions in the Climate Change Committee's Net Zero Balanced Pathway (JZS, paragraph 3.58).

> …
>
> 145. The Secretary of State has considered subsequent changes to the Government's position on climate change, including the announcement by the Government that it would target a 68% reduction in UK emissions by 2030 compared to 1990 levels pursuant to Article 4 of the Paris Agreement, and the inclusion of international aviation emissions in the sixth carbon budget and its target to reduce emissions by 78% by 2035 compared to 1990 levels. The carbon budget for the 2033- 2037 budgetary period was set at 965 Mt CO2 by way of Carbon Budget Order 2021.
>
> …
>
> 148. The Examining Authority concluded that the Development's Carbon Dioxide contribution of 730.1 Kt CO2 per annum (N.B. at full capacity on a worst-case scenario assessment), would according to the Applicant have formed 1.9% of the total UK aviation carbon target of 37.5 Mt CO2 for 2050, will have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets [ER 8.2.74]. The Examining Authority concluded that this weighs moderately against the case for development consent being given [ER 8.2.75].
>
> 149. However, the Secretary of State is satisfied that Government's Transport Decarbonisation Plan and the Jet Zero Strategy, which set out a range of non-planning policies and measures that will help accelerate decarbonisation in the aviation sector, will ensure Government's decarbonisation targets for the sector and the legislated carbon budgets can be met without directly limiting aviation demand. For this reason, he does not accept the Examining Authority's view that carbon emissions is a matter that should be afforded moderate weight against the Development in the planning balance, and considers that it should instead be given neutral weight at the most.
>
> 150. For the reasons set out in the paragraphs above, the Secretary of State is content that climate change is a matter that should be afforded neutral weight in the planning balance"

32. As part of the decision-making process the defendant addressed the question of redetermination correspondence and provided the following assessment in paragraph 265 of the decision letter:

> "265. In addition to the representations received in response to the Secretary of State's redetermination consultations, the Secretary of State also received 82 items of correspondence on the Application from a number of Interested Parties during the redetermination process. This correspondence covered a range of issues, including the need for the Development,

> environmental impacts, emissions and climate change, heritage impacts, socio-economic benefits, funding and financing, noise and health impacts and other developments since the close of the examination. Unless addressed in this letter above, the Secretary of State considers that the redetermination correspondence he received does not raise any new issues that are material to his decision on the Development. As such, he is satisfied that there is not any new evidence or matter of fact that needs to be referred again to Interested Parties under Rule 19(3) of the Infrastructure Planning (Examination Procedure) Rules 2010 before proceeding to a decision on the Application."

33. Having assessed all of the material specified in the letter the defendant ultimately expressed himself satisfied that there was a clear justification for authorising the development and granting the Manston Airport Development Consent Order Application.

The Grounds.

34. As set out above, the claimant's case proceeds on the basis of two grounds. The first ground relates to the defendant's assessment of need, and in particular his departure from the conclusions of the ExA and the IA. This ground has three themes to it, the first theme being procedural unfairness. The claimant submits that it was procedurally unfair for the defendant to rely heavily upon the Azimuth report and its qualitative research methodology without having the underlying evidence upon which it relied (in the form of the notes of the interviews and other material) or without permitting that underlying evidence to be subjected to detailed scrutiny by interested parties such as the claimant.

35. Secondly, it is submitted by the claimant that it was procedurally unfair for the defendant to accept and rely upon a further report submitted by the interested party in the form of the IBA report without giving other parties such as the claimant the opportunity to make representations in response to the IBA report. The claimant has provided a witness statement in support of her claim in which, at paragraph 13, she sets out a considerable number of points which she would have wished to make to the defendant about the contents of the IBA report and the flaws in its analysis.

36. Whilst the defendant and the interested party draw attention to the fact that an organisation called Five10Twelve made representations in relation to, amongst other matters, the IBA report after the closure of the second round of consultation, a witness statement from Ms Samara Jones-Hall, the CEO and director of Five10Twelve, explains that (having reviewed the representations provided by the interested party following the closure of the second consultation) she wrote to the Planning Inspectorate to ask whether she should submit further evidence to the defendant or the Planning Inspectorate as she could not see any way of providing more information or evidence given that the second consultation had closed. The Planning Inspectorate responded to her saying that she could send information to them, or to the defendant, and that the defendant would receive those responses either way. As Ms Jones Hall remained unclear whether she was entitled or permitted to submit further information she sent it on the basis that hopefully her further representations would be considered. Thus, the claimant submits that the fact that a further representation after the closure of the second round of consultation was considered does not avail the defendant in relation to the

failure of the consultation process to specifically enable the claimant to make representations about the IBA report.

37. The second theme of ground 1 is the contention that the defendant acted irrationally or perversely by calling for representations in relation to quantitative rather than qualitative need in the Statement of Matters. The defendant went on to determine that there was a need for the development based upon qualitative need, a matter not specifically catered for in the Statement of Matters. This approach to the reconsideration of his decision was unlawful.

38. The third theme of ground 1 is based upon the contents of the ministerial briefing set out above, and also the draft decision. The claimant submits that the defendant erred in his approach because he was unlawfully advised that the potential for growth of freight traffic at other airports was not a material consideration in reaching his decision. The claimant submits that it plainly was a material consideration in the assessment of need, and in particular in the opportunity of future airport capacity to meet need. The suggestion that it was not a material consideration was a clear error of law.

39. Ground 2 of the claimant's case is related to climate change. It has two themes. The first theme is that the defendant failed to reach a conclusion on the relevance of the sixth carbon budget to the decision which he was making and in particular the effect of the proposal upon that carbon budget. The second theme is that it was unlawful for the defendant to rely upon the DTP and the JZS as the sole basis for reaching his conclusion that the impact on the interests of climate change would be neutral. This was particularly the case as he failed to take into account a relevant consideration, namely that the modelling work for the JZS did not take account of Manston.

Policy.

40. It is unnecessary for the purposes of this judgment to rehearse all of the relevant policy, both national and local, bearing upon the decision which the defendant had to make. The focus of the claimant's challenge so far as policy is concerned, is specifically the DTP and the JZS. The reliance on these policies comes in the context of ground 2 and the claimant's contentions with respect to climate change. The DTP was dated 26th March 2020 and covered all forms of transport. It had a section of commitments pertaining specifically to the aviation sector. The starting point of those commitments was to consult upon the JZS which would set out the steps to be taken to reach net zero aviation emissions by 2050. Coupled with this commitment there was intended to be a consultation on targets for domestic aviation to reach net zero by 2040, and a target for decarbonisation of emissions from airport operations also by 2040. Initiatives were proposed in relation to sustainable aviation fuels and modernisation of airspace. The DTP committed to further developing the UK Emissions Trading Scheme, a mechanism designed to be an important policy tool across the economy to bear down upon greenhouse gas emissions. The UK Emissions Trading Scheme was relied upon to assist in the acceleration of aviation decarbonisation.

41. In July 2021, in accordance with the commitments made in DTP, the defendant published the JZS consultation exercise, and in particular a document entitled "Jet Zero Consultation: Evidence and Analysis". The document consulted upon a number of measures which were designed to deliver net zero, alongside four scenarios which were set out as pathways to net zero. In particular, the document was supported by an annex

entitled "Modelling Net Zero". The annex explained that it had used the Department of Transport's aviation model to forecast air passenger demand for the UK, and allocate that demand to the UK's airports based on a number of weighting factors. Forecasts were then used to produce predictions of CO2 generation from aviation activity.

42. In particular, the model made assumptions in respect of airport capacity. Those capacity assumptions were described in the following paragraphs:

> "Annex A: Modelling net zero.
>
> A.5 In June 2018, the Government set out its support for airports to make best use of their existing runways ("MBU") and a new runway in the Southeast in the Airports National Policy Statement, subject to related economic and environmental considerations. We have revised the capacity assumptions in our modelling to reflect this, while also updating capacities for several airports where more up-to-date evidence has become available. Our assumptions also reflect plans for a third runway at Heathrow (with a phased introduction).
>
> A.6 The capacity assumptions that have been made are not intended to pre-judge the outcome of future planning applications. However, in order to conduct the modelling, specific assumptions have to be made on a number of inputs, including about the future capacity of the main airports in the UK. In line with a precautionary approach to the level of future carbon emissions, and to reflect the uncertainty around future developments in this area, we have assumed capacities that are consistent with the planning applications that have been made by airports, and also increased the capacity of others where our forecasting suggests there will be significantly higher demand in the future. Increasing capacity limits in this way allows us to focus the analysis on testing the potential of abatement technologies to meet the challenge of net zero, without capacity constraints arbitrarily restricting demand.
>
> A.7 The modelling scenario that we have used should **not** therefore be seen as a prediction of what DfT thinks will happen with regard to future capacity expansion, but as a reasonable upper bound of possible future airport capacity levels and therefore associated emissions, in order to better test the potential of measures to meet net zero."

43. The detail of the airport capacity assumptions was then set out in a schedule identifying each individual airport about which capacity assumptions had been made, and what those assumptions were in relation to both air traffic movements and terminal passengers. Manston Airport did not feature as one of the airports contained within the airport capacity assumptions.

44. Following the completion of this consultation exercise, in July 2022 the defendant published the JZS. The JZS identified the need for action in the form of six policy

measures. These were firstly, system efficiencies in the form of improving the efficiency of the existing aviation system; secondly, the development of sustainable aviation fuels; thirdly, the development of zero emission flight; fourthly, the creation of successful carbon markets and investment in greenhouse gas removals to compensate for residual emissions in 2050; fifthly, influencing consumers by preserving the ability for people to fly whilst supporting consumers making sustainable aviation travel choices and sixthly, addressing non CO2 impacts by working closely with academia and industry to produce improvements to the science and potential mitigation of non CO2 impacts. The detail in relation to these strategic objectives was set out in the document.

45. In relation to the theme of markets and removals, at paragraph 3.46 of the JZS references were made to the UK Emissions Trading Scheme, which covers all domestic flights in the UK as well as flights from the UK to EEA and Gibraltar, and references were made to the proposals to increase the ambition of that scheme by aligning its carbon cap with a clear net zero trajectory and carbon price assumptions illustrating the potential costs faced by airline operators in the future. The JZS also references the UK Emissions Trading Scheme strategy seeking to facilitate interaction between itself and international schemes such as the Carbon Offsetting and Reduction Scheme for International Aviation ("CORSIA"). The JZS explains that the UK Emissions Trading Scheme covered 44% of all commercial flights to and from UK airports and 27% of emissions from UK departing flights based on 2019 emissions. The JZS also records that from 2023 a total of 114 states had volunteered to participate in CORSIA representing nearly 80% of international aviation activity and the strategy was aiming to have the legislation for CORSIA in place by 2024 thereby covering the majority of international flights departing the UK. The JZS also rehearsed the investments proposed in respect of greenhouse gas removals and the development of carbon capture, usage and storage clusters designed to capture and store between 20-30MtCO2 by 2030.

46. In relation to the theme of influencing consumers the JZS addresses growth in the aviation sector in the following terms:

> "3.56 The **Government remains committed to growth in the aviation sector and working with industry to ensure**
>
> **a sustainable recovery from the pandemic.** In our recently published strategic framework for the future of aviation – 'Flightpath to the Future' – we recognise that airport expansion has a role to play in realising benefits for the UK through boosting our global connectivity and levelling up. The framework is clear that we continue to be supportive of airport growth where it is justified, and our existing policy frameworks for airport planning provide a robust and balanced framework for airports to grow sustainably within our strict environmental criteria. We have also been clear expansion of any airport in England must meet our climate change obligations to be able to proceed.
>
> 3.57 Our approach to sustainable growth is supported by our analysis (set out in the supporting analytical document) which shows that **we can achieve Jet Zero without the Government**

> **needing to intervene directly to limit aviation growth**. The analysis uses updated airport capacity assumptions consistent with the latest known expansion plans at airports in the UK. The analysis indicates that it is possible for the potential carbon emissions resulting from these expansion schemes to be accommodated within the planned trajectory for achieving net zero emissions by 2050, and consequently that our planning policy frameworks remain compatible with the UK's climate change obligations.
>
> 3.58 Our economy-wide Net Zero Strategy considers that, even if there was no step- up in ambition on aviation decarbonisation (e.g. through our "continuation of current trends" scenario), we would still be able to achieve net zero by 2050. However, this is not the approach we are taking: instead we are committing to ambitious action to reduce in-sector aviation emissions. Our "High ambition" scenario, which we will use to monitor the sector's progress, has 19.3 MtCO2e residual emissions in 2050, compared to 23 MtCO2e in the Climate Change Committee's (CCC) Balanced Net Zero Pathway.
>
> …
>
> 3.61 **We will support airport growth where it can be delivered within our environmental obligations.** The aviation sector is important for the whole of the UK economy in terms of connectivity, direct economic activity, trade, investment, and jobs. Before COVID-19, it facilitated £95.2 billion of UK's non-EU trade exports; contributed at least £22 billion directly to GDP; directly provided at least 230,000 jobs across all regions of the country and underpins the competitiveness and global reach of our national and our regional economies. We are committed to enabling a green recovery of the sector, as well as sustainable growth in the coming years.
>
> The Government's existing planning policy frameworks, along with the Jet Zero Strategy and the Flightpath to the Future strategic framework for aviation, have full effect and are material considerations in the statutory planning process for proposed airport development."

47. The JZS sets out a five-year delivery plan setting out various policy commitments in relation to reaching net zero, and involving monitoring and review to ensure that the CO2 emissions reduction trajectory for aviation is being reached. Across a variety of themes policy commitments are identified and implementation approaches and delivery milestones are identified. These commitments include commitments in relation to the UK ETS and the implementation of CORSIA. In respect of airport growth, the JZS provides as follows:

> "**Policy Commitment.**

> We will support airport growth where it can be delivered within our environmental obligations.
>
> We will keep under review whether further guidance is needed to assist airport planning decision-making, with particular reference to environmental impacts.
>
> **Implementation approach and delivery milestones**.
>
> The Government's existing policy framework for airport planning in England – the Airports National Policy Statement (ANPS) and Beyond the horizon, the future of UK aviation: Making best use of existing runways (MBU) – have full effect, as a material consideration in decision making on applications for planning permission. Our analysis shows that it is possible to achieve our goals without the need to restrict people's freedom to fly.
>
> Applicants should engage with the relevant planning authority at an early stage of the planning process to agree an appropriate approach.
>
> Applicants should provide sufficient detail regarding the likely environmental and other effects of airport development to enable communities and planning decision-makers to give these impacts proper consideration.
>
> Planning authorities and applicants should consider all relevant policy, guidance and other material considerations that may assist appraisal for airport development proposals and decision-making. Applicants should clearly set out their approach and findings in an accessible way that can be easily understood by the general public and decision- makers. **We will keep under review whether further guidance is needed to assist airport planning decision-making.**"

48. Amongst the accompanying analytical material supporting the JZS was the table previously contained in the consultation document setting out the assumptions as to capacity in relation to various airports, and repeating the caveat that had been expressed in relation to the consultation document, namely that the assumptions did not represent any proposals for limits on future capacity growth at specific airports, nor did they indicate the maximum appropriate levels of capacity growth at specific airports for the purpose of planning decision making. They did not represent expected passenger numbers just the upper limit assumed for each airport as an input to the modelling process.

The Law.

49. In the present case there is no dispute that, by virtue of the scale of the interested party's proposals, section 23 of the Planning Act 2008 required the granting of a development consent order to authorise the proposals. By virtue of section 116 of the 2008 Act the

defendant was obliged to prepare a statement of his reasons in respect of the decision pertaining to the application.

50. The procedure in respect of the application is governed by the Infrastructure Planning (Examination Procedure) Rules 2010. As is evident from the matters set out above, for the purposes of the present case the examination had been completed and the examining authority had provided a written report to the defendant pursuant to rule 19 (1) and (2). The provisions of regulation 19(3) are as follows:

> "19. Procedure after completion of examination
>
> …
>
> (3) If after the completion of the Examining authority's examination the Secretary of State
>
> (a) differs from the Examining authority on any matter of fact mentioned in, or appearing to the Secretary of State to be material to, a conclusion reached by the Examining authority; or
>
> (b) takes into consideration any new evidence or new matter of fact, and is for that reason disposed to disagree with a recommendation made by the Examining authority, the [Secretary of State] shall not come to a decision which is at variance with that recommendation without –
>
> (i) notifying all interested parties of the Secretary of State's disagreement and the reasons for it; and
>
> (ii) giving them an opportunity of making representations in writing to the Secretary of State in respect of any new evidence or new matter of fact."

51. It is also evident from what has been set out above that the earlier decision of the defendant had been quashed. Rule 20 of the 2010 Rules governs the procedure following the quashing of the decision and provides as follows:

> "Procedure following quashing of decision.
>
> (2) Where a decision of the Secretary of State in respect of an application is quashed in proceedings before any court, the Secretary of State –
>
> (a) shall send to all interested parties a written statement of the matters with respect to which further representations in writing are invited for the purposes of the Secretary of State's further consideration of the application;
>
> (b) shall give all interested parties the opportunity of making representations in writing to the Secretary of State in respect of those matters."

52. The requirements of fairness in a context such as the present were set out by Lord Mustill in *R v Secretary of State for the Home Department Ex Parte Doody* [1994] 1 AC 531 at page 560 D2 to G as follows:

> "What does fairness require in the current case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification ; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest's fairness will very often require that he is informed of the gist of the case which he has to answer."

53. The extensive international scientific and political consensus in relation to the need to take action in respect of climate change is well established. Recognition of the need to take action is of longstanding in the UK, and the chosen mechanism to address these issues from the legal perspective has been the Climate Change Act 2008. This legal framework provides a target within section 1(1) of the 2008 Act to ensure that the net UK carbon account for the year 2050 is 100% lower than the 1990 baseline. The target of 100% was instituted by the Climate Change Act 2008 (2050 target amendment) Order 2019 with effect from the 27th July 2019.

54. In order to ensure that the target is met the 2008 Act provides within its architecture for a number of measures to reduce or remove greenhouse gas from the atmosphere. Section 4 of the 2008 Act imposes a duty on the defendant to set a carbon budget for periods of five years following on from the commencement of the Act. Section 5 of the 2008 Act makes provision for the level of the carbon budgets so as to ensure that the target contained in section 1 of the 2008 Act is met. Section 10 provides for a range of matters which must be taken into account in connection with the setting of carbon budgets which, alongside the state of scientific and technologic knowledge in relation to climate change and socioeconomic circumstances, include at section 10(2)(i) the estimated amount of reportable emissions from international aviation for the relevant budgetary period.

55. In order to assist the defendant section 32 and schedule 1 of the 2008 Act set up the Climate Change Committee ("CCC") which is comprised of members with specified expertise to reflect those matters which the defendant is required to take into account in setting carbon budgets. Section 34 of the 2008 Act places the CCC under a duty to advise the defendant in relation to the setting of a carbon budget prior to it being set. The CCC regularly reports to Parliament each year providing its views on whether or not the 2050 target will be met and the prospects for whether the carbon budgets that have been set are likely to achieve that objective.

56. Reporting obligations are placed on the defendant in relation to the performance achieved against each carbon budget along with a requirement to report in circumstances where the carbon budget has been exceeded on the proposals and policies are designed to compensate in future periods for such an excess.

57. In addition to the tool of carbon budgeting, the 2008 Act also contains provisions, in particular within section 44, to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities to reduce such emissions or remove greenhouse gases from the atmosphere. Consequent upon the United Kingdom's withdrawal from the EU, the provisions of the 2008 Act have been used to establish a United Kingdom emissions trading scheme which has been referenced above in the context of the JZS. Additional provisions within the framework of the 2008 Act relate to powers in respect of waste generation and a requirement to report upon the impact of climate change and also report in relation to adaptation.

58. As set out above the detailed legal architecture of the provisions for addressing climate change are now established and understood. Aspects of the 2008 Act have been subject to the court's scrutiny, for instance in *Elliott-Smith v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633, in relation to the UK emissions trading scheme and its compliance with section 44 of the 2008 Act, and *R(on the application of Friends of the Earth Limited) v Secretary of state for Business, Energy and Industrial Strategy* [2023] 1 WLR 225; [2022] EWHC 1841 in relation to the question of whether or not the publication of the Net Zero Strategy complied with the requirements of sections 13 and 14 of 2008 Act, which contain a duty to prepare proposals and policies for the purpose of meeting carbon budgets and a duty to report on those proposals and policies.

59. In order to meet the requirements of the 2008 Act, in addition to the tools and techniques which are embedded within that legislation it is, of course, open to the defendant to publish additional policies and proposals addressing the need to meet the target contained within section 1 of the 2008 Act. It appears that the DTP and the JZS were this kind of policy intended to bolster and reinforce the requirement of the 2008 Act to meet the target under section 1(1).

60. As set out above, in addition to the UK Emissions Trading Scheme an international scheme, CORSIA, has been established and which as set out above is intended to facilitate the reporting and offsetting of aviation emissions not covered by the UK Emissions Trading Scheme. The Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021 is now in force and was made under powers conferred by the Civil Aviation Act 1982. This order notifies the International Civil Aviation Organisation of the UK's participation in CORSIA.

Ground 1: Submissions and Conclusions.

61. The first strand of the arguments in relation to ground 1 is the contention that it was procedurally unfair for the defendant to rely so heavily upon the Azimuth report without being provided with the underlying evidence or permitting the scrutiny of that evidence by interested parties. The claimant submits that the requirements of fairness in these circumstances must be understood by the context in which this issue arises. The particular aspect of the context which the claimant focuses upon were that the defendant's conclusion on need was contrary to that which had been reached both by the ExA and IA, who, in the case of the ExA, concluded that the absence of the underlying interview material and other evidence required the discounting of the Azimuth report in reaching their recommendation.

62. In addition, the defendant reached his own conclusion based upon need relying heavily on the Azimuth report which had been previously discounted. In those circumstances the Azimuth report was of critical importance to the ultimate conclusions of the defendant. It followed therefore that there was a particularly acute need in the interests of fairness for the underlying evidence which supported the qualitative assessment to be disclosed. In the absence of that material being disclosed the claimant and other interested parties were hamstrung in their ability to address the validity of the report's conclusions and persuade the defendant that it was not a reliable basis for decision making.

63. In response the defendant and the interested party contend that there was no requirement for the interested party or Azimuth to furnish the transcripts of the interviews and other commercially sensitive and confidential information which underpinned the Azimuth report in order for it to be relied upon and play a part in the decision-making process. Plainly it was a material consideration, and the weight which was to be attached to it was a matter for the defendant and the decision maker. The weight given to that report by the decision maker is a matter which could only be challenged on the basis that the decision to give it the weight that it was given was *Wednesbury* unreasonable.

64. Having considered the rival submissions which have been made in relation to this aspect of the claimant's case I am unable to accept that there was any breach of the requirements of fairness in the context of this particular case by reason of the failure to provide the interview transcripts or other material underpinning the Azimuth Report. There was in my judgment nothing to prevent the interested party placing reliance on the Azimuth report without the disclosure of the information upon which it was based, and which was commercially confidential.

65. The Azimuth report was capable of amounting to a material consideration in the decision-making process, particularly given that it was pertinent to an important issue in the case namely the question of demand and need. There is nothing to preclude expert evidence being provided in a decision-making process of this kind in which some of the underlying data or evidence is not disclosed on the grounds that it is commercially confidential and cannot be put into the public domain. There are no provisions which could require the defendant to insist upon production of that underlying material; by the same token it is not contended by the claimant that in the absence of that material the Azimuth report should be treated as irrelevant. The essential issue which arises when an expert report of this kind is submitted, and underlying evidence is withheld on the basis of confidentiality, is the question of the weight which can be attached to such a

report in the absence of the material which underpins some of the judgments and conclusions which have been reached. It was the question of the weight which could be given to the report in these circumstances upon which the ExA focused. In his turn, the defendant also focused upon what weight could be attached to the Azimuth report in the absence of the underlying evidence. The defendant engaged with the impact of the material which had been omitted and reached the conclusion that it did not in his judgment affect the weight which he proposed to afford the report. The defendant provided reasons for that conclusion.

66. Ultimately, it was for the defendant to conclude what weight could be attached to the Azimuth report and in the light of the observations which he reached it is clear he concluded that significant weight could be attached to the Azimuth report's analysis. He concluded that the withholding of the commercially sensitive material from the planning process had been justified and that details of those organisations and market players who had been interviewed had been identified. The Azimuth report had been submitted and available for scrutiny along with the other material comprised in the application. In the circumstances fairness did not require additional disclosure of the kind suggested by the claimant to have been required. I am not satisfied, therefore, that fairness required the provision of this material.

67. The second strand of the arguments under ground 1 relates to the late production of the IBA report, and the contention that fairness, and indeed the 2010 Rules, required the defendant to provide the opportunity for representations to be made upon the IBA report. Firstly, as to common law fairness, the claimant submits that the context of this case is that the IBA report was produced late in the process as part of the second round of consultation. The claimant draws attention to the heavily structured nature of the development consent order process, and the orderly exchange of documentation and answers to questions under which the procedure occurs. As a result of the IBA report having been produced at the second stage, and as a consequence of the narrow range of issues about which the third stage of consultation in respect of the determination process occurred, the claimant submits that fairness required that an opportunity be afforded for observations to be made on what was a new and substantial piece of evidence.

68. Turning to the requirements of the 2010 Rules, the claimant draws attention to the strictures of rule 20 of the 2010 Rules, which require representations to be focused upon the matter specified by the defendant. Secondly, it is submitted that in this case there was a breach of the requirements of rule 19(3)(b) on the basis that the defendant took into consideration new evidence in the form of the IBA report, and was for that reason disposed to disagree with the recommendation made by the ExA in particular in respect of need, and did not notify the interested parties of that disagreement and the reasons for it and give them an opportunity to make representations in writing in respect of it.

69. In response the defendant and the interested party submit that, whilst there was no express invitation to comment on the IBA report, equally there is no procedural requirement for such an invitation under rule 20. In short, there was nothing to prevent the claimant or indeed any other party to the process making representations to the defendant about the IBA report after it had been received. Not only did the provisions of rule 20 not require such provision to be expressly advertised, the proper understanding of the defendant's correspondence in relation to the consultation process which has been set out above contemplated that there would be representations made, and subsequently published, outside the individual stages of the consultation.

70. So far as rule 19 of the 2010 Rules is concerned the defendant and the interested party submit that this provision was simply not in play. Rule 19, as the heading for the rule makes clear, pertains to the situation where the ExA has submitted its report to the defendant, but the defendant has yet to reach a decision: it therefore applies to the "procedure after completion of examination". It is intended to address the situation where the participants will be unaware of the ExA's report, and the defendant differs from the ExA's conclusion in respect of an issue based upon new evidence or new factual material. In that particular situation rule 19(3) provides the opportunity for participants to be informed of the nature of the disagreement, and provides them with the opportunity of addressing it. In the present instance the conclusions of the ExA were clear and had been published. This was a situation to which rule 20 applied, namely the defendant was engaged in the "procedure following quashing of decision". As such, rule 19 did not apply. Even if it did, on the face of the decision the defendant did not differ from the recommendation of the ExA in relation to need on the basis of the IBA report, but rather on the basis of his appraisal of the weight to be attached to the Azimuth report, which was not new material.

71. Dealing firstly with the contentions in relation to the 2010 rules, I accept the submissions made by the defendant and the interested party that a distinction needs to be drawn between rule 19 and rule 20, in particular in the light of the headings of the two rules in question. On the basis of the headings and the provisions of the rules it is clear that rule 19 applies after completion of the examination and the submission of the ExA's report to the defendant prior to decision making. By contrast rule 20 is specific to addressing the procedure following the quashing of a decision. It is self-evidently the case that in present circumstances the defendant was addressing a redetermination procedure following his decision having been quashed.

72. The rules address two quite separate processes which arise in two quite separate factual contexts. In the situation governed by rule 19 the parties would be unaware of the ExA report's contents and recommendations, and will have only had an opportunity to comment upon the issues and matters arising within the context of the exchange of submissions and materials orchestrated by the examination process. That will not have featured the views of the defendant or, alternatively, new evidence or facts which were not part of the examination process, but which have the potential to lead the defendant to a disagreement with the ExA's recommendation. In those circumstances it is clear why rule 19 would provide the opportunity for those matters to be put in the public domain and for the parties to have a chance to comment upon them. By contrast the situation addressed by rule 20 is one in which the ExA's report will be in the public domain, and the process which is envisaged under rule 20(2) is one which is focused on particular issues about which the defendant requires further information. Thus, in my judgment rule 19 is not of application at the stage of proceedings after an initial decision has been the subject of a quashing order. The reference in paragraph 265 of the decision to rule 19 is an error, but not one which in my judgment was material so as to justify the grant of relief to the claimant.

73. Even were I wrong in relation to that conclusion, I am nonetheless satisfied that the submissions made by the defendant and the interested party on the application of rule 19(3) are correct. Even were one to construe rule 19 as applying to this stage of the process, as it was after the completion of the ExA's examination, what is clear on the face of the defendant's conclusions is that it is the weight which he attached to the

Azimuth report which has led to him rejecting the ExA's recommendation. Whilst reference is made in the decision to the IBA report, when the defendant's conclusions are scrutinised it is clear that the reason he was disposed to disagree with the ExA's recommendation was not any new evidence or new facts but rather his appraisal of the weight to be attached to the Azimuth report.

74. Turning then to the contention that there was procedural unfairness arising from the failure to afford the opportunity for the claimant to make the points which he wished to make about the IBA report, in my view that is a contention which cannot be sustained in the light of the correspondence and the evidence. As a preliminary point, as was observed during the course of argument, the consultation process which the defendant constructed and adopted by virtue of the correspondence of 11th June 2021, 30th July 2021 and 11th March 2022 was not perfect. It contained the potential flaw that correspondence could have been received by the defendant outside the three stages of the consultation in the form of redetermination correspondence (as defined in those letters) which would not be published until the end of the determination process. Thus, it could have been possible for a person to submit a representation in between the rounds of consultation to the disadvantage of the applicant or another interested party, and about which they would be quite unaware until that redetermination correspondence was published at the end of the determination process alongside the new decision letter. It is possible to envisage unfairness which could result in that context. However, that flaw in the defendant's consultation process firstly, would not be sufficient to persuade me that the entire procedure following the quashing of the defendants first decision was unfair or, secondly, that there was any unfairness to the claimant in the particular circumstances of her case.

75. So far as this point is concerned, as Sullivan J (as he then was) observed in paragraph 62 of his judgment in *R(Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env LR29:

> "A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight, it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. This is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out."

76. Against this background Sullivan J concluded that the test of unfairness would depend upon the finding by the court "not merely that something went wrong, but that something went clearly and radically wrong". I accept that that is the correct test to apply in these circumstances. Having explored the issues during the course of argument I have no doubt that a better consultation process could have been devised, particularly in relation to the treatment of redetermination correspondence. However, my concerns in that respect fall far short of a conclusion that something had gone clearly and radically wrong with the structure of the consultation process which was undertaken in the present case.

77. The main point pertaining to the particular circumstances of the claimant, is also of significance. I accept the submission made by the defendant and the interested party

that there was nothing in the correspondence which precluded the claimant from making any submission at any time to the defendant, and in particular making any representations about the IBA report after it had been published at the close of the second round of consultation. Indeed, each of the items of correspondence made plain that representations were being received outside the specified stages of the consultation process and would be published later as part of the redetermination correspondence. Thus, the opportunity existed for the claimant to make representations if she so wished. Indeed, it appears from the correspondence between Five10Twelve limited and the Planning Inspectorate that this submission is reflected in the Planning Inspectorate's understanding that this was the position. Thus, representations could have been made to the defendant, albeit that no specific further round of consultation or invitation to comment was published. In the circumstances I am not satisfied that there was unfairness to the claimant as is submitted on her behalf.

78. The third theme of ground 1 is the claimant's contention that the decision reached by the defendant was irrational or *Wednesbury* unreasonable. The basis of this contention is that the defendant sought submissions in his statement of matters upon the question of quantitative need. Having raised that as a matter about which he required particular assistance, the decision which he subsequently published was one in which he placed substantial reliance not on quantitative need but on the qualitative need assessment which had been undertaken in the Azimuth report. In reaching this conclusion the defendant makes a mention of the additional quantitative material which was furnished from York Aviation and other sources relied upon qualitative material that had been provided far earlier in the process. In those circumstances the claimant submits it was not reasonably or rationally open to the defendant to reach the conclusions which he did in relation to need.

79. In response to these submissions the defendant and the interested party contend that an attack based upon irrationality in this context presents the claimant with a particularly high hurdle (see *R(Newsmith) v SSETR* [2001] EWHC 74 (Admin)). The defendant reached his decision as an exercise of judgment based upon a comprehensive analysis of the various strands of evidence that were before him in respect of the question of need. The defendant specifically stated that he had taken into account the various different approaches to forecasting which had been presented as part of the decision-making process and it was not necessary for him to specify each and every element of that material in turn. The overall judgment which was reached was one which was open to him.

80. My conclusions are as follows. The decision which the defendant had to reach in relation to demand forecasts and overall need required a judgment to be undertaken in respect of a variety of types of evidence before him. It is clear from the material that legitimate attempts to forecast demand could be undertaken by a variety of methodologies: the review of methodologies contained within the Azimuth report bears testimony to this. As an exercise of judgment based upon expert technical evidence there is in my judgment no doubt that the claimant faces a daunting task to persuade the court that the decision which was reached was one which was irrational.

81. The particular basis upon which the claimant contends that the defendant acted irrationally in the present case is that he asked in the Statement of Matters "whether the quantitative need for the Development has been affected by any changes since 9th July 2019", and then went on to determine the application relying heavily upon qualitative

need information. However, in my view it is clear that the Statement of Matters did not in any way preclude the defendant from relying upon any of the material which had been introduced to the decision-making process through the examination process. All of that material was still available and needed to be evaluated in his decision-making process.

82. Further, the terms of rule 20 do not give rise to any such limitation. The purpose of rule 20(2)(a) is simply to identify matters "with respect to which further representations are invited". Those will not be the matters which will necessarily be determinative of the defendant's decision, but are matters which the defendant draws attention to as topics upon which further representations are invited. The nexus which the claimant seeks to suggest might exist between the contents of the Statement of Matters and the basis for decision making does not, therefore, exist.

83. It is clear that the lengthy decision which the defendant provided both rehearsed as appropriate the nature of the evidence which was before him, and also explained the reasons why he afforded greater weight to some elements of that evidence than to others. There is nothing in the substance of the decision which demonstrates that the judgments which the defendant reached in relation to the competing evidence in relation to need were irrational or not open to him. I am unable to accept that the high threshold which it would be necessary for the claimant to demonstrate has been established in the present case.

84. The third strand of ground one relates to the contention that the decision reached by the defendant was unlawful because he failed to have regard to a material consideration. In particular, it is submitted that the defendant failed to have regard to the potential for spare capacity at other airports and regarded that as irrelevant. The submission is founded upon, in the first instance, the ministerial briefing which is set out above. In particular the claimant draws attention to the observations made in respect of capacity in that briefing where it observes that although the ExA and the IA took into account capacity at other airports that could be available in future "such capacity is not material to this decision as there is no certainty such capacity will come forward in the future". It is submitted that in effect the defendant failed to take account of capacity at other airports in this context. That was an error since such capacity was material. Building upon this submission the claimant draws attention to the draft decision letter which accompanied the ministerial briefing. That draft letter referred at paragraph 97 to the view of the defendant that he was "only able to attach very little weight to capacity through applications that have yet to come forward". Further at paragraph 102 of the draft decision letter the defendant is recorded as considering that the capacity at other airports "is not material to the Secretary of States decision on this application".

85. The claimant draws attention to the fact that there were changes between the draft letter which accompanied the ministerial briefing and the decision letter which was ultimately published. At paragraph 97 the decision letter again records the defendant's view that he is not able to attach weight to applications that have yet to come forward because there is no certainty such applications would be delivered. At paragraph 102 of the final decision letter the redrafting records that capacity at other airports "is not required to be taken into account by policy, and it is not in the Secretary of States view otherwise obviously material to the Secretary of States decision on this application for the reasons set out above principally, the lack of any certainty such potential capacity will ever come forward". Paragraph 102 of the final decision letter goes on to observe that "to

the extent that possible capacity is legally material, the Secretary of State gives no significant weight to it for the same reasons."

86. The claimant draws attention to the ministerial briefing and these changes between the draft decision letter and the final decision letter to submit, firstly, that the defendant was incorrectly advised, in that he was told that he could not take a potential increase in capacity at other airports into account. This was incorrect and legally defective. The claimant submits that the reality of the problem may have been recognised in the revised text, in particular at paragraph 102, but this draft letter was changed after the defendant had made his decision and he was not asked to reconsider the revised position set out in the final letter. Thus, his decision was based on the erroneous position adopted in the briefing document and the draft decision letter.

87. In response to these submissions the defendant and the interested party observe that it does not appear the claimant contends that the final decision letter was in error in respect of its treatment of potential future capacity at other airports. In respect of the briefing and the text of the draft letter, on the basis of which the defendant reached his decision, the defendant and the interested party submit that the briefing document and the draft letter need to be read together and as a whole. Thus, the observations in the briefing document about capacity not being material to the decision must be understood in the context of the draft decision which provided the full explanation to the defendant of that position. Taking account of what is set out in paragraph 97 of the draft decision letter, the view which is being articulated is not that future additions to capacity are irrelevant, but rather they should carry "very little weight" as a result of the fact that they have yet to come forward. The draft decision letter needs to be read as a whole, and the observations in paragraph 102 of that document rely on that explanation to justify the conclusion that capacity was not material to the decision on the basis that it was a matter which attracted very little weight.

88. Having assessed these competing submissions I am satisfied that there is no substance in the claimant's argument. I accept the submission that the legality of the defendant's decision ought to be assessed in this context on the basis of the material that was placed before him to reach his conclusion on the application. That material did not include the final version of the decision letter following further thoughts in relation to its drafting. The court's conclusions are therefore to be reached on the basis of the briefing document and the draft decision letter. In my view it is appropriate to read all of this documentation as a whole to see whether it discloses legal error, rather than alighting upon certain extracts of it taken out of the context of the complete documentation.

89. It is now well established that in essence there are three kinds of potential material consideration when a public law decision of this kind is being made. The first kind of material considerations are those which are mandated by the statutory power which is being exercised. The second kind are those which, whilst not mandated by the statutory framework, are nonetheless obviously material to the decision which is being made. Whether or not they are obviously material depends upon the specific factual and policy context in which the decision is being reached. The third variety of material considerations are those which it would be perfectly lawful for the decision maker to take into account, but which are neither mandated nor obviously material to the decision. It is for the decision maker to determine, within the bounds of making a rational decision, whether it is necessary to take the consideration into account. The explanation for this approach is set out in the judgment of Lord Carnwath in *R(on the*

application of Samual Smith Old Brewery (Tadcaster) and others v North Yorkshire County Council [2020] UKSC 3, at paragraphs 29 to 32.

90. The second important piece of context for addressing arguments in relation to material considerations is the important distinction to be drawn, as was drawn by Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, between the existence of a material consideration and the weight to be attached to it. As Lord Hoffmann observed in his speech in that case there is a clear distinction between whether something is a material consideration and the weight that should be attached to it in making a decision. The question of whether something is a material consideration will be a question of law, whereas the question of the weight to be attached to it is a question of judgment. Provided a decision maker has had regard to all of the lawfully material considerations in a decision it is entirely a matter for the decision maker what weight to give those material considerations including giving them no weight at all. Lord Hoffmann also addressed a subsidiary argument, presented to the court in that case by Mr Roy Vandermeer QC, that every material consideration "must be given some weight, even if it was very little". That submission was rejected by Lord Hoffmann, who characterised the distinction between very little weight and no weight at all as "a piece of scholasticism which would do the law no credit".

91. In my judgment, when the briefing document and the draft letter are read as whole it is clear that the recommendation of the defendant's officials, which he adopted, was that the potential for airport capacity expansion elsewhere was something to which very little weight could be attached, and was not obviously material to the decision for the reasons relating to the uncertainties and contingencies upon which any expansion depended. It follows that I am not satisfied that the claimant has established that the defendant was advised he could not take additional airport capacity into account and it was irrelevant. Rather the briefing and draft decision presented to him, and which he accepted, set out that very little weight could be attached to capacity through applications which had yet to be brought forward on the basis that there was no certainty that any of them would materialise. That was a conclusion which was open to the defendant on the basis that it acknowledged and considered the question of capacity at other airports, but concluded for the reasons that the defendant gave that very little weight could be attached to it. In those circumstances I am unable to accept that there was any illegality in the approach presented to the defendant and adopted by him in the ministerial briefing and the accompanying draft decision letter.

92. It follows for all of the reasons which have been set out above ground 1 of this application must be dismissed.

Ground 2.

93. The claimant's ground 2 relates to the defendant's consideration of climate change issues in reaching the final decision to approve the application. As noted above, the conclusion of the ExA was that in relation to the wider impacts of greenhouse gas emissions, and in the light of the changes to the Climate Change Act 2008 made in 2019, moderate weight should be afforded in the case against approval for the development consent order in the overall planning balance. This was in the context of the assessment of the development's carbon dioxide contributions of 730.1Kt CO2 per annum, and an aviation carbon target of 37.5Mt CO2 for 2050 of which the

development's contribution would have formed 1.9%. These figures were set out at paragraph 148 of the defendant's decision.

94. The claimant makes two submissions in relation to the issue of climate change and the way in which it was ultimately addressed in the defendant's decision under challenge. The first submission is that, apart from a reference in paragraph 145 of the decision letter, the defendant makes no mention of the sixth carbon budget pursuant to the 2008 Act, and the implications for the development of the adoption of the sixth carbon budget. This submission is made having particular regard to the advice from the CCC in their report of December 2020 given in the context of the sixth carbon budget. This advice was that there should be no net expansion of UK airport capacity unless that sector is on track to sufficiently out perform its net emissions trajectory and the additional demand can be accommodated.

95. The claimant draws attention to the fact that in the decision letter the defendant changed the stance which he had taken in the first decision letter in which he accepted the view of the ExA, to one in the second decision letter in which he reduced the weight to be afforded to this consideration from moderate weight against the development to one of "neutral weight at the most". The only basis for the defendant reassessing this issue as set out in paragraph 149 of the decision was his reliance upon the DTP and the JZS.

96. The claimant submits that this reliance upon the DTP and the JZS was unjustified and in error for the following reasons. Firstly, as set out above, the modelling work that was undertaken for the JZS and relied upon in its consultation stages did not include modelling of capacity expansion at Manston Airport. Thus, the conclusion of that document that net zero could be achieved did not include within its assumptions any potential expansion of Manston Airport. As such, the defendant left out of account a material consideration in reaching his conclusion namely that the JZS was not predicated on any expansion occurring at Manston Airport.

97. The second point raised by the claimant is that the JZS is based upon a number of general, aspirational and untested proposals and assumptions which do not provide any form of robust basis for decision making let alone a decision to go behind the assessment made by the ExA that moderate weight should be attached to climate change related issues in reaching this decision.

98. In answer to these submissions the defendant and the interested party observe firstly, that the defendant had clear and express regard to the sixth carbon budget, including explaining the nature of the changes arising on its adoption, in paragraph 145 of the decision letter. This provided the context for the conclusions which the defendant reached, alongside the earlier setting out in the decision of the material in relation to new policies which had emerged since the earlier decision in particular in the form of JZS, as well as reciting the conclusions of the ExA including the scale of greenhouse gas emissions forecast to be produced by the operation of the development. The defendant and the interested party observe that the defendant clearly explained that the change in his stance between the first decision letter and the second was predicated upon the emergence of new and specific policy designed to ensure that both the net zero target was met, and that airport growth could occur where it was otherwise justified and sustainable.

99. The defendant and the interested party submit that the measures which were set out in JZS were coherent and accompanied by the provision for five-year review and annual monitoring in relation to progress against the relevant targets. Part of the JZS included the engagement of the UK Emissions Trading Scheme and CORSIA, as well as the range of other initiatives to ensure reductions in greenhouse gas emissions in the aviation sector. Against that background the defendant was perfectly entitled to rely upon those newly adopted policies as a justification for his conclusion that there would be an acceleration of decarbonisation in the aviation sector so as to ensure that the targets for that sector and the legislated carbon budgets could be met without the direct limitation of aviation demand.

100. So far as the claimant relies upon the omission of Manston Airfield from the modelling, the defendant and the interested party submit that this was to fail to understand the purpose for which the modelling was undertaken. The modelling was not specific or definitive as to where airport expansion would occur, but rather it was, firstly, an aid to decision making in the formulation of the wider policy, secondly, predicated on a worst-case potential forecast as well as, thirdly, and importantly, undertaken both without obligation to those expansions which were included in the modelling or prejudging any other applications which might come forward for consideration. Thus, the defendant and the interested party contended that there was no substance in the claimant's ground 2.

101. My conclusions in relation to these submissions are as follows. Dealing firstly with the claimants point that Manston Airport was excluded from the modelling undertaken for the purpose of preparing JZS, it is in my view important to see the role of that modelling in context. As was observed in the consultation document, the capacity assumptions within the modelling were not intended to prejudge the outcome of any future planning applications but were taken in line with a precautionary approach and were not to be regarded as a prediction of what the defendant thought would happen in respect of future capacity expansion. They represented a "reasonable upper bound of possible future airport capacity levels and therefore associated emissions, in order to better test the potential of measures to meet net zero." Thus, once the modelling is seen in context, the omission of Manston Airfield from that modelling was not of significance in relation to the decision that the defendant was taking. The modelling was simply a tool to assess the validity of the policy and nothing more. In that connection, therefore, I am not satisfied that the defendant left out of account a material consideration as claimed by the claimant.

102. Turning to the question of the sixth carbon budget, in my view there was no error in the decision reached by the defendant. The change in the defendant's stance, as well as his approach to the sixth carbon budget, were both addressed and adequately explained in the decision which he reached.

103. The claimant variously submits that the defendant failed to address, in the light of this being amongst the specific matters identified in his Statement of Matters, what regard was to be had to the sixth carbon budget and provided no analysis of the implications for the sixth carbon budget in the decision. There was a failure to have regard to it as a material consideration and a failure to grapple with the quantified adverse effects of the scheme. The policies relied upon were, aspirational and their success inherently uncertain however, these points ultimately amount in my view to disagreements with the merits of the approach with the defendant took.

104. The approach of the defendant in respect of the sixth carbon budget is in my view clearly but succinctly set out in paragraph 149 of the decision. The defendant relied upon the new policies, and in particular DTP and JZS, as measures that would accelerate decarbonisation in the aviation sector and ensure carbon budgets were met without directly limiting aviation demand. The defendant thus relied directly upon those new policies to reach his conclusion that this was an issue to which neutral weight should be afforded. In my view, as a matter of law, that was a permissible approach. The defendant was entitled to rely upon his own policies, which had not been the subject of any successful legal challenge, to deliver the outcome for which they were designed, namely achieving the carbon budgets which had been and were to be legislated without impacting upon aviation demand.

105. The defendant relied upon those policies, and in particular the JZS, in the context for which they had been designed. That context starts with the legislative architecture of the 2008 Act and the provisions set out above designed to ensure that its aims are achieved. The context also included policies identified by the defendant to support the achievement of the objectives in the 2008 Act without precluding, for instance, further airport expansion. The policies, and in particular JZS, are multifaceted, and include (consistently with the legal architecture) the reliance upon other legislative measures such as the UK Emissions Trading Scheme and CORSIA, along with the complimentary measures which have been described above in the extracts from the document. In my judgment it was not legally inappropriate or incorrect for the defendant to rely upon his own policies designed to enable achievement of carbon budgets by the aviation sector to reach the conclusion that in the light of those new policies the question of greenhouse gas emissions and climate change could properly be regarded as neutral in the overall planning balance. I am therefore unable to accept the claimant's submissions in relation to ground 2.

Conclusion.

106. For all of the reasons set out above I am not persuaded that either of the claimant's grounds are made out in substance and therefore this application for judicial review must be dismissed.