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Case No: CO/3477/2012, CO/3467/2012,
CO/3635/2012, CO/3605/2012
& CO/3732/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2013

Before :

MR JUSTICE OUSELEY

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Between : THE QUEEN on the application of

(1) BUCKINGHAMSHIRE COUNTY COUNCIL and Others
(2) HS2 ACTION ALLIANCE LIMITED
(3) HEATHROW HUB LIMITED and Another
(4) HS2 ACTION ALLIANCE LIMITED and Others
(5) AYLESBURY PARK GOLF CLUB LIMITED and Others **Claimants**

- and -

SECRETARY OF STATE FOR TRANSPORT **Defendant**

- and -

HIGH SPEED TWO LIMITED **Interested Party**

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- -

Ms Nathalie Lieven QC and Ms Kassie Smith (instructed by **Harrison Grant Solicitors**) for the **First Named Claimants**
Mr David Elvin QC and Mr Charles Banner (instructed by **SJ Berwin LLP**) for the **Second Named Claimants**
Mr Rupert Warren QC (instructed by **Nabarro LLP Solicitors**) for the **Third Named Claimants**
Mr David Wolfe QC (instructed by **Leigh, Day & Co Solicitors)** for the **Fourth Named Claimants**
Mr David H Fletcher (instructed by **Sharpe Pritchard**) for the **Fifth Named Claimants**
Mr Tim Mould QC, Mr James Maurici, Ms Jacqueline Lean and Mr Richard Turney (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 3rd, 4th, 5th, 6th, 7th, 10th, 11th, 12th, 13th and 17th December 2012

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Approved Judgment

MR JUSTICE OUSELEY :

Introduction

1. These five claims, which were heard together, concern High Speed Two, HS2. This is the proposed new high speed rail network connecting London to Birmingham, and then on to Leeds and Manchester, in a second phase. This would create what for obvious reasons is known as the Y Network. It might later extend to Glasgow and Edinburgh. It would terminate in London at Euston Station. The first phase also includes, in addition to the Birmingham terminus, the junction north of Lichfield which is the fork of the Y network. HS1 is the existing Channel Tunnel Rail link from St Pancras. The first phase of HS2 would include a direct link through to HS1. The first phase of HS2 would also be designed to permit the addition in Phase 2 of spurs to Heathrow, but its proposed alignment would not provide a line through Heathrow for all trains, and it could not be realigned in the future.

2. By way of brief introduction, the Government set up a National Network Strategy Group in November 2008, and in January 2009, the Secretary of State for Transport, SST, incorporated HS2 Ltd and commissioned it to develop proposals for a new high speed railway between London and the West Midlands and potentially beyond. HS2 Ltd (HS2L) is the vehicle used by SSTs to advise them on and eventually to promote HS2. It reported to Government in December 2009. The SST announced to Parliament in December 2009 that a White Paper would be published "setting out plans" which would include "route proposals, timescales and associated financial, economic and environmental assessments". This would be followed by "full public consultation".

3. The Command Paper "High Speed Rail" was published in March 2010, along with other reports. It set out the Government's "proposed strategy" for "the development of a core high speed rail network linking London to Manchester and Leeds via Birmingham" with northward high speed connections "from the outset". Wide consultation, a national debate, with a view to legislation was to follow.

4. The Coalition Government affirmed its commitment to a high speed rail network in May 2010; but it was to be achieved in phases because of financial constraints. During 2010 various route options were considered; the Government's preference for the Y network was announced in October 2010. In December 2010, the SST published the final preferred route for the London to Birmingham sections, and announced that full public consultation on the high speed rail strategy, and on the London to Birmingham route would start in February 2011.

5. The formal consultation was initiated in February 2011 by the paper "High Speed Rail Investing in Britain's Future", the Consultation Document. It was accompanied by an Appraisal of Sustainability, AoS, an Engineering Report and an Economic Case Report. There was also a Summary Consultation Document. The consultation period closed on 29 July 2011.

6. The Government announced its decisions on 12 January 2012 in a Command Paper "High Speed Rail: Investing in Britain's Future – Decisions and Next Steps", the DNS. The Summary of Decisions announced that there was "a compelling case for delivering a step-change in the capacity and performance of Britain's inter-city rail network", the high speed Y network was the best means of achieving that, and a phased approach with a hybrid Bill for each phase was necessary. There should be a direct link to the HS1 line to connect with the Channel Tunnel in Phase 1, and a direct spur to Heathrow Airport in Phase 2. The route corridor for the London to Birmingham section proposed in the Consultation Document of February 2011 was the best option but certain alterations to the route itself should be made. A package of measures was set out in another document, the "Review of Property Impacts", to assist those affected by blight, but not covered by current statutory provisions; it did not include a bond-based property purchase scheme.

7. Those are the decisions under challenge in these actions. Buckinghamshire County Council and fourteen other local authorities, including Warwickshire County Council and the London Boroughs of Camden and Hillingdon, were fifteen of the eighteen members of a group of local authorities, 51M, opposing

HS2. I shall call them "the Bucks CC Group". They challenge the decision on the grounds:

> (1) that the decision to promote HS2 by way of a hybrid Bill in Parliament breaches the Environmental Impact Assessment Directive 2011/92/EU;
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> (2) that the decision to proceed with Phase 1 without carrying out a cumulative impact assessment of Phase 2 also breaches that Directive; trans-boundary assessments were also required;
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> (3) that the decision to proceed required a Strategic Environmental Assessment under the S.E.A. Directive 2001/42/EC;
>
> (4) that the decision to proceed breached the Habitats Directive 92/43/EEC;
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> (5) that the consultation process had been unlawful because of a) an insufficiency of details about the routes north of Lichfield, b) a failure to reconsult with them over reports obtained about an alternative solution they promoted, c) a failure to provide certain data supportive of their case, d) a failure to reconsult affected individuals significantly disadvantaged by post-consultation changes;
>
> (6) that the decision ignored material considerations or was irrational in respect of a) underground line capacity through Euston, b) the link between HS2 and HS1 and c) the Heathrow spur;
>
> (7) that the decision failed to comply with the public sector equality duty in s149 Equality Act 2012, with a late attempted variant allegation of indirect discrimination under s19 of the Act, principally because of the effect of the redevelopment of Euston Station to the west on an ethnic minority community.

8. High Speed 2 Action Alliance Ltd, HS2AA, is a not for profit organisation working with over 70 affiliated action groups and residents' associations opposed to HS2. It brought two claims with different Counsel and solicitors.

9. Its general claim, CO/3467/2012, challenged the decision on the same basis as the Bucks CC Group's grounds 1, (use of hybrid Bill process), 2 (absence of cumulative impact assessment), 3 (breach of strategic Environmental Assessment Directive), 4 (breach of Habitats Directive), and 5 (the lawfulness of the consultation process). It also said that the SST had unlawfully failed to take into account the consultation response of Heathrow Hub Ltd, but as HHL was itself a Claimant, HS2AA adopted its arguments. It took the lead however on the alleged breach of the SEA and Habitats Directives – the Bucks CC Group took the lead on its other grounds.

10. HS2AA's particular claim, CO/3605/2012, challenged the decision to proceed with HS2 and a general blight measure, on the ground that the consultation process provided insufficient detail for consultees to make informed responses in principle on one general measure, before a later consultation process on the details of that one measure. The basis upon which the decision was reached was different from the basis upon which consultation took place. A legitimate expectation as to the substance of the decision was breached. The process was also unfair because the SST had not conscientiously considered the detailed consultation response of HS2AA on this point.

11. Heathrow Hub Ltd, HHL, promoted an airport terminal at Iver on the Great Western Main Line, through which it would route HS2, providing interchange with Crossrail as well, connecting to Heathrow's on-airport terminals via a dedicated "airside" passenger transfer system. It owns various intellectual property rights in that project, and through Heathrow Hub Property Ltd owns real property necessary for its project.

12. First, it contended that the SST had fettered his discretion in relation to aviation strategy by ruling out HHL's proposal before consultation on his aviation strategy or had breached HHL's legitimate expectation of full consultation on that strategy. Second, and more importantly, the SST had ignored HHL's consultation response, instead adopting demonstrably flawed responses to the issues raised. It added to the SEA and Habitats grounds that Article 8 of Decision 661/2010 on

guidelines for the trans-European network (TEN-T) was also breached by non-compliance with those Directives. It adopted the hybrid Bill point made by other Claimants.

13. Aylesbury Golf Club Ltd, with two local farmers, challenged the decision on the grounds of unfairness in the consultation process. First, the route published in February 2010 had been altered to their detriment when the preferred route was consulted on in February 2011, as a result of discussions with the National Trust of which they were unaware. Second, their own alternative route had not been conscientiously considered, nor had HS2 been willing to discuss it with their consultant. The only consultation responses genuinely considered on routeing had been minor changes largely of mitigation.

14. These five claims were all heard together, so that fact and law relating to one could be considered in another.

15. It will be apparent from the issues which I have outlined that it is not my task in this judgment to reach a view one way or the other on the merits of HS2.

16. I shall deal with the issues in the following order, (relevant paragraph numbers in brackets):

(1) Strategic Environmental Assessment Directive: its application 17-106; voluntary assumption of duty 107; substantial compliance 108-185; relief 186-189; HHL's submissions 190-196;

(2) Habitats Directive: 197-242;

(3) lawfulness of the hybrid Bill procedure: 243-276;

(4) cumulative impact under the EIAD: 277-301;

(5) consultation challenge by the Bucks CC Group: 302-308; routes north of Birmingham 309-333; the reports on the OA 334-406; the passenger loading data 407-443; route amendments 444-482;

(6) public sector duty: 483-507;

(7) rationality challenge by the Bucks CC Group: 508-509; Euston Underground capacity 510-527; link with HS1 528-553; Heathrow spur 554-571;

(8) HHL's challenges: 572; aviation strategy 573-581; consideration of consultation response 582-643; others 644-652;

(9) Aylesbury Golf Club and Others' consultation challenge: 653-680;

(10) HS2AA's compensation challenge: 681; insufficiency of information 745-778; changing basis of decision 779-802; legitimate expectation 803-817; consideration of consultation response 804-844.

1A Should there have been a Strategic Environmental Assessment?

17. This issue depends on whether the DNS falls within the scope of the Strategic Environmental Assessment Directive, 2001/42/EC, SEAD, transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 SI No.1633. There is no relevant difference between them but since the Claimants relied on aspects which are not in the Regulations, such as the objectives of the Directive, I shall refer to the provisions of the Directive.

The Directive

18. The purpose of the Directive is to complement the environmental protection afforded by the assessment of the effects of projects required by the Environmental Assessment Directive 85/337/EEC. The SEAD applies at an earlier stage when the framework for the consideration of development consent for such projects was being set, and before options for significant change were precluded. Hence the objective of the Directive, as explained in Article 1, is to provide for a high level of protection of the environment, integrating environmental considerations into the preparation and adoption of plans and programmes, by ensuring that an environmental assessment is carried out of "certain plans and programmes which are likely to have significant effects on the environment".

19. By Article 2(a):

> "(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption through a legislative procedure by Parliament or Government, and
>
> - which are required by legislative, regulatory or administrative provisions;"

20. Article 3(1) provides that: "An environmental assessment, in accordance with Articles 4 to 9 shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects". Paragraph 2 of Article 3(1), so far as material, requires an environmental assessment to be carried out for "all plans and programmes":

> "(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management,

> water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or
>
> (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC." (The Habitats Directive)."

21. Annex I to the former EIA Directive, 85/337/EEC, includes the "construction of lines for long distance railway traffic". Article 3(1) also applies to other plans and programmes which set the framework for future development consents; paragraph 4. It was not at issue but that HS2 would require an Environmental Impact Assessment under the former and now under the new EIA Directive 2011/92/EU.

22. Paragraph 5 of Article 3 requires Member States, in deciding whether or not a plan or programme would be likely to have significant effects, to consider the criteria in Annex II. The criteria are in two parts: those relating to the plan or programme, and those relating to its effects. It is the first part which matters at this stage. It refers, so far as material, to the relevance of the degree to which the plan or programme sets a framework for projects, and the degree to which it influences other plans or programmes including those in a hierarchy.

23. The Claimants contended, through Mr Elvin QC, that the March 2010 Command Paper was the "administrative provision" by which the DNS, the "plan or programme", was required, either on the broad meaning of the word "required" as developed by the Court of Justice of the European Union, or because, in domestic and EU law, the March 2010 Command Paper had given rise to a legitimate expectation which meant that the DNS was "required".

24. The SST contended, through Mr Mould QC, that the DNS was not a "plan or programme" but a high level policy statement or decision to which the SEAD did not apply, nor was there any administrative provision which required it. It set no framework, nor was it subject to any formal procedures for preparation or adoption. All parties were agreed that there was no legislative or regulatory requirement for the DNS.

25. If an SEA had been required, Mr Mould contended that the Appraisal of Sustainability complied substantially with the Directive anyway. I will set out the provisions of the SEAD relevant to that contest later.

The interpretation of the Directive

26. I did not find the travaux preparatoires to which I was referred of great assistance in determining whether Mr Elvin was right about the scope of "plan or programme", or any other aspect of the SEAD. I accept that they show that the Directive is wider than the plans and programmes of town and country planning. Mr Elvin also pointed out that, at a time when that sort of limitation was part of the draft, the Explanatory Memorandum also said that the Directive did not apply to "the more general policy level of decision making at the top of the process…." Mr Mould also relied on that passage: "plans or programmes" were to be contrasted with "policy" to which the Directive did not apply, though it had at one time been envisaged that it would do so. Policy could be seen, according to the Explanatory Statement submitted to the European Parliament, as "the inspiration and guidance for action", whereas a plan was "a set of co-ordinated and timed objectives for the implementation of policy", and a programme was "a set of projects in a particular area".

27. Of rather greater importance were the decisions of the CJEU and of the UK Courts. The decision of the CJEU in *Terre Wallonne ASBL and Inter-Environnement Wallonie ASBL v Region Wallonne* [2010] ECR 1-5611 is of interest, not because it lays down any principles for it largely recites parts of the legislation, but because its conclusion, elaborated by the Advocate-General,

illustrates the broad approach taken to the concept of a "framework" in paragraph 2(a) of Article 3 and to the application of the SEAD. It covered a Water Code which would set the framework for the use of nitrogen fertilisers and the storage of manure to protect waters from pollution from run-off from agricultural land. It set a framework because it would be difficult for the authority to refuse an application for the relevant consent which complied with the criteria in the Code. It was not any less a framework because its application permitted of some discretion. Mr Mould also noted A-G Kokott's reference to "freely taken political decisions on legislative proposals" not being subject to the obligation to carry out SEA.

28. In *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* [2012] Env.L.R. 30, on 22 March 2012, the Fourth Chamber had to consider whether an SEA was required for the total or partial repeal of a land-use plan, which the domestic Order had provided for, but had not required to be produced. A-G Kokott proposed that, although this was a modification of a plan or programme, no SEA was necessary. This was because:

> "The word "required" in art.2(a) of directive 2001/42 must be construed as meaning that the definition does not include plans and programmes which are provided for by legislative provisions but the drawing up of which is not compulsory. Plans or programmes which may under certain conditions be prepared voluntarily are covered by that definition only in cases where there is an obligation to draw them up."

29. The Court however took a very different view. The question was whether a plan or programme was "required" by "legislative, regulatory or administrative provisions", under Article 2(a) of SEAD, when the plan or programme was "provided for by national legislation but whose adoption by the competent authority would not be compulsory". The applicants argued that a literal interpretation, which excluded from the SEAD those plans which were "only provided for" by legislative or other provision, would exclude plans from assessment which usually did have a significant environmental effect, and would lead to a discordant application of the Directive according to the various legal orders of Member States. The Belgian, Czech and UK Governments argued that the wording was clear and, in the light of the travaux preparatoires, only made measures that were required by the rule of law to be subject to the Directive. The

Commission suggested that a plan was "required" by legislative provision where there was "a legal obligation to prepare or adopt a plan".

30. The Court held:

> "29 The interpretation of art.2(a) of Directive 2001/42 that is relied upon by the abovementioned governments would have the consequence of restricting considerably the scope of the scrutiny, established by the directive, of the environmental effects of plans and programmes concerning town and country planning of the Member States.
>
> 30. Consequently, such an interpretation of art.2(a) of Directive 2001/42, by appreciably restricting the directive's scope would compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to this effect, *Valciukiene v Pakruojo rajono savivaldybe* (C-295/10) [2012] Env. L.R. 11 at [42]). That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures.
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> 31. It follows that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as "required" within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down."

31. There was an issue over whether the comments in the last part of paragraph 30 were of general application to the scope of "plan or programme", as Mr Mould contended, or merely particular to the circumstances of the case, as Mr Elvin contended. Mr Mould relied on *Nomarchiaki Aftodioikisi Aitoloakarnanias* Case C-43/10, 11 September 2012, which concerned whether a river diversion scheme which also provided the framework for the construction of dams fell within the SEAD. The judgment appears to have been affected by poorly focused factual material, but at paragraphs 95-96, the Court held:

> "It is not evident that the project concerned constitutes a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny (see, to that effect, Case C-567/10 *Inter-Environment Bruxelles and Others* [2012] ECR 1-0000, paragraph 30).
>
> "Consequently, the answer to the seventh question is that a project for the partial diversion of the waters of a river, such as that at issue in the main proceedings, is not to be regarded as a plan or programme falling within the scope of Directive 2001/42."

32. The A-G had also commented that if a specific project required development consent, an SEA under this Directive would not appear to be necessary, since project development consent was not itself a plan or programme; para.151. The requirements of this Directive and of the EIA Directive were largely parallel and if the one covered all that was required of the other, the Directive would be satisfied. She however had concluded that the plans were within the SEAD.

33. Mr Elvin submitted that the broad approach to the SEAD in *Inter-Environnement Bruxelles* was supported by Article 7 of the Aarhus Convention 1998, with which secondary Community legislation had to be interpreted harmoniously, and to which the SEAD was presumed by the Public Participation Directive 2003/35/EC and by the Common Position EC No 41/2002, to give effect. Article 7 contains a generally expressed obligation on the parties to provide opportunities for public

participation in the preparation of policies, plans, and programmes relating to the environment. Mr Mould disputed that the SEAD was intended to give effect to a Convention it did not mention, and which was not in force when the SEAD was made. There had been at most no need to amend the SEAD to achieve compliance.

34. I turn to domestic decisions. The most important is *Walton v The Scottish Ministers* [2012] UKSC 44, which concerned the validity of a road scheme made under a Scottish Act. The scheme was said to be invalid because the SEAD applied and had not been complied with. A regional transport strategy, MTS, had been published in 2003 by a non-statutory partnership, NESTRANS. It described various road schemes, one of which, the WPR, a bypass for Aberdeen, was taken up and promoted by the Minister. The Minister proposed to alter part of it, along with providing a new section of road, the Fastlink. The question was whether this modification to the WPR was a modification to a plan or programme within the SEAD. This in turn depended on whether the MTS was a "plan or programme" "required by legislative, regulatory or administrative provision". The Court concluded that Fastlink was not within the Directive because it did not itself alter the framework for the future development consent of projects; rather it altered a specific project which continued to require development consent.

35. Lord Reed however said at paragraphs 61-62:

> "61. It might be argued with some force that none of these documents has been shown to have been "required by legislative, regulatory or administrative measures" as stipulated by the second indent of article 2(a), even according the term "required" the width of meaning given to it in *Inter-Environnement Bruxelles* at para 31….On the other hand, it might be argued that the documents "set the framework for future development consent of projects", as explained by Advocate General Kokott in her opinion in *Terre Wallone* at points 64-65, and were therefore likely to have significant effects on the environment. In those circumstances, it might be argued that a purposive interpretation of the directive would bring the documents within its scope.

> "62. For reasons which I shall explain, it does not appear to me to be necessary to reach a concluded view on these questions. It is sufficient to say that it appears to me to be arguable that the MTS, or the local transport strategies which formed its constituent parts, formed a plan or programme within the meaning of the directive. The question whether the decision to construct the Fastlink constituted a modification to a plan or programme can be considered on the hypothesis that the MTS (or its constituent documents) comprised such a plan or programme."

36. Lord Carnwath was perhaps yet more sceptical at paragraph 99:

> "99. On the first point, like Lord Reed, I am content to proceed on the assumption that the MTS, as approved by NESTRANS in March 2003, was itself such a "plan or programme". However, I should register my serious doubts on the point, even accepting the flexible approach required by the European authorities. I note from that the passage from *Inter-Environnement Bruxelles* quoted by Lord Reed (para 22) refers to regulation of plans and programmes by provisions "which determine the competent authorities for adopting them and the procedure for preparing them…" There may be some uncertainty as to what in the definition is meant by "administrative", as opposed to "legislative or regulatory", provisions. However, it seems that some level of formality is needed: the administrative provisions must be such as to identify both the competent authorities and the procedure for preparation and adoption. Given the relatively informal character of the NESTRANS exercise, it is not clear to me what "administrative provisions" could be relied on as fulfilling that criterion."

37. In *Central Craigavon Ltd v Department of the Environment for Northern Ireland* [2011] NICA 17, the Court of Appeal in Northern Ireland considered whether the draft Planning Policy Statement on retailing fell within the scope of the SEAD, as a plan or programme, and if so, whether it was required by administrative provisions. Its consideration of the latter issue has been overtaken by the CJEU decision in the *Region De Bruxelles-Capitale* case, above, but there is some

relevance in how it dealt with the nature of the PPS. It held that it was not a plan or programme since it did not provide a framework. However, the exclusion of "policy" from the scope of the Directive did not mean that anything that went by that name inevitably fell outside the Directive, since the issue was one of substance and not of nomenclature. The Court also concluded that a particular policy in the PPS which dealt with a large existing shopping centre did not constitute a plan or programme within the Directive, since listing the considerations material to a development consent did not create a framework for development.

38. In *R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* (No 1) [2010] EWHC 2866 (Admin) Sales J held that the revocation of a Regional Strategy was the modification of a plan or programme, that is of the development plan, since the Strategy could play a decisive role in determining development consents. In *Cala Homes No 2* [2011] EWHC 97(Admin) Lindblom J held that a letter from the Chief Planner to local authorities on the day of judgment in *Cala Homes No 1,* saying that the decision to revoke Regional Strategies was a material consideration in planning decisions, did not fall within the Directive. The Government's stated policy commitment to revoking Regional Strategies was not a modification of a plan or programme.

39. I was also referred to Commission Guidance on the meaning and application of the Directive. The Guidance suggested that the degree to which an act was likely to have significant environmental effects itself was relevant to whether it was a plan or programme, as between which no very clear distinction could be drawn. The words might cover any formal statement which went beyond aspiration and set out an intended course of action. A plan might set out how it was proposed to carry out a policy, instancing land use plans; a programme might be a plan covering a set of projects. It offered views on what was meant by "required by administrative provision" which might have seemed straightforward but which did not find favour with the CJEU.

40. I do not regard this Guidance as a source of law or interpretation, any more than is any other Executive view expressed in, say, a Circular, on the construction of an Act of Parliament. A judge may find that it expresses what he thinks and he can adopt it as an expression of his views; but that is very different. Nor was the

Guidance illuminating on this issue which concerns the application of the Directive concepts to a particular process, which has no clear parallels in what the Commission considered anyway.

41. Mr Mould adopted parts of the Commission Guidance as supporting Lord Carnwath's approach to "administrative provisions": these were "formal requirements for ensuring that action is taken…which do not necessarily have the full force of law…" and the extent "of formalities in its preparation and capacity to be enforced" can be indicative of whether a provision is within the scope of an "administrative provision" in the SEAD. Their scope should be coloured by the words "legislative, regulatory or administrative provision," a not uncommon grouping of words in EU law.

The documents at issue

42. The "administrative provision" ie the March 2010 Command Paper, "requiring the plan" in the DNS, was issued under the Royal Prerogative, and not by virtue of any legislative or regulatory provision, and it is here that the "requirement" for the DNS is to be found, if it exists.

43. This Command Paper was the Government's response to HS2L's report of December 2009, "High Speed Rail: London to the West Midlands and Beyond", to which the Government had announced in Parliament in December 2009 that it would respond. This report was published alongside the Command Paper in March 2010.

44. The Government assessment of the December 2009 report, set out at the start of the Command Paper included the view that a "step change" in transport capacity between major conurbations was needed in the next 20-30 years, and that high

speed rail was the most effective way to increase capacity sustainably. Its assessment continued:

> "6. That Britain's initial core high speed network should link London to Birmingham, Manchester, the East Midlands, Sheffield and Leeds, and be capable of carrying trains at up to 250 miles per hour.
>
> 7. That the initial core 'Y' high speed network should include connections onto existing tracks, including the West and East Coast Main Lines, so that direct high speed train services can be operated from the outset to the other cities.
>
> 8. That the capacity released through transferring long-distance services to this network should be used to expand commuter, regional and freight service on existing lines, with particular benefit for areas expected to see significant housing growth including Milton Keynes, Luton, Northampton, Peterborough, Kettering, Corby and Wellingborough;
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> 9. That HS2 Ltd's recommended route for a London-Birmingham high speed line ('High Speed Two'), which would run from a rebuilt Euston Station in London to a new Birmingham City Centre station at Curzon/Fazeley Street, is viable, subject to further work on reducing specific impacts on the local environment and communities.
>
> 10. That following completion of that further work, formal public consultation on the government's proposals for high speed rail in the light of HS2 Ltd's recommended route for such a line should begin in the autumn;
>
> 11. That HS2 Ltd should now begin similar detailed planning work on the routes from Birmingham to Manchester and to Leeds, to be completed in summer 2011, with a view to consulting the public early in 2012;
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> 12. That effective integration with London's current and planned transport networks is crucial, and that this is best delivered through the combination of a Euston terminus and a Crossrail Interchange station sited between Paddington and Heathrow, which would also provide a link to the Great Western Main Line;

> 14. That high speed rail access to Heathrow is important, and should be provided from the outset through a fast and direct link of about 10 minutes via the Heathrow Express from the Crossrail Interchange station;
>
> 15. That, as foreshadowed in paragraph 57 of the government's 2009 Decision on Adding Capacity at Heathrow, further assessment is needed of the case for a potential station at Heathrow Airport itself. The Government has appointed Lord Mawhinney to assess the options…;
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> 17. That powers to deliver this proposed high speed rail network should be secured by means of a single Hybrid Bill, to be introduced subject to public consultation, environmental impact assessment and further detailed work. …;
>
> It will be the subject of formal public consultation and further review and assessment before any final decisions can be taken on either the strategic case for high speed rail or the specific routes that any line may follow.
>
> The Government proposes to begin formal public consultation in the autumn, to cover three key issues:
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> - HS2 Ltd's detailed recommendations for a high speed line from London to the West Midlands.
> - The strategic case for high speed rail in the UK
> - The Government's proposed strategy for an initial core high speed rail network."

45. Options considered in the Paper included enhancements to the existing road and rail networks, the inverted A and reverse S and E networks as alternatives to the Y network as a high speed network configuration north of Birmingham, alternatives to Euston for the London terminus, links to Crossrail, alternative routes through the Chilterns, alternative forms of station provision in Birmingham and for interchange, alternative forms of connection to Heathrow Airport and to HS1. It ruled out major expansion of the road and aviation networks as unsustainable, and also major enhancements to the existing rail network as providing far less additional capacity, with considerable disruption to travellers, and with few of the "connectivity improvements", of the proposed new Y network.

46. Part 3 of the Paper, "Engagement and Consultation" contained the following:

> "9.2 Part three sets out the Government's plan for taking forward the work that HS2 Ltd has undertaken to date and for developing a wider strategy for high speed rail. Of fundamental importance within this process will be formal public consultation on the detail of HS2 Ltd's recommended route option from London to Birmingham, and on the Government's strategic proposals for high speed rail. A consultation 'routemap' is provided later in this chapter. The subsequent chapters deal with what would be entailed in securing the powers to allow such a route to be constructed, and an outline of the likely key elements and timing of the construction process itself.
>
> The Government is mindful of the need for ongoing engagement with stakeholders even ahead of formal public consultation. This process of pre-consultation is important to ensure that the formal public consultation is communicated successfully to interested parties and particularly those most likely to be affected by HS2 Ltd's recommendations.
>
> This chapter sets out the public engagement activities that the Government and HS2 will now take forward to inform the government's preparation of the formal public consultation planned for the autumn."

47. The Government said that it would publish its full Appraisal of Sustainability alongside the consultation paper, expected in the autumn of 2010; there would be a consultation on the route north of Birmingham early in 2012, for at that time the Government was envisaging a single bill for the whole Y network. But it would not make final decisions on the HS2L route recommendations or on its proposed strategy for high speed rail until it had received the consultation responses. The Y network was to "be planned as a single coherent project", avoiding uncertainty about whether and when powers for any second phase of a phased project could be secured.

48. It is worth noting what happened between this Paper, the "administrative provision" requiring the DNS, and the publication of the DNS, the "plan or programme", on Mr Elvin's case. A revised remit was issued to HS2L, and Lord Mawhinney was asked to undertake the review of connections to Heathrow to which the Paper referred.

49. Although the Coalition Government supported the principle of a new high speed rail network, it announced, as I have said, that financial constraints meant that the full network would proceed in phases. Lord Mawhinney was to continue with his review of high speed rail connections to Heathrow. HS2L was also asked to do further work on options for high speed links to Heathrow, including through-route, spur or loop, on a link between HS2 and HS1, and to carry out a comparative business case assessment of the Y and S networks.

50. Lord Mawhinney's report, published in July 2010, recommended in the first place an interchange between HS2 and Crossrail at Old Oak Common, and later consideration being given to a direct link from HS2 to Heathrow when the network expanded beyond the West Midlands.

51. In October 2010, HS2L was asked to review the design of the proposed route at a number of places, and HS2L also published its advice on the comparative business cases for the S and Y network, and on the day of its publication, the SST announced the Government's preference for the Y network.

52. On 20 December 2010, the SST made a statement to Parliament about the Government's proposed strategy and the way in which consultation would be carried out. The consultation would focus on the strategy for the Y network to be delivered in two phases, the construction of a spur to Heathrow in Phase 2, the direct link to HS1, via a new tunnel from Old Oak Common and existing

infrastructure in Phase 1, and a route from London to the West Midlands, amended to reduce its impact.

53. A number of detailed reports on various aspects of the proposals were published between September and December 2010; they are listed in Ms Munro's Witness Statement, at para 14. Detailed route maps were published. The consultation process then took place from 28 February to 29 July 2011. Alongside the Consultation Document itself, the Government also published a range of supporting documents, which included an updated economic analysis, a Route Engineering Report, and the Appraisal of Sustainability.

54. The DNS of January 2012 was accompanied by thirteen further reports listed in Mr Graham's 3rd Witness Statement at para 52.

The submissions: the Command Paper as the "administrative provision requiring" the DNS

55. Mr Elvin submitted that the DNS was "required" by the "administrative provision" of the March 2010 Command Paper, for the purposes of the SEAD: the SST was the competent authority in domestic law for adopting national strategic transport decisions, and the March 2010 decision to have a consultation process meant that the procedure for preparing the DNS was regulated by administrative provision, including the rules of administrative law on consultation - and the Government's 2008 Code of Practice on Consultation, which covers much the same territory.

56. Administrative provisions did not necessarily have to be binding, as Commission Guidance pointed out. They were not regulatory provisions; what they "required" might not be legally enforceable and in that respect a clear distinction needed to

be maintained between legislative and regulatory provisions on the one hand, and administrative provisions on the other. Their "requirements" could operate differently. Mr Mould had accepted that a Command Paper in certain circumstances could be an "administrative provision"; another example Mr Elvin gave was an old-style non-statutory development brief.

57. A Command Paper could have the necessary degree of formality; this one did so in the clarity of its framework for future decision-making: topics, consultation, preferred options, and future steps.

58. Alternatively, Mr Elvin contended that the March 2010 Command Paper had generated a legitimate expectation in domestic and EU law, and hence a "requirement" that the Government "would publish its confirmed final strategy for HS2." This derived from the clear commitment to public consultation in the Paper, a commitment adopted by the Coalition Government; the Consultation Document was clear that "a final decision" would be published after the conclusion of the consultation process, and the SST had said as much to Parliament in December 2011. Where the competent authority of a Member State generated a legitimate expectation that it would adopt a "plan or programme", that became a requirement to do so, derived from administrative provision.

59. The EU concept was illustrated by *Embassy Limousines & Services v European Parliament* [1998] ECR II- 4239. Although the concept of legitimate expectation is not the same in domestic and EU law, the differences are not such as to require separate consideration here, in my judgment, although the latter may be less helpful to the Claimants.

60. The legitimate expectation relied on was not directly that there would be an SEA of the consultation proposals or DNS. Indeed the SST specifically excluded such an obligation; see eg his letter of 13 January 2011 to the Claimants' solicitors. It was that there would be consultation on the high speed strategy and the details of Phase 1, before final decisions were made. Even if the SST could lawfully have decided to proceed in a different fashion, or not to proceed to a decision at all, that

did not prevent the Command Paper "requiring" the DNS in the broad SEAD sense of "require".

61. Mr Mould pointed out that however broad an approach the CJEU might encourage to the scope of "required" and "administrative provision", a purposive construction could not "disregard the clearly expressed intention of the legislature of the European Union"; *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* [2011] Env. L.R 26. Moreover, the provisions of the EIA Directive were intended "to be an aid to efficient and inclusive decision-making in special cases and not an obstacle-race"; *R (Jones) v Mansfield DC* [2004] Env LR, Carnwath LJ, para 58. Mr Mould said that the same applied to the role of the SEAD.

62. Although a Command Paper could be an "administrative provision", the March 2010 Paper did not "require" the preparation or adoption of the DNS, and laid down no procedure regulating it. The DNS was a "freely taken political decision on a legislative proposal", comprising policy decisions and a statement of political intent as to how those decisions were to be given legal effect. The decision to abolish Regional Strategies did not constitute a requirement by administrative provision such as to require SEA, even though that policy commitment was to be a material consideration in planning decisions; *Cala Homes No.2*.

63. The fact that the consultation process was subject to the Government's Code of Practice did not make the Command Paper an "administrative provision" or one which "required" the subsequent DNS. It was no more than generally applicable guidance for all Government consultations. The announcement by the SST that he was to consult on HS2 and would then make a decision on what to do gave rise to no legitimate expectation, let alone one which could be the sort of formal requirement envisaged by the SEAD.

64. The Government could not have been required to hold a consultation procedure which followed the form and content referred to in the March 2010 Paper, but was free to alter it, and the way it proceeded. A promise of consultation did not regulate, as at that moment, the precise subject matter of the consultation. There

could be no legitimate expectation in March 2010 of a particular content for the consultation, nor as to its timing, manner and other details. Indeed, in May 2010, the Government decided to proceed in two phases rather than in one, and did so before the Y shape of the network was decided on, and before decisions were made for the purposes of the 2011 Consultation on the inclusion of the HS1 link in Phase 1, the Heathrow spur in Phase 2, and a refined Phase 1 route. These were all freely taken political decisions.

Conclusions: was the Command Paper an "administrative provision requiring" the DNS?

65. Although I have divided the phrase in the Directive into two parts, dealing second with "plan or programme" since logically it comes later, it is easier to see whether or not a "plan" is required by an administrative provision once it has been decided whether it is a plan within the scope of the Directive. If it is a plan within the Directive, it is easier to see that the necessary purposive construction or application of "required by administrative provision", would place that part also within the scope of the Directive. Otherwise the sort of plan at which the Directive is aimed would be the more likely to escape assessment in circumstances to which the objectives of the Directive apply. It is also easier to construe or apply the whole of the second limb of Article 2 (a) as one phrase to one process, rather than splitting it up. It is easier to recognise the species when it is in sight than to define it in two stages. As I will come to, I have concluded that the DNS is not a "plan or programme" within the scope of the Directive. The process of Command Paper and DNS is not that of an "administrative provision requiring", in the broad CJEU sense, a "plan or programme".

66. Nonetheless, the CJEU, *Walton* and the submissions before me have considered the issues in two stages, and I set out my conclusions in that way too.

67. Mr Mould agreed and I accept that a Command Paper issued under the Royal Prerogative is capable of being an administrative provision within the SEAD. I see no reason why the 2010 Command Paper should not be such a provision. The question is whether it "required" anything in the sense of that word as developed

by the CJEU. Of course it required nothing in its ordinary English sense, nor in such other senses as were gathered from other versions of the text as understood by A-G Kokott- at least she refers to none. This broad CJEU sense covers "regulated" or "provided for" by the provision in question, without those phrases necessarily being the only ones which reflect the connotations which "required" has, on the CJEU approach.

68. However, the phrase "required by administrative provision" has to add something to Article 2(a). A plan or programme within the scope of that phrase in Article 2(a) is unlikely to emerge from nowhere, without prior administrative action of some sort. The mere fact that there is some prior administrative action cannot of itself therefore satisfy the language of the Directive. A mere statement of intent, or of policy, by Government that it will produce a plan is not a requirement on Government, in any sense, that it produce a plan. A real degree of formality, control and non-statutory administrative need for a process culminating in a decision is required.

69. I accept that the body which was to reach the decision was identified, that the topics for decision were set out, that the process in terms of further work and consultation was clear, as were the steps likely to be taken after the DNS, as a matter of process. The Command Paper was, however, a statement of Government policy on high speed rail, and of the stages by which, subject to consultation and further work, the policy was to be put into effect, by laying a Bill before Parliament for its decision. It was a statement by the developer as to how and why it would proceed with what project.

70. The Command Paper contained no requirements in any sense of that word. Government was entirely free to change its mind on whether it wished to proceed to such a decision, or to change the nature of the decisions consulted on, or to omit the further work; it could change the topics and scope of the consultation process.

71. The DNS was not regulated by the Command Paper, for the same reasons. I assume that the Command Paper created a legitimate expectation that there would be consultation if the process envisaged by the Paper were undertaken, but that does not make the DNS something regulated by the Command Paper. Regulation, if such it be, of part of the process by which it was produced does not make the ultimate outcome, the putative plan, a decision which is regulated by, required in that sense by, the Command Paper.

72. The phrase "provided for" does not mean to my mind merely "envisaged by" or "anticipated as a result of". It connotes more of a sense of formality, control and non-statutory administrative need or obligation, as in "regulated by", leading to the taking of a decision, than is found in the announcement of an optional process which can be begun, changed or abandoned at will. The need for some form of formality in the process and outcome is not satisfied by the common consequence that, if pursued, there will be consultation, whether covered by common law or by a general Government Code. The Government could have changed its mind on how and on what it consulted, even on whether it would do so.

73. Taking what the Command Paper said was to happen, it did not in my view require, in the broad sense, anything. Government simply announced its intention as to how it then envisaged proceeding towards the implementation of its high speed rail strategy.

The submissions: the DNS as a "plan or programme"

74. I have already summarised above the key components of the DNS, taken from its "Summary of Decisions". Mr Elvin submitted that it was a "formal statement of government policy which goes beyond aspirations and sets out an intended course of future action for the promotion, construction and operation of HS2 which includes its future development consent process…." It was the overall strategy for the Y network, to the whole of which the SST committed himself in Parliament on 10 January 2012 and, to achieve which, there might be some provision in the first phase hybrid Bill. The SST had described HS2, in the

October 2009 Scoping Report for the Appraisal of Sustainability, as falling between transport policy and a development project, which Mr Elvin submitted fitted the scope of the SEAD admirably.

75. The other options, whether motorway or aviation, or enhancing the existing conventional speed network, for example by the alternative promoted by the Bucks CC Group, or a different high speed network configured north of Birmingham in an inverted A or reverse S or E shapes, were no longer being considered after the DNS. Mr Elvin submitted that the sifting process, whereby the number of options had successively been reduced as detail increased, culminating in the finalisation of options, should be subject to SEA, in order to meet the objective of SEAD. Once a policy began to pre-empt decisions on individual projects, it should be viewed as a plan or programme. In addition to setting both the National Strategy for high speed rail and its shape as a Y network, Phase 1 would also fix the location of the junctions for the lines to Leeds and Manchester. The precise locations of these junctions were published in March 2012, and would have an effect on at least the initial routeing of those two lines.

76. Mr Elvin submitted that the DNS set the framework for the grant of development consent for HS2 by Parliament: the consent process, through the hybrid Bill, would operate within or be guided by the parameters set by the DNS. HS2L's task, as a result of the DNS, was to promote HS2 in the manner decided upon in the DNS. The Bill, as it would be introduced to Parliament, would follow the decision in the DNS, and Parliamentary decisions on it would be subject to Government whip.

77. It was irrelevant that the decision on development consent would be taken by a body different from the one which developed the plan or programme. It did not matter therefore that it would be Parliament, by legislation, granting development consent. The DNS was intended, not just through whipping but because of the processes undertaken, to be influential in that decision. The framework did not have to dictate to the decision-maker what the decision on development consent should be, leaving no discretion or judgment.

78. The DNS was the culmination of the work which had led to the Command Paper, and the consultation process with all the many reports published for consultation. Here the DNS itself said that its purpose was "to set out the decisions reached by the Government" on the consultation issues. It also outlined the programme "for the immediate next stage of the project…"

79. The DNS could still be a plan or programme even, if by itself, it had no significant environmental effects, since that would be true of any plan which could only be implemented pursuant to a development consent. However, Mr Elvin also pointed out that the DNS was now having effects, not just in the creation of blight, but in the preparation of safeguarding directions, the drafts of which were the subject of a consultation process starting in October 2012. These, when made, would prevent plan proposals or permissions conflicting with the preferred London – Birmingham route and the other components of Phase 1. Implementation of that route would of course prevent the option of a route passing closer to Heathrow, allowing interchange with the Great Western Main Line, GWML, as promoted by HHL. The DNS had already led to the undertaking of detailed work only on the Y shaped Phase 2 routes, and to the fixing of their junctions with Phase 1.

80. The concept of "plan or programme" was not confined to land use development plans. The DNS was as relevant to national planning policy as was the National Planning Policy Framework which was material to decisions on planning applications, and supplementary planning documents, which did not have the legal effect of a development plan. Both of those were subject to SEA. A "policy", for example, in the context of development plans, could readily be a framework plan. A plan or programme did not have to concern a multiplicity of projects, and in any event the two phases of the Y network, as envisaged, involved a multiplicity of projects.

81. There was no real distinction to be drawn in this context between a programme for a number of projects which together make up the Y network and a plan for one large single project, the Y network, implemented through a succession of development consents.

82. The need for further environmental assessment of Phase 2 did not obviate the need for an SEA at this stage, since this was the stage when the national core network strategy, including the strategy for Phase 2 was being formulated; successive more detailed stages might require successive, different forms of environmental assessment. The Government's assertion, albeit incorrectly, that the Appraisal of Sustainability complied with the requirements of the SEAD, suggested that there was nothing about the stage in the decision-making process or available level of detail which precluded SEA or made it inappropriate. What mattered was the degree of influence and therefore direct effect which the plan might have over decisions on development consents.

83. Mr Mould submitted that the DNS was a statement of high level national transport policy: the decisions that there should be a high speed rail network rather than an enhancement of the existing network, and that the Y network was best placed to deliver the transport and wider socio-economic objectives sought by the Government, were high level national policy decisions excluded from the scope of SEAD. The rejection of other configurations, the inverted A, and reverse S and E, north of Birmingham also fell into that category. There were strong elements of policy in the decision on the creation and timing of a spur to Heathrow. He also described the DNS as setting out a "long term strategy to meet a long term challenge."

84. But there was also a decision to seek development consent for the Y network in two phases, and to do so by two hybrid Bills, which Mr Mould described as process decisions. Finally there was the decision to seek development consent in the first phase for the preferred route with the variations announced in the DNS, (a route that would preclude the HHL proposal), the spur junctions for the spur line, the link to HS1 and the junctions to the north of Lichfield for the continuation of the Y. The project would be subject to EIA. The blight package decision was not of consequence for this argument.

85. Mr Mould drew on the description in *Hillingdon LBC v SST* [2010] EWHC 620 (Admin) of the formulation of aviation policy through a White Paper, leading to

consultation and a decision announced in Parliament that a third runway at Heathrow should be supported, with a planning application to be expected from the airport operator. Carnwath LJ said at paragraphs 47-48:

> "47. In this case, the mechanism used was that of non-statutory consultation, followed by a policy announcement by the responsible Minister to Parliament. As I read it, the relevant decision was that announced to Parliament. The accompanying Decisions Paper was simply designed to "summarise and explain" that decision. The statement made clear that the practical implementation of the policy would be through a planning application made by the airport operator. That was before the relevant provisions of the 2008 Act had been brought into operation. Assurances have since been given of the government's intention to prepare an Airports NPS under the 2008 Act.
>
> "48. Thus the 2009 Decisions are no more than policy statements without any direct substantive effects at this stage. I refer to my discussion of similar issues, in the context of proposals for local government reorganisation, in *Shrewsbury and Atcham BC v Secretary of State* [2008] EWCA Civ 148 paras 32-4. I there distinguished between the scope for judicial review as respects, on the one hand, the process of "initiation, consultation, and review", and, on the other, the "substantive event" at the end of that process, that is a formal act having... substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests.
>
> In the present case, following the 2003 White Paper and the 2009 Decision, we are still a long way from any "substantive event" in the sense of a formal statutory authorisation for the construction of the third runway, following the procedure as now set out in the 2008 Act. Any grounds of challenge need to be seen in the context of a continuing process towards that eventual goal."

86. A broad approach to the scope of the SEAD could not eliminate the distinction it clearly contained between plans or programmes and general policy. The SEAD was not confined to land use plans, although development plans, since the Commission indicated they were covered, illustrated the distinction drawn by the SST between "plans or programmes" and general or high level policy decisions. A decision to seek development consent by whatever means was not itself a plan or programme within the SEAD. No useful reliance for this purpose could be placed on the various usages of such general English words as "plan" or "programme" in the DNS and other documents from the SST.

87. The acknowledgement in *Inter-Environnement Bruxelles* that a plan or programme would normally involve a multiplicity of projects was also a useful indicator of the scope of the SEAD. The proposal for two hybrid Bills did not mean that HS2 involved a multiplicity of projects.

88. The SEAD envisaged that a "plan or programme" would set the framework for future development consents. But the DNS did not do so; it had no significant effects itself on the environment; it defined no criteria or detailed rules for the development of land, compliance with which would permit development or make its consent more probable. The DNS stood in contrast to a statutory development plan, with which a proposed development should generally accord, and to a national policy statement under s5 Planning Act 2008, (see s5 (5) in particular), to which SEAD does apply.

89. Mr Mould accepted that the DNS could well be a framework were development consent for HS2 to be sought by a planning application or a Transport and Works Act Order, since the DNS would then be a consideration material to a Government or Ministerial decision on development consent. But that was not so where development consent was to be sought in a hybrid Bill where the decision was left entirely to the judgment of Parliament. A decision to proceed in that way had completely different legal consequences for the way in which development consent is considered. He contrasted this with the position which arose in *R (Medway Council and Others) v SST* [2002] EWHC 2516 (Admin) para 32, in which the exclusion of Gatwick expansion from consultation on the location of future airport capacity was unfair because although it could be raised as an alternative during the SST's later statutory decision-making process, it would

have been excluded from the White Paper by the SST and its promotion as an alternative therefore would be contrary to Government policy where the SST himself was the decision-maker.

Conclusion: the DNS as "plan or programme"

90. As indicated already, I have concluded that the DNS is not and does not contain a "plan or programme". I accept that the question of whether the DNS, with the other reports published with it, is a "plan or programme" is a matter of substance and not nomenclature. A document may also fulfil one or more functions, and the fact that part of the document may not, and some of its decisions may not, amount to a "plan or programme", does not preclude other parts from being one. It would be wrong, on an overall view of the DNS and the documents published with it, to try to characterise the whole of it as falling within the Directive or outside of it. If part is a plan or programme, the Directive applies to that part. The decision on these issues is for the Court, and not for the reasonable judgment of the SST. Nothing really turns on whether this DNS is a plan or programme; the issues here are the same whatever word is applied to the DNS.

91. I largely accept Mr Mould's characterisation of the decision in the DNS: there are high level strategic or national policy decisions that the Government is to promote a high speed rail network, and in the Y shape, and to promote it in two phases. The decisions as to what each phase will contain could be regarded as matters of high level strategy or decisions as to the content of applications for development consent, or both. The DNS contains the "process" decision that development consent will be sought through two hybrid Bills. It also decided what detailed route it would seek consent for, subject to further detailed consideration and the outcome of the EIA. This stage and nature of the decision-making process is not dissimilar to that which Carnwath LJ analysed, in a different context, in the *Hillingdon* decision.

92. However, the characterisation of the decision as high or low level policy decision does not really answer the question. The word "policy" in this context can be

dangerous since policies can include presumptions in favour of a form of development, or weigh certain aspects more heavily than others - as a matter of policy. That does not mean that all government polices, however general, to seek development consent fall within the SEAD.

93. The crucial issue is whether, on a purposive construction of the SEAD, these DNS decisions set a framework for subsequent decision-making on development consents, laying down rules or criteria or policy guidance, for it. The purpose of SEA is to ensure that the decision on development consent is not affected by earlier plans which through the framework, the rules or criteria or policies they contain, weigh one way or another against the application when the earlier plans have not themselves been assessed for likely significant environmental effects. The significant environmental effects have to be assessed at a time when they can play their full part in the decision; they cannot be left unassessed so that the development decision is made when the framework in the plan has sold the pass. A plan framework tilts the balance, creates presumptions, and urges weight to be given to various factors. I accept that a land use development plan is a very good example of a plan or programme, though is not the only sort of plan to which the SEAD applies.

94. There are, to my mind, two different forms of decision, although the Claimants regard the distinction as illusory. A decision that the Government will favour applications being made to it for high speed rail developments in sections to create a network shaped as a Y and starting at Euston would be a framework for the grant of development consents, and would be a plan for SEAD purposes. The weighting of the arguments in its favour would be clear; the way in which Government would approach the application of its own policy would be clear. The same would apply to a National Policy Statement on a nationally significant infrastructure project. In that sort of decision-making structure, the decision-maker is not entirely free to go which ever way it sees fit, but is constrained by the policy or framework to set the decision in the context of the plan, even if entitled ultimately to reject the proposal. A plan is not the less a plan because an application for development consent, though compliant with it, might be rejected if out weighed by other factors.

95. But that is different here: the decision-maker on the applications for development consent is to be Parliament. Its decisions are legally and formally untrammelled by the statements of Government policy. It is entirely free to accept or reject them as it sees fit. If it agrees with the view expressed by Government, then it will of course give effect to that view; and if it disagrees with those views, it will decide otherwise. The fact that Parliament will consider the detailed work done by Government, and will no doubt give consideration to the views it has expressed, is very different from Parliament having to set its decision within the framework of criteria or policies which Government pronounces. Parliament's views are not trammelled by those pronouncements; no proper justification for disagreeing is required of it: it can just disagree. The policy and judgments in the DNS, which could be a framework for the decision-maker in some contexts, are not such a framework here.

96. The very concept of a framework, rules, criteria or policy, which guide the outcome of an application for development consent, as a plan which requires SEA even before development project EIA, presupposes that the plan will have an effect on the approach which has to be considered at the development consent stage, and that that effect will be more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations. That simply is not the case here.

97. I was not persuaded by Mr Elvin's answers to this. The fact that the DNS represents the final view of the Government on the need for a new Y shaped high speed rail network as opposed to new motorways, a new conventional rail network, enhancements to the existing rail network, or a new high speed rail network of some other shape, which I accept, does not grapple with the real point. That confuses the basis upon which the promoter of the project made his decision as to which project to promote, how and why, with the framework or policy structure within which the separate decision-maker will make its decision. The fact that the DNS is a statement of a national core strategy does not answer the question of its role in the decision-making process, which is the crucial aspect for the purposive approach to the Directive. The separate decision-maker highlights that the DNS is about the decision by the developer as to which project to promote. That is not within the SEAD.

98. I do not think that either case is advanced by a close analysis of paragraph 30 of *Nomarchiaki*, above; it adequately conveys the purpose of the SEAD, without being definitive or circumscribing its purpose. But I cannot accept the concept of a framework or plan as falling within the SEAD where the decision-maker is entirely free to disregard it. The purpose of the SEAD is to deal with the problem which arises when that freedom of future decision-making is constrained by a plan framework.

99. Mr Elvin's response that the project would be whipped through Parliament, and so what Government wants is in reality very influential with the decision-maker, is no answer at all. The need for SEAD, and the judgment as to whether a document is a plan on a purposive construction of the SEAD, does not apply to that sort of interaction between policy maker and decision-maker. I deal more fully with that point later when considering the hybrid Bill and EIA. But it would be wrong for the Court to rule that Parliament, whipped or not, is not constitutionally free to reach whatever conclusion it wishes, and to weigh Government policy entirely as it sees fit.

100. I accept that the DNS is having an effect on the property market, blighting properties in a swath along its route. There will be a safeguarding direction, which will formalise the blight for those whose properties are to be taken. It cannot be said that the DNS has no effect. But that is not the effect which matters in the particular context of SEAD. The question is what effect it has on the way in which the decision on development consent will be taken. It has no formal, stated significance for how the factors relevant to the decision should be weighted, either in itself or from some external statement about it, nor could it effectively do so given that Parliament is to be the decision-maker.

101. Mr Elvin submitted that the SST was wrong to the extent that he relied on the fact that Phase 1 and indeed Phase 2 of HS2 would be subject to environmental assessments under the Environmental Impact Assessment Directive to support his argument that no SEA was required at this stage. This would deprive the SEA of its force since its purpose was to provide for an assessment at a time before the options were significantly diminished, while the plans were actually being developed; the two forms of assessment were largely complementary and not alternative.

102. I accept that as a general approach, but whether it matters in practice in relation to a particular case depends on the facts, and in particular on how far the consideration by the decision-maker of options or the merits of the grant of development consent is affected, in the manner I have described, by earlier decisions which have not been subject to strategic environmental assessment. I do not see any aspect of the project which would fall outside the scope because of an EIA as required by the Directive because of some prior unassessed decision. What would fall within its scope in particular are reasonable alternatives to the project promoted. It does not matter for these purposes that there will be no assessment of all the options considered and rejected by the promoter in arriving at its decision on which project to promote. The wider alternatives are also not precluded from consideration by the decision-maker.

103. For those reasons I reject the contention that the SEAD applied to the DNS.

Reference to the CJEU

104. Mr Elvin also submitted that the scope of these provisions of the SEAD, and their application to this particular process, could not be regarded as *acte clair* within *CILFIT srl v Ministero della Sanita* [1983] 1 CMLR 472. The issues should be referred to Luxembourg, unless held to be *acte clair* in the Claimants' favour. This Court had power to make a reference and it did not need to await a decision of higher authority.

105. I decline to order a reference on this point. The principles, as was pointed out in *Walton*, are sufficiently clear. Their application in many specific instances are matters very much for national courts, and the particular features of national administrative procedures. Here the issue is one of application in a particular national context of principles which were clear, at least in the CJEU sense that it had pronounced upon them recently and in a consistent manner. In any event,

were a reference appropriate, it should only be made in this case after higher domestic courts have had the opportunity to consider the issues, which would of course assist the CJEU were a reference on this sort of issue to be made. *Walton* did not involve a reference, and I certainly see no reason at this stage to order one.

106. I recognise that *Walton* treated it as arguable that facts not so very different from those here, gave rise to a "requirement" in the broad CJEU sense. I have reached a view that, although arguable, on analysis the Command Paper was not an administrative provision. That is not a point for a reference now to the CJEU, not just because of the conclusion to which I have come on "plan or programme" but because the views of higher courts should be obtained first.

1B Voluntary assumption of a duty to comply with the SEAD

107. I reject Mr Elvin's next contention that, even if the SST were not obliged to comply with the SEAD, he had undertaken to do so and was bound therefore to comply with it. The SST was not prevented by the terms of the SEAD from applying it where it was not necessary in EU law - or under the domestic Regulations. But the passages in the documents relied on by the Claimants show no such undertaking; quite the reverse in my view. A statement that the Appraisal of Sustainability would "broadly reflect the principles" of the SEAD contradicts the proposition for which it was cited. There is nothing in what was said which committed the SST to apply the SEAD, if it were not applicable. Indeed, the AoS itself said that although the SEAD was "key to determining the overall appraisal framework", the scheme "would not qualify as either a plan or programme under the terms of the Directive…." This same point was repeated in the DNS and in the Review of the AoS published with the DNS. The DNS and the Review of the AoS show that the principles of the SEAD were applied to the degree thought necessary for this stage in the project; see for example para 6.24 of the DNS. The AoS was intended to be fully compliant with the principles of the SEAD; para 3.1.5 of the Review. Those passages do not show any voluntary assumption of a duty of compliance. There is a different albeit related argument, to which I shall come, that the AoS was substantially compliant with the SEAD, although the SST disavowed any duty to comply with it.

1C Substantial compliance

108. The SST contended that if the SEAD were applicable to the DNS, albeit that he had not set out to comply with it, nonetheless in the circumstances, he had substantially complied with it, and therefore had not breached it. In particular, the SST contended that the Appraisal of Sustainability complied with the requirements of the SEAD. The Claimants took issue with that.

109. The former type of appraisal derives from a separate, entirely domestic, provision in s19 (5) of the Planning and Compulsory Purchase Act 2004, which requires such an appraisal of development plan documents. Any given AoS may or may not, in its nature, cover more or less the same territory as SEA.

The concept of substantial compliance

110. Mr Elvin submitted that the concept of "substantial compliance" in this context did not mean that, where the Directive had to a large or substantial extent been complied with, the areas of non-compliance were of no legal importance. It was a different concept from the discretion which a Court may have to refuse relief where there have been breaches of a Directive or Regulation. "Substantial compliance", as an EU legal concept, required compliance with the Directive in all its requirements, or to put it another way, in all but name; Case C-431/92 *Commission v Germany* [1995] ECR 1-2189, and *R(Edwards) v Environment Agency* [2008] UKHL 22, [2008] 1 WLR 1587, Lord Hoffmann para 61. I accept that. Mr Mould submitted that the test was whether the substance of the obligations has been met "even if in formal terms they have not". That may or may not conceal a difference of significance, since one of the important features of SEA or EIA is the manner or form in which information is made available to the public for its consideration, and not just the adequacy of its substance. "Substantial compliance" is however to my mind to be treated as meaning

compliance with the substantive obligations in the Directive, whether as to content or manner in which information is made available and consulted on.

111. That concept therefore differs from the exercise of a judicial discretion to refuse relief, which presupposes that there has been a breach of the Directive, but not one which in the circumstances of the case requires a remedy in the way a breach normally would. Of course the nature and degree of the breach, the prejudice it caused and the problems or benefits which would be created by relief are relevant to the exercise of that discretion.

112. The nature of that discretion in relation to breach of a Directive was considered by the Supreme Court, in *Walton*, above, and by Lord Carnwath in particular with whom the other Justices agreed, at paragraphs 103-140. At paragraph 139, having made the point that *Berkeley v Secretary of State for the Environment No 1* [2001] 2 AC 603 did not require automatic nullification of a decision which breached a Directive, he said:

> "13.9 Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

113. There was a further issue more apparent than real between the parties as to the role of the Court. Mr Elvin submitted that it was for the Court to decide whether there had been substantial compliance with the Directive; and that it was not a matter for the reasonable judgment of the SST. I have no doubt but that that is right put as simply as that, and I did not understand Mr Mould to disagree. He accepted that, for example, the question of whether legally prescribed procedures were followed in substance was an issue for the Court.

114. His point was that the fulfilment of the Directive's requirements sometimes required judgments of a factual, planning or evaluative nature which it was for the body carrying out the assessment to reach, subject to judicial review on traditional *Wednesbury* grounds. Issues for example as to the adequacy of the content of an SEA in that respect were for testing by review on *Wednesbury* grounds. It was not for the Court to reach its own decision on how an EIA or SEA should address those issues of fact or judgment. If the decision reached was a reasonable one, the Directive had been complied with in that respect. The meaning of the words was for the Court, of course. This distinction was borne out by *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321 [2012] Env LR 22. Laws LJ pointed out that the Environmental Impact Assessment Directive and Regulations were replete with expressions requiring such judgments: what was a cumulative or a significant effect? What was sufficient information about those effects? He also concluded, to the extent necessary, that the question of whether a project was a stand-alone scheme or part of a larger project which should have been included in the EIA was for the factual or other judgment of the decision-maker subject to review by the Court, rather than one for the Court itself to decide. By application of the same reasoning, the question of what alternatives were reasonable to consider was a reviewable decision for the decision-maker, and not one for the Court to decide for itself. This line had been routinely applied in earlier authorities which had grappled with whether an environmental statement under EIAD was adequate.

115. I did not understand Mr Elvin to take issue with the principle of such a distinction, although whether any particular example fell one side of the line or the other was at issue. He contended that none of the points at issue over substantial compliance in this case were for review only on *Wednesbury* grounds. Mr Mould contended that the consideration of alternatives, which lay at the heart of Mr Elvin's case, necessarily involved judgments, for the plan-maker, about whether any suggested alternative was reasonable, taking into account the plan-maker's objectives and the plan's geographical scope. Whether it merited evaluation as an alternative to the plan proposed was a matter for the plan-maker's judgment. Regulation 12(3), dealing with the information required, showed that the quantity and quality of information provided was for the plan-maker, subject to review by the Court on *Wednesbury* grounds, and not for primary judgment by the Court.

116. I do not think that the reservations of the Aarhus Convention Compliance Committee in Complaint ACCC/C/2008/33, the *Port of Tyne* case, about the efficacy of judicial review for Convention purposes in the absence of some proportionality test, is a persuasive basis for concluding that all issues of fact and planning judgment are for the primary decision of the Court in a contest over "substantial compliance". I certainly cannot see that the Aarhus Convention itself can have changed the required approach, making the Court the primary decision-maker on what is a significant effect, for example.

117. If SEAD applied to this process, the SST would have been obliged by Article 3 SEAD to carry out an environmental assessment of the plan or programme, which here would be the Y strategy, and of reasonable alternatives to it. SEA would require those matters to be subject to public consultation. It is necessary now to compare what the SEAD required and what the Appraisal of Sustainability provided.

The SEAD

118. Article 2(b) of SEAD defines "Environmental assessment" as:

> "…the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4-9."

119. By Article 5 (1), an environmental report must be prepared which identifies, describes and evaluates the likely significant effects of the plan or programme. The likely significant effects of the plan or programme to be assessed include its secondary, cumulative and synergistic effects. The report must cover "reasonable

alternatives taking into account the objectives and the geographical scope of the plan or programme." Among the many requirements listed in Annex 1 to the SEAD for the content of the environmental report are "(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties… encountered in compiling the required information", and "(i) a description of the measures envisaged concerning monitoring…." Article 10 requires the implementation of plans and programmes to be monitored. I held in *Heard v Broadland DC* [2012] EWHC 344 (Admin) at para 71 that the detail of examination required of the selected alternatives was the same level as that of the plan or programme.

120. Article 6 requires that the draft plan or programme and the environmental report be made available to various designated authorities with specific environmental responsibilities, here such as English Heritage, Natural England and the Environment Agency, and to the public likely to be affected by or interested in the decision-making, including relevant NGOs. They were to be given an early and effective opportunity to express their opinions on the draft plan or programme and the accompanying report.

121. Transboundary consultations are required by Article 7 where a Member State considers that its implementation of a plan or programme is likely to have significant effects in the territory of another Member State.

122. Article 8 requires the environmental report and the consultation responses to be taken into account during the preparation of the plan and before its adoption or submission to legislative procedure. Once the plan is adopted, a statement of how the environmental considerations have been integrated into it is required, including how the report and consultation responses have been taken into account, and the reasons for choosing the adopted plan in the light of the other reasonable alternatives considered; Article 9 (b).

123. Mr Mould placed weight on Regulation 12 (3) of the Environmental Assessment of Plans and Programmes Regulations 2004 No 1633. This, which was not said to

conflict with the Directive, required the report made under Regulation 12(2) and Article 5 to contain:

> "such of the information referred to in Schedule 2…as may reasonably be required, taking account of – (a) current knowledge and methods of assessment;(b) the contents and level of detail in the plan or programme;(c) the stage of the plan or programme in the decision-making process; and (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

124. Schedule 2 also required an outline of the reasons for selecting the alternatives dealt with.

The failings of the AoS as an SEA

125. Mr Elvin outlined the failings of the Appraisal of Sustainability, published with the Consultation Document, in providing "substantial compliance" with the SEAD: the two main points were the way in which Phase 2 was or rather was not dealt with, and the way in which alternatives were or rather were not dealt with. There were other lesser points.

126. Mr Mould made the general point that the AoS was prepared by independent specialist consultants, following a scoping process on which comments were invited from Government departments and such bodies as Natural England, and with advice from a specialist commissioner from the Infrastructure Planning Commission. He emphasised the extent of the information provided, and the length of the AoS and its 6 appendices, some 1000 pages.

127. I however approach this point with some scepticism that a process which is not an SEA and does not set out to be an SEA, will coincidentally match the requirements of the SEAD. However much the AoS may have been informed by SEAD principles, however qualified its authors and careful an AoS it was, it did not set out to be an SEA, prepared so as to comply with the Directive. It is also important to keep in mind that the predicate for this argument is that the DNS constitutes, or at least contains, a plan or programme in the sense that it does set the framework for the decision-maker in its decisions on development consent through rules or criteria or the policies which are to be applied, absent good reason to the contrary.

(a) The Y network

128. First, the AoS assessed only Phase 1 and not the whole Y network and the Heathrow spur; it would be too late for them to be assessed at the Phase 2 stage since they would already have been adopted in principle by the DNS. The cumulative effects of Phase 2 with Phase 1 were omitted from the AoS; and were omitted notwithstanding that the economic benefits of the whole Y network were assessed. The work on Phase 2 was or could have been made sufficiently far advanced for the AoS to cover it all, and it was in March 2012 that the likely junction locations near Lichfield were published for Phase 2. It was not lawful to fail to assess the whole Y network simply because the work had not yet been done; that was not the sort of difficulty envisaged by the SEAD as permitting shortfalls in an assessment.

129. Mr Mould accepted that the AoS had focused on Phase 1, but relied on the effect of Regulation 12(3), above, in relation to the assessment of Phase 2. As at the date of the DNS, no detail had been developed for the Phase 2 routes, and so no level of appraisal commensurate with that for Phase 1 was possible or appropriate at that stage; this was the opinion of Mr Miller, Head of Environment at HS2L with overall responsibility for managing sustainability and environmental aspects of HS2. The Phase 2 AoS would address the cumulative effects of Phase 2 with Phase 1. The Phase 1 EIA would address cumulative and indirect effects of the

full Phase 2 trains on the Phase 1 network, and the effect of Phase 1 HS trains on the conventional network north of Lichfield; see paras 2.2.3 and 2.2.8 of the March 2012 draft Scope and Methodology Report for the Phase 1 EIA. It would also consider the effects of the construction of Phase 2 where there were also impacts from the construction and operation of Phase 1; 2.4.3.

130. Phase 2 was however considered to the extent that it was possible to do so, and here Mr Mould gave a number of instances where Phase 2 was referred to, including operational noise. This is at least as good as any other reference to illustrate his point, para 8.10.11: the potential benefits of noise mitigation assumed the Phase 1 services only, but "the candidate areas were selected on the basis of assumed future high speed services extending to Leeds and Manchester. This would ensure that mitigation of the scheme is future-proofed should the northwards extension of HS2 take place."

131. The work on Phase 2, as at August 2012, had now reached the same level as had the work on Phase 1, although as yet unpublished.

132. In reality, in my judgment, there is nothing of any substance in the AoS about the impacts of Phase 2 on Phase 1 and there is nothing about the effects of Phase 2 on the area affected more directly by Phase 2, although there are comments about its potential regenerative benefits. If an SEA of the decision in relation to the Y network were required, it has not been undertaken. Yet the DNS sets the framework or policies for the Y project, in a way which, on the necessary hypothesis, will prevent an entirely free decision by Parliament, before it has been assessed. It would be a very good example of where an SEA was required.

133. Whether the SEA of the plan required the level of detail of Phase 1 is another matter, on which I need express no view. But if an SEA of the Y network were required, the answer that the route was not known sufficiently is not an adequate answer. Rather it lay within the promoter's hands, and would have been available with only a fairly short delay, reduced by any lesser detail which might reasonably have been thought adequate for an SEA. The DNS would still be

having the intended effect of laying down a policy framework to guide the decision-maker.

134. This would be such a substantial non-compliance that I would not exercise my discretion, however broad, in the SST's favour. The EIA process for Phase 2 would not suffice since the framework, on the hypothesis necessary for this argument, would be that the framework for it had been set.

(b) Reasonable alternatives

135. Atkins, consulting engineers, were commissioned by the SST in August 2009 to develop alternatives to high speed rail for enhancing the national transport network. Its report of March 2010, "High Speed 2 Strategic Alternatives Study-Strategic Outline Case" considered road and rail improvement alternatives to the high speed proposition being developed by HS2L, between London and the West Midlands. It considered, from a variety of economic and environmental aspects, 4 rail "packages" of enhancements to the existing network, rejecting the fifth of lengthening trains, and 4 incremental road "packages", improving the highway within the existing highway boundaries. The rail packages also extended to the North West.

136. HS2L's December 2009 report "High Speed Rail: London to the West Midlands and Beyond" considered three shapes for a high speed network north of Birmingham which did not include the Y network, though it considered the elongated inverted A, of which the Y is a truncated part. It also contained a short assessment of a new but conventional speed line. It considered a list of over 90 station and route section options which were reduced to an intermediate and then a short list.

137. The March 2010 Command Paper, in chapter 2, discussed various road and rail enhancement packages for the London-West Midlands corridor: it concluded that any new rail line, high speed or conventional, would transform capacity by comparison with upgrades to the existing lines; increasing motorway capacity would not match the scope for improving city centre to city centre journeys which any form of rail network improvement would bring. The relevant carbon emissions of rail, road and air were assessed. New motorways were environmentally disadvantageous compared to new rail lines, though new alignments were likely to be more disadvantageous than improvements to existing infrastructure. Overall a new railway line would provide the greatest capacity increase, and a high speed line the only significant "connectivity benefits".

138. The core high speed network was considered in chapter 4, referring to HS2L's analysis of the Y network compared with the inverted A and reverse S and E, before concluding that the Y network was to be preferred, based on the economic or business case. Chapters 5 and 6 dealt with the design approval and route from London to the West Midlands. Chapter 7 dealt with links to Heathrow and to HS1. The environmental work had not been done.

139. In a report of October 2010, "High Level Assessment of the wider network options- Reverse "S" and "Y" Network", HS2L compared the business cases for the S and the Y networks. The greater construction and operating costs of the latter were considerably outweighed by its greater revenue, and the wider transport benefits of the speedier service between the larger cities served. The Atkins report, and their more detailed technical reports on road and rail alternatives, as well as the December 2009 HS2L report, were published, along with a non-technical summary AoS.

140. Since the Government's strategy focused on the West Coast corridor and the Y network, as did the Atkins report, strategic alternatives were developed for enhancing the Midland and East Coast main lines, as well, to form three further enhancement Scenarios, examined in Atkins' February 2011 report "High Speed Rail Strategic Alternatives Study- Strategic Alternatives to the Proposed "Y" Network". No environmental analysis was carried out on those three scenarios since the Government thought that the environmental assessments in the earlier Atkins report had enabled it to understand the environmental impacts of

enhancing existing lines, recognised to be less than those of a new network. This February 2011 report was published with the Consultation Document.

141. In the Consultation Document, Chapter 2 dealt, shortly, with the alternatives to high speed rail: aviation and road transport, new conventional speed lines, and enhancements to the existing network focusing on RP2 version A, or Scenario B, which became the Optimised Alternative of the 51M group.

142. Appendix B "provided further detail on the options for stations and routes that HS2 Ltd considered, how these options were sifted, the main alternatives identified and the factors that it took into account in reaching its conclusions". These alternatives were options for the HS2 route and stations from London to the West Midlands. 27 possible sites for London terminus had been considered, but whittled down to 7 options for the simple reasons given. The 7 sites were reduced to 2, again for the reasons shortly stated; the two options for a double deck at Euston had been rejected again for the reasons given shortly, as comparing poorly with the preferred single deck solution at Euston. The use of lands at Kings Cross was also rejected for engineering and sustainability reasons. The process whereby the lines of route were reduced to 7 was briefly set out, the 3 short listed routes were identified and compared, and there was brief analysis of the other 4. The range of route options in the West Midlands and the station options was identified and briefly compared against the preferred option.

143. The developing AoS was itself described by Mr Miller as a "key element" in the sifting of alternatives; the main alternatives, which were considered to be the next best options, were described along with the original long list in Appendix 6 to the AoS, also published in February 2011.

144. Section 5 of the AoS says that the main Consultation Document describes the approach to the appraisal of route and design alternatives, from which came the preferred route, the rationale for which it says is described in the context of the main scheme alternatives, and dealt with more fully in Appendix 6; and so it is confined to the route of Phase 1. Appendix 6, prepared in March 2010, compared

the then preferred Phase 1 scheme, (not the same as the consultation route) with what it called Main Alternatives which were two other routes for Phase 1, a section in the West Midlands, and more detailed alternatives for the London and West Midlands termini, and a station at Iver on the Great Western Main Line, GWML, which has features in common with, but is by no means the same as, the Heathrow Hub proposal. These were the next best options referred to in the Consultation Document.

145. The AoS, paras 5.1.1.-5.1.3, referred to the accompanying report "High Speed Rail Strategic Alternatives Studies: Strategic Alternatives to the Proposed Y Network". It said that that report explained why there was a need for increased rail capacity over the next 20-30 years, why transfer of rail demand to road and domestic aviation was not an appropriate solution, and why a new high speed rail network would be much better than any other option, when tested against listed criteria including local and environmental impacts. (CJAB vol 7 Tab 13 p888, which I was told was the document referred to, contains no such analysis that I could see.) There was no need to provide an environmental assessment of transfer of rail demand to road and air, or of enhancements to existing conventional rail lines, since they were not reasonable alternatives for achieving the objectives of the plan.

146. The Strategic Alternatives Study referred to considered three scenarios involving enhancements to existing rail capacity, and appraised their broad economic costs and benefits, rather than their environmental impacts. It did not deal with alternative high speed rail configurations north of Lichfield, the alternatives to the Y such as the inverted A, reverse S or E shapes.

147. A Review of the AoS was published in January 2012 in response to issues raised in the public consultation. Also in January 2012, the Government published two reports to it from HS2L; one summarised the effects of route refinements made in response to the consultation process, and included sustainability issues as well as cost and engineering; the other was the "Review of HS2 London to West Midlands Route Selection and Speed." This re-examined the process leading to the selection of the consultation route, as described in the Consultation Document, in the light of the consultation responses, considered alternative route corridors, station locations, the implications of lower high speed design speeds, connections

with the conventional or classic network, and the link to Heathrow. The Review referred to the three stage process leading to the selection of the consultation route and the main alternatives following different corridors but serving the same four stations at the same maximum design speed. The criteria at each stage included cost, engineering feasibility, demand and environmental impacts, with the level of design and appraisal detail increasing with the narrowing of the options.

148. In April 2012, the Government published another report dated January 2012 from HS2L, entitled "High Speed 2 London to West Midlands Appraisal of Sustainability – Post Consultation Route Refinements", a title which reveals sufficient of its contents for present purposes.

149. Mr Elvin, against that background, submitted that there was no assessment of reasonable alternatives. There had been an assessment of some alternatives before the Consultation Report: in the scoping report for the AoS, three tiers of sift were described, whereby various alternatives to Phase 1, at least as I understand it, were considered and rejected as not worth further consideration because of their impacts. This breached Article 6(3) since there had been no public consultation on that at an early and effective opportunity.

150. The Consultation Document was neither an environmental assessment of alternatives, let alone on a basis comparable with that for Phase 1, and there was no explanation for the selection of the alternatives to it which were considered.

151. Neither the AoS nor the Strategic Alternatives Study contained a comparative environmental assessment of the Y strategy against other strategies, including upgrading existing infrastructure or a lower design speed with its effect on straightness and route choice, or an assessment of the significant likely environmental effects of reasonable alternatives and there was no public consultation on them.

152. Mr Elvin submitted that this suffered from the deficiency identified by Mitting J in *St Albans City and District Council v SSCLG* [2009] EWHC 1280 (Admin), [2010] JPL 10, that only alternatives "for" and not "to" a development were considered: a plan for housing development would erode the Green Belt in Hertfordshire and that had been properly assessed; the plan decided that it should occur in the areas of three towns; later planning analysis would decide where in those three areas the erosion should occur. What was omitted, in breach of the SEAD, was consideration of reasonable alternative locations to the three towns identified, for the erosion of the Green Belt in Hertfordshire.

153. The reasonable alternatives selected should have been set out, with reasons for their selection, and their likely significant effects assessed. This should be consulted on, with those responses being taken into account in the DNS.

154. There was no SEA statement with the DNS saying how HS2 and the proposed route were chosen in the light of the other reasonable alternatives considered; Article 9 (b). The AoS Review did not say how the AoS was taken into account in the decision-making in the DNS. The AoS Review could not itself be adequate since it was published with the DNS, rather than being available for public consultation leading to the DNS.

155. Mr Mould pointed out that whether an alternative was reasonable such as to require its assessment in the environmental report required account to be taken of the objectives and geographical scope of the plan. An assessment was only required of an alternative judged to be reasonable, and there was often a close link between the reasons for not selecting an alternative and for selecting the preferred option. Those were issues for the plan-maker's judgment, as indeed Commission Guidance said.

156. He also relied, safely enough at least at this stage, on what I had said in *Heard v Broadland DC* above, paragraph 67:

> "options can be rejected as the plan moves through successive stages, and do not necessarily require to be re-examined at each stage: the plan-making process permits the broad options at stage one to be reduced or closed at the next stage, so that a preferred option or group of options emerges; there may then be a variety of narrower options about how they are progressed, and that that too may lead to a chosen course which may have itself further optional forms of implementation. It is not necessary to keep open all options for the same level of detailed examination at all stages…."

157. A description of alternatives examined, and why, could be undertaken by reference back to earlier documents provided that the reasons remained valid; some possible alternatives could be regarded as non-starters so as not to require even outline reasons for being disregarded.

158. Appendix 6 did contain a detailed analysis of reasonable alternative route and station site options for Phase 1; a reasonable approach to the stage which Phase 2 had then reached was adopted. It was lawful to sift out options which were no more than possible but fell short of being reasonable, as the sift criteria showed had happened, in order to develop an initial preference. But that information was available in the consultation material for public comment. The alternatives in Appendix 6 were the reasonable alternatives to the consultation route, given the earlier rejection of strategic alternatives. It was also what HS2AA was concerned about. Enhancing the existing rail network would be likely to have lower environmental impacts than completely new alignments, but would not meet the objectives set by Government; the strategic alternatives were rejected because they did not offer the same benefits in capacity, crowding, journey times, reliability and other benefits which are more aptly described as economic.

159. Mr Mould contended that the DNS and the accompanying documents did achieve what Article 9(b) required; and the AoS Review referred to the consultation responses received. In any event, were there to be a breach in that respect, the Court could require a fuller statement to be provided.

Conclusions on reasonable alternatives

160. I turn to my conclusions. The alternatives said to require analysis included new motorways or enhancements to the existing ones, and rail alternatives in the form of a new conventional rail network or enhancements to the existing networks or a lower but still high speed network. The alternatives should have also included alternatives to the Y network, and alternatives to the route and stations for Phase 1.

161. This all serves to confirm to my mind that, even if part of the DNS is to be assumed to be a plan for SEA purposes, part simply cannot reasonably be assumed to be a plan for SEA purposes. The decision that there should be a new high speed rail network is not a plan within the SEAD but is a statement of high level policy which falls outside it. The only plan which can realistically be assumed to fall within the scope of the SEA starts with the decision that there should be a new high speed rail network, albeit not necessarily at the same design speed as proposed.

162. The SEAD requires the environmental report to contain an outline of the reasons for selecting the alternatives dealt with. That selection is made taking into account the objectives of the plan. Alternative objectives do not have to be explained nor, for these purposes, the reasons why the objectives are thought worth achieving. It is alternative ways of meeting the objectives which are the focus of the SEA. The Government concluded that alternative strategies for motorways or a new conventional or enhanced existing rail network were not capable of meeting the plan objectives set for high speed rail. It is obviously a contestable view as to whether those objectives should be met, or can be met to a large extent by means other than a new high speed rail network. These alternative strategies could not, however, have constituted reasonable alternatives to the plan for assessment in the SEA, since they are incapable by their very nature of meeting all the objectives for a new high speed rail network. The sifting process whereby a plan is arrived at does not require public consultation at each sift. This whole process has been

set out in considerable detail in the many published documents for those who wished to pursue it, but it did not all have to be in an SEA.

163. The consultation process ranged wider on alternatives than would have been necessary for a consultation limited to what the SEAD required in relation to a plan. Although these were alternatives which the Government was prepared to consider through its non-SEA consultation process, that does not make them reasonable alternatives for the purpose of SEA, when measured against the objectives of the plan. The analysis of the OA in the consultation process does not show what would have happened in an SEA.

164. The *St Albans City and District Council* case does not really help. The crucial point is not in the prepositions "for" and "to", but in what was omitted: there was a gap in the assessment between the decision that housing development would have to occur in the Green Belt in Hertfordshire, and the selection of the three locations within which the choice of locations for that erosion was to occur. I see no parallel to the position here.

165. However, on the basis that the Y network is part of the plan or programme, alternatives to the Y shape, that is the inverted A, the reverse E and S shapes have only been considered and rejected on their economic and business cases. They have not been explicitly rejected as being less than reasonable alternatives. The same applies to the adoption of a lower design speed. They may or may not have been considered as reasonable alternatives to be assessed if the promoters' minds had been applied to the SEAD; they might have been rejected on the basis that they did not get past the economic case; and there was no obligation either to assess all reasonable alternatives. What is required in the SEA are the reasons for the selection of the reasonable alternatives chosen for assessment. Neither the AoS nor Consultation Document contains any statement about alternatives to the Y network, since the Y network falls outside their scope. But that would not fall outside the scope of an SEA if the DNS were a plan for the Y network. That, taken with the omission of the Y network itself, is substantial non-compliance.

166. Appendix B to the Consultation Document contains a brief description of how the preferred options for Phase 1 were selected, and what were the chief contenders. The short list of three routes includes what were regarded as the two main rivals; it does not say, in so many words, that they were the only reasonable alternatives, though I infer that that is what was thought from view of the language used. The alternatives in the Birmingham area were in part discounted in language which makes it clear that one, Moor Street and the Solihull corridor, was not regarded as a reasonable alternative; the other rival to Fazeley Street was not so described.

167. Appendix 6 of the AoS does examine a form of preferred route for Phase 1 in the same detail as the reasonable alternatives which emerged from Consultation Document shortlist. The basis for their selection is set out in the Consultation Document.

168. It seems to me, in relation to Phase 1 and alternatives, that the AoS and the Consultation Document suffice, and I would not have regarded there as being substantial non-compliance if the only question were whether the Phase 1 AoS and Consultation Document complied with SEAD.

169. HHL make a point in relation to its own proposal. Was the Iver Station alternative which was assessed treated as a proxy for all through route options? And if so, why? And if not, why was that particular alternative selected? But the explanation in paragraphs 61-63 of Annex B to the Consultation Document seems to me to do the minimum necessary in that respect. They were regarded as having the same important effects on the route impacts. What was not considered was a comparison between the AoS version of the preferred route with the detail of the Phase 2 spurs, and any of the Iver options, since that detail was not available. If the DNS does set a framework, the framework set appears to include the absence of a through route to Heathrow, and the provision of spurs at Phase 2. The later provision of spurs has not been assessed though becoming part of the framework, and the consideration of reasonable alternatives has not been carried out on properly comparable basis. Were I of the view that the DNS was in this respect a plan within the SEAD, setting a framework or guiding policy preferences for Parliament's decision, I would have concluded that this was substantial non-compliance. The absence of information on the spurs is entirely the Government's choice, and that is not an adequate basis for the absence of assessment.

170. Mr Elvin remarked, but did not press the point as a separate ground of failing, that the preferred route assessed in the AoS was not the consultation route. If this were an SEA, I would regard the adequacy of that as debateable, depending on the degree and effect of any differences, and the scope for those to be considered at a later stage, here, the EIA.

171. The DNS does review the case for alternatives in the light of the consultation responses, though it goes beyond those in the AoS, and beyond those which an SEA is likely to have required. The January 2012 Review of the AoS, a document published alongside the DNS, and part of the decision, makes no useful contribution in this respect.

172. However, for the two reasons which I have given, essentially related to the Y network and its alternatives, and the spurs to Heathrow, the AoS did not comply substantially with the SEAD, if it had to.

(c) Monitoring

173. Third, submitted Mr Elvin there was no description of monitoring measures, as required by Article 9(c). There were merely statements to the effect that monitoring would be carried out, and that a programme could be established, as required by Annex 1(i). It was not sufficient to say that the EIA would identify for the Parliamentary process the effects and requirements for mitigation, which would include monitoring provision as necessary.

174. Mr Mould characterised this point as excessively legalistic. The AoS said that HS2L would monitor the significant environmental effects of the implementation of the project; EIA would set in train the process for monitoring the residual effects of HS2 after the incorporation of mitigation, as part of the routine project planning process. A monitoring programme "could be established" which would address strategic or national level impacts. Monitoring could be left till the assessment of the more specific proposal going before Parliament.

175. The Review of the AoS, published with the DNS, stated that monitoring would occur through the duties imposed under the EIAD, the Habitats Directive, and other legislation which process would continue in the Parliamentary process and during construction and operation. The EIA would determine the monitoring provision, environmental plans would be formulated, such as a Construction Code of Practice, and there would be other guidance and work with relevant authorities. If necessary, the Court could order a more specific statement of monitoring measures if it thought the SST to be in error in that respect.

176. In my judgment, the answer to how monitoring would be done may well be in the Review of the AoS, but that is too late for the SEA of the plan in the DNS, on the necessary assumption that it required SEA. But if the issue of substantial compliance turned on this point, I would have adopted either the solution proposed by Mr Mould or considered whether the deficiency would be made good in the EIA which has to be undertaken. Either way it would have led to no relief.

(d) Trans-boundary consultation

177. Fourth, submitted Mr Elvin, there was no trans-boundary consultation despite the link proposed via HS1 to the continental railway system, contrary to Article 7. There was plainly potential for significant trans-boundary environmental effects through increased train frequency, and there was evidence of a possible need for further rail infrastructure in France, and perhaps elsewhere to provide sufficient capacity. The absence of complaint by France did not affect the ability of these

Claimants to rely on such a failure; *HMRC v Phillips Electrics UK Ltd* C-1811; 6 September 2012, at paragraph 39.

178. Mr Mould relied on the evidence of Mr Miller that likely trans- boundary effects were judged to be negligible, rather than significant. That was a judgment for the plan-maker and not one for the Court. The evidence relied on by the Claimants was thin or speculative. No Member State had complained about a want of consultation. The Court should only rarely allow a Claimant who has been properly consulted to complain of a lack of consultation of others; *Wainwright v Richmond upon Thames LBC* [2001] EWCA Civ 2062, paragraph 47.

179. In my judgment, there is nothing in this point so far as non-compliance is concerned. The evidence of Mr Miller disposes of it, and there is no contrary evidence to suggest that that judgement was irrational. I regard the *Phillips Electrics* case as being very different; it concerned the right of one company in a group, established albeit non-resident and non-taxpayer, to freedom of establishment which was wrongly impaired by a limitation on the resident taxpayer member enjoying group relief in respect of its profits. *Wainwright* is more persuasive.

(e) Post consultation route changes

180. Fifth, there was no environmental report assessing the amendments made to the consultation route after the consultation, or of reasonable alternatives to such amendments. The DNS route was significantly different from the consultation route, and it was neither the route assessed in the AoS nor an assessed alternative to it. Ancient woodland would be destroyed, and the implications of creating a new 2.75 mile tunnel in terms of highways, noise and dirt were significant. The January 2012 HS2L report, "Review of Possible Refinements to the Proposed HS2 London to West Midlands Route" described the proposed changes as a "considerable enhancement" with "substantially lower" noise impacts, a smaller number of demolished properties and substantially fewer at risk of land take. Some changes were adverse, and different properties were affected. Some

changes were acknowledged to be of marginal benefit. What mattered for the SEAD was not the degree of change but the fact of change; the degree of change would be relevant to the issue of reconsultation as a matter of fairness.

181. Mr Mould replied that the draft plan and environmental report had been consulted on together; Mr Elvin's argument risked the creation of a legal obstacle course which would prevent consultation ever reaching a conclusion or deter it from leading to changes; this risk was one the Courts should be astute to avoid; *Shropshire Health Authority ex p Duffus* [1990] 1 Med LR 119.

182. The changes were not so significant as to require further consultation in fairness; rather they were relatively minor and could be the subject of representation in the EIA and petition to Parliament.

183. I deal with fairness and consultation in dealing more generally with the consultation grounds, but I reject the claim in respect of that aspect of it. The SEA process would be absurd if no changes could be made to the plan assessed in the SEA without triggering a further SEA, and doing so because of the fact of change alone, regardless of the promoter's view of its significance, reviewable on *Wednesbury* grounds. The iterations would be endless or there would come a point at which a consultation process would be pointless since it could lead to no further modifications. I would not have regarded this as non-compliance, but even if so and even if substantial, I would have taken the view that of its nature the failure would be remedied by the EIA and I would have granted no relief.

184. To my mind, it is first a question of degree as to whether what is adopted after the SEA consultation is so different that the SEA has not been complied with. It is then a question of whether the effect of such changes can be dealt with fairly, and respecting the purpose of the Directive, at a later stage in the process of obtaining development consent.

185. Here, the effect of local route changes in the context of this part of the plan are not so large as to require a new SEA if one were required in the first place, and second, they could be the subject of objection in response to the EIA and by petition in Parliament. No such option existed in the *St Albans* case, above, since the adoption of the Regional Strategy required erosion of the Green Belt in the area of the three towns identified.

1D Relief

186. Mr Elvin submitted that if there had not been substantial compliance, in the proper sense, with the SEAD, the DNS should be quashed. There were too many breaches of too great a significance for the exercise of a judicial discretion not to quash, and there was no basis, even applying a domestic approach to prejudice and substance of enjoyment of the affected rights, as might be warranted by *Walton*, to refuse relief. The delay would only be a few months. The Claimants had not been able in practice to enjoy the rights conferred by the European legislation; *Walton* para 139. Petitioning Parliament would be no substitute.

187. Mr Mould relied on *Walton* for the general approach to relief. There was an obvious and powerful public interest in the SST preparing the hybrid bill for Parliament, for it to reach its judgments on the benefits and costs of the proposal. This sort of very great prejudice to public or private interests was accepted by Lord Hope in *Walton*, paragraph 156, as capable of warranting the exercise of the discretion not to quash a decision for failure to comply with a procedural requirement of European law. Here, the Claimants have enjoyed the rights conferred by the SEAD; they were able to respond to consultation which included consideration of alternatives to high speed rail and the routes to the West Midlands, and they put forward all that they wished to and would be able to participate in the Bill process. They had suffered no substantial prejudice by reason of the matters they complained about.

188. Moreover, an EIA would still be required. The Advocate-General in *Nomarchiaki*, above, characterised the SEAD and EIAD as "largely parallel", and both

assessments could have the same scope where "the project and the plan are largely congruent". Mr Mould submitted that that applied here. So any defects in the AoS, if the SEAD applied, could be remedied at the stage of the EIA.

189. On the assumption, which I reject, that an SEA was required, the defects in the AoS as an SEA in relation to the Y network and spurs are too great to be remedied at an EIA stage. The pass would have been sold. Parliament has to be regarded as not free to reach its own decision. The full network is an important part of the case for even starting on Phase 1, though not determinative of it. The Phase 1 line determines the need for spurs. I would not have exercised my discretion in favour of the SST on this point.

1E HHL's submissions on SEAD

190. Mr Warren QC for HHL adopted Mr Elvin's submissions and added four of his own. First, an SEA complying with the SEAD would have been obliged to assess HHL's proposal for a hub as a reasonable alternative. This would necessarily have involved a comparison between the impacts of the spur, together with the inevitably revised HS2 route, and the consultation proposals.

191. Mr Miller's evidence was that a hub at Iver on the GWML (not wholly the same as HHL's proposal for a terminal at Iver) was considered as a reasonable alternative in the December 2009 report, and on subsequent occasions. An Iver station spur from HS2 was considered as a main alternative in Appendix 6 of the AoS.

192. In the light of my earlier conclusion in relation to the spur, I shall deal with these submissions on the basis that the concern is with the consideration of the specific HHL proposal. It is for the DfT/HS2L to decide what are reasonable alternatives.

The Consultation Document regards the crucial points, in relation to spur versus through route, as being the route impact, the considerable delays to non-airport passengers, and the limited number of airport passengers who would benefit from a through route. One form of through route was selected for consideration since it raised the main issues. That has been adequately explained. On that basis, there are sufficient reasons in the AoS for the selection made, and DfT/HS2L were rationally entitled not to select HHL's proposals as a specific reasonable alternative which the SEA should consider.

193. Mr Warren's second point concerned HHL's ability to participate in the decision-making process as required by Article 6(2). HHL regards the impact of its route on the Chilterns AONB and West London as markedly less than HS2. This is not a view shared by HS2L/DfT, not least because HHL has not defined its route. However, this seems to me no more than a variant of its consultation point, which I deal with later. It put forward very little detail on comparative environmental impact, whether for its route or for the spur – so far as either route was known.

194. The third submission was that an SEA was required because HS2 involved "the development of a trans-European network", on the basis of the link to HS1. He referred to Article 8 of Decision 661/2010 which requires environmental assessments to be carried out and considered in relation to such programmes.

195. However, Article 8 does no more than highlight the obligations in Article 7 of the SEAD where such a project is being considered in one Member State alone. There must still be a likelihood of significant environmental effects in a Member State other than the only one in which the project is constructed. Mr Miller's evidence was that these effects were not addressed in the AoS because they were thought to be negligible. There is no evidence to show that to be an unreasonable judgment. There is no evidence supporting any such effects. There is nothing in this point.

196. Mr Warren's fourth submission was that the Phase 1 EIA envisaged excluding analysis of the impact of the spurs. It is in my view premature to reach a view on

whether the anticipated exclusion of the Phase 2 spurs from assessment at the Phase 1 stage would involve a breach of the EIAD. Phase 1 would mean any direct HS2 connection to Heathrow had to be by spurs. Of course, as the DNS is not an SEAD plan, HHL is not trammelled in raising the issue again in the context of the consideration of reasonable alternatives in the EIA; they may or may not be successful in getting it considered with the benefit of further argument about the impact of the spurs. HS2L/DfT could decide that the impacts on non-airport passengers and the benefits to airport passengers have been sufficiently considered and evaluated for analysis of comparative environmental impacts, on what is already known, to be so unlikely to make a difference that HHL's hub is not a reasonable alternative to the refined route and spurs at EIA stage. That is a decision for the promoter in the first place to judge, and for the decision-maker to consider, subject only to review on *Wednesbury* grounds.

2 Was an appropriate assessment under the Habitats Directive required for the DNS?

197. HS2AA, with the support of the Bucks CC Group and of HHL, contended that the Habitats Directive, Council 92/43/EEC and initially and imperfectly transposed by the Conservation (Natural Habitats etc) Regulations 1994, and now transposed by the consolidating Conservation of Habitats and Species Regulations 2010 SI No. 490, CHSR, applied to the DNS. The DNS was a "plan" covered by the Directive, and it should have been subject to appropriate assessment but was not. Phase 1 affected a special area of conservation and a species protected under the Habitats Directive, HD. The overall plan which should have been assessed was the Y network, and an assessment confined to Phase 1 alone would not have been sufficient either. Cumulative effects or in-combination effects of the two phases had not been considered. The requirement to assess projects did not apply but showed that there was a prior stage at which plans should be assessed.

198. The SST contended that the HD did not apply as the DNS was not a "plan" and was not even said to be a "project". In any event an appropriate screening had been undertaken, leading to the conclusion that no significant environmental effects were likely from Phase 1 in relation to protected sites. No analysis of Phase 2 could have been undertaken at the time of the DNS, for want of a route capable of such assessment.

199. I deal later with the separate argument over Bechstein's bats, a protected species.

The Habitats Directive and its interpretation

200. The material part of the HD affecting special areas of conservation is in Article 6, which provides:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

201. By Article 6(4), where a plan or project does adversely affect a site, and there is no alternative solution, it can only proceed for imperative overriding reasons, with all necessary compensatory measures. The 2010 Regulations are to the like effect; Regs 61 and 62.

202. There is no definition of "plan or project" in the HD, but the definition of those words in the EIAD have been applied to the HD.

203. The circumstances requiring an "appropriate assessment" were considered in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* Case C-127-02 [2005] 2CMLR 31;CJEU; the Dutch cockle-pickers case. There had to be a "probability or a risk" that a plan or project would have significant effects on the site. But the precautionary principle meant that such a risk existed "if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned." This "implies that in case of doubt as to the absence of significant effects such an assessment must be carried out…." Hence, the first sentence of Article 6(3) "must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

204. I was also referred to the opinion of A-G Sharpston in *Sweetman and Others v Au Bord Pleanala,* Case C-258/11, delivered 22 November 2012. She made the point that versions of Article 6(3) in languages other than English, showed that "likely" could suggest a higher degree of probability than intended, and "capable of having an effect" was closer to the true sense of the Directive. It was the "possibility" of a significant effect which generated the requirement for an appropriate assessment; and at that stage in the process "significant" was only a threshold test designed to eliminate plans or projects which had "no appreciable effect". At the second stage, a plan or project could only be authorised if the

competent national authority is "convinced that it will not adversely affect the integrity of the site concerned."

205. Mr Mould contended, on the facts, that the CHSR in Regulation 61(2) required a person applying for a consent for a plan or project which was likely to have a significant effect on a European site, to provide either the information reasonably required by the competent authority for the purposes of the appropriate assessment, or "to enable [the authority] to determine whether an appropriate assessment is required". There is no suggestion that such a screening process conflicts with the HD.

The facts

206. That screening process was explicitly undertaken on behalf of HS2L in Appendix 4 to the AoS. Four principal route alignments were considered in sections, as well as six route options in and around Birmingham, and other variants and connectors. The route proposed for Phase 1 does not cross any European sites, and the screening assessment examined all such sites within 10 kms of the proposed route, as a precaution. Only in respect of the South-West London Water-bodies SPA, (Special Protection Area), and Ramsar Site was so much as a possible indirect effect identified.

207. The concern was that the operation and construction of HS2 which would cross the Mid-Colne Valley SSSI, about 400m from Broadwater Lake, would disturb the gadwall and other wildfowl there, which might be part of the internationally important numbers of over-wintering gadwall and shovelers which used the SWLW SPA, some 8 miles away, and which gave rise to its SPA designation. If the construction or operation of the viaduct disturbed the SSSI, and the SSSI provided supporting habitat for the SPA population, disturbance of the SSSI could affect the integrity of the SPA.

208. The screening assessment, para 6.1.8, expressed the view that the distance from the viaduct to the SPA made significant adverse effects on the SPA unlikely, but that "further research would be required to establish the current size and importance of the population of gadwall at Colne Valley SSSI and likely adverse effects on the SPA arising from impacts on the SSSI".

209. Natural England responded during the 2011 consultation process that the AoS ought not to conclude at this stage that an appropriate assessment was unnecessary since a likely significant effect on the South West London Water-bodies Special Protection Area and Ramsar site could not yet be ruled out. This was not because Natural England had reached the view that there was likely to be a significant effect, but because the AoS itself said that "further research would be required to establish the current size and importance of the population of gadwall at Colne Valley SSSI and likely adverse effects on the SPA arising from impacts on the SSSI."

210. The Review of the Appraisal of Sustainability published in January 2012 said that the likelihood of significant effects was "very low" but added that Natural England had suggested that further assessment would be required to confirm this, which would require an increased level of scheme design, more detailed bird surveys and noise modelling. HS2L said, in para 6.4.2, that it would confirm before a consent decision whether there would be such an effect and, if so, undertake an appropriate assessment.

211. The DNS echoed that in para 6.25; the likelihood of an indirect effect in this manner was "low". Following discussions with Natural England, winter bird surveys would be needed to provide reliable conclusions, and these would start in the winter of 2012-13, as part of the EIA. Their purpose would be to establish the existence of any relationship between the over-wintering birds and habitat dependence at the SSSI and at the SPA.

212. However events moved on. Natural England accepted, in a letter of 27 June 2012 that the further survey work which had then been done satisfied it that the

operation of HS2 would have negligible impact and no significant effect. Although the same could not then be said of the more intermittent effects of construction disturbance, Natural England, in its letter of 14 November 2012, also agreed that the further survey work showed that there were no likely significant effects from disturbance during construction or operation.

The submissions

213. The debate over whether or not the DNS was a "plan or project" within the HD echoed that over whether it was a "plan or programme" for the purposes of the SEAD. The Claimants contended and the SST denied that it would have a significant influence over future development decisions.

214. Mr Elvin pointed out, however, that the concept of "plan" in the HD did not have to set the framework for development consent nor be required by legislative, regulatory or administrative provision. The prospect of an assessment under the HD at the stage of presentation of the hybrid Bill could not satisfy the HD. It might be that a plan would become a project requiring an assessment later under the HD, but that could not avoid an assessment while it was still a plan since the HD applied to both. The HD required two tiers of protection and to reduce it to a single one would reduce the ability of the competent authority to secure the necessary high degree of protection for European sites.

215. Mr Elvin also submitted that the plan to be assessed, was the overall plan and not component parts or phases: the Y network at least. The SST had known, as a result of the December 2009 HS2L report, "High Speed Rail: London to the West Midlands and Beyond", para 6.1.34, that "many more nationally designated sites affect potential routes beyond Birmingham" than between London and the West Midlands. These comments, however, covered the routes to Scotland, not just to Leeds and Manchester, and were not confined to the Y network for that section either. Mr Elvin submitted that the decision to have a Phase 2 and that the Y network should be chosen over the reverse S or E or inverted A were made without regard to the potential impacts on any European sites which might be

affected. The need to avoid significant impacts to such sites could rule out whole corridors or force changes which inhibited the objectives of high speed rail or increased its costs.

216. Mr Elvin submitted that the level of information available on Phase 2 had been simply a matter of timing and choice by the SST, rather than the result of some extraneous cause of impossibility. It had now been confirmed in Mr Miller's witness statement that work on Phase 2 had reached the same level of detail as that for Phase 1, and advice on the routes was submitted to the Government in March 2012. So there was no justifiable difficulty in carrying out an appropriate assessment for Phase 2.

217. The last part of paragraph 45 of the Dutch cockle-pickers case, above, highlighted the importance of the assessment taking account of the effects of other plans or projects on the same site, even if separate plans or projects. Mr Elvin submitted that the SST had failed to consider the cumulative or in-combination effects of Phases 1 and 2 together, whether or not seen as part of the one project. The River Mease SAC north of Birmingham, for example, had not been considered, nor therefore the potential effect on the UK's network of European sites. Consideration at the stage of Phase 2 would be too late, since the DNS fixed the principle of Phase 2, and would hinder or prevent consideration of whether there was any satisfactory alternative to Phase 2, should derogation from certain protections in the HD become necessary.

218. The subsequent work done by the SST, showing that no significant Phase 1 effect was likely, was irrelevant according to Mr Elvin: it had not been consulted on, or taken into account by the decision-maker when the plan was adopted. Natural England's last response was given but three days before the hearing. This subsequent work could not in principle therefore be an appropriate assessment. It did not mean that the EIA or Parliament's decision would be that there was no adverse effects.

219. Nor should that subsequent work be a basis for the exercise of a discretion to refuse relief: it would mean that the two tier protection was replaced by a single tier, and replaced in such a way that the decision on the project was affected by the unassessed earlier plan. The position remained insufficiently certain on the evidence. There were other serious failures to comply with the HD, including over Bechstein's bats.

220. Mr Mould submitted that the DNS was not a "plan" within the HD, because, as was the case with the SEAD, to which the concept of "plan" was linked, it did not apply to the more general policy level of decision-making, such as in the DNS. If it was not a plan for the purposes of the SEAD, it was not a plan for the HD. The DNS was a statement of policy intention and of no greater legal significance than that; the decision on it would be entirely for Parliament. It bore no comparison to a land use policy document.

221. The aim of the HD was to prevent harmful activities being permitted without prior assessment of their effect, as the Dutch cockle-pickers case said, but the DNS permitted nothing. Although a plan might not itself have to permit anything, *Commission v UK* Case C-6/04 [2005] ECR I-9017, para 55, held that a land use plan should be subject to appropriate assessment under the HD because, the obligation in the Planning Acts to reach a decision in accordance with it save where material considerations indicate otherwise, "necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned."

222. In *R (Boggis) v Natural England* [2009] EWCA Civ 1061, [2010] PTSR 725, the Court of Appeal held that the notification of an SSSI did not constitute a plan for these purposes, although the effect of notification was to require certain conditions to be satisfied before specified operations were carried out. Natural England's view about the conservation and enhancement of natural features, could not amount to a plan either. Those views were of no statutory significance, and were planning permission to be required for an operation, those views could not be determinative of that decision. The notification lacked the "bite" necessary for a plan.

223. It was also consistent with the HD for adverse effects on sites to be considered to the extent possible at each successive stage, where the level of detail in the plan or project permitted more specific assessments; *Commission v UK*, above; A-G Kokott. The hybrid Bill would give project consent and full consideration of whether there was any likely significant effect on the SWLW SPA would be necessary for that. The level of detail available in respect of Phase 2 was such that no detailed assessment or indeed screening assessment was possible at the DNS stage. That would come later at the Bill stage; see also the decision in *Commission v UK*.

224. Mr Mould submitted that there was no evidence of potentially cumulative effects from Phase 1 and Phase 2 on any particular site, whether at the River Mease SAC or elsewhere. *Boggis*, above, in para 37, held that an allegation that the HD had been breached required "credible evidence that there was a real, rather than a hypothetical, risk which should have been considered." The AoS in Appendix 4, notably in chapter 5, did consider in some detail the effects of HS2 in combination with other developments or plans.

225. The screening assessment had been made, which showed a very low risk of indirect effects at one site, which would be the subject of further survey work and if necessary an appropriate assessment before consent was granted. The operation of the HD should not become a legal obstacle course.

226. Natural England's two most recent letters would justify withholding relief in the exercise of discretion had there been any earlier breach of the HD. The most that quashing the DNS would achieve in this respect would be a reconsideration of the position by SST, the result of which on this aspect is already plain.

Conclusion on the application of the Habitats Directive

227. In my judgment, the DNS is not a plan for the purposes of the HD. The DNS is a decision by the promoter of a project as to the project for which development consent will be sought from another body, the decision-maker, why, in what form and through what process. It does not create the framework for the subsequent decision on the project by the decision-maker, Parliament, nor is it akin to a land use plan in that it sets out policy objectives and priorities in a way which the decision-maker has to apply or consider. This is not a form of self-direction by the decision-maker as to how the decision will be taken. If a plan, for HD purposes, does not need to set a framework, it nonetheless has to have some effect, such that an appropriate assessment of the project fails to meet HD objectives.

228. However broad the scope of a plan for the purposes of the HD, I cannot see that Mr Elvin's suggestion that the HD creates a two tier or two stage protection, let alone one which is removed by the absence of an appropriate assessment for the DNS, has any practical reality or application here. Not every project has a precursor plan.

229. I see this as closer to the facts of *Boggis,* and indeed not as strong a case from the Claimants' point of view, since the DNS, of itself, lacks legal consequences. A purposive approach is required, but I can see no reason why what is required by way of appropriate assessment should not be done at the time when the project undergoes EIA. I can see no aspect of an appropriate assessment which should be dealt with at the DNS stage which would be omitted if the only appropriate assessment were carried out later but before the Bill is deposited. If there were such an aspect, it would assist in showing that the DNS, on a purposive approach was a plan. But there is nothing. I see instead merely duplication, and on a less informed basis.

230. The screening process has been carried out as required by the Regulations, for which there is no counterpart in the Directive. The way in which the outcome of the screening process has been considered reinforces my view that the DNS does not need to be treated as a plan for the purposes of the HD to be satisfied. The

possibility of a significant effect which could require an appropriate assessment was identified. If no more work had been done, an appropriate assessment would have been required at a later stage. The later survey work, albeit not part of the screening process itself, shows that an appropriate assessment will not be required, at least not for that effect. If objectors say that one is nonetheless required at a later stage that is a case that they will then have to make out. A decision on whether an appropriate assessment is required will still be called for. A negative decision would be open to challenge – albeit without much prospects on the present information because of the apparent reasonableness of the conclusion reached about the SWLW SPA.

231. If a lawful appropriate assessment of the Phase 1 project, applying the approach in the Dutch cockle-pickers case and *Sweetman* above, requires the examination of cumulative impacts with other projects or with Phase 2 for example at the River Mease SAC, and they are omitted or no appropriate assessment at all is carried out, that would be a ground of challenge to the grant of any development consent enacted by Parliament. It would be a breach of the HD at the project stage. Likewise, if the London to Lichfield line and junction locations determined the line of the Y in such a way that the northern legs could affect a European site, an appropriate assessment of that may be called for at Phase 1. The same could apply in relation to the Heathrow spurs. Nothing done or omitted thus far enables any such deficiency to escape future scrutiny. If the issue has not been covered in the screening process, that would not obviate the need for an appropriate assessment if the application of the HD required it. I also accept Mr Mould's submission about the need for, and absence at the moment of, credible evidence of a risk which should have been considered in relation to cumulative impact, at least at the present.

232. There is nothing additional in the argument about whether Phase 1 should be seen as part of a single project for the Y network, which an appropriate assessment should cover, to that which I consider under the ground generally challenging the consideration of cumulative impact in the context of two hybrid Bills for the Y network. It is quite wrong to treat the DNS as fixing the principle of Phase 2.

233. The suggestion by Mr Elvin that an appropriate assessment under the HD required the consideration of alternatives to the Y network and the possible onward

extensions of the Y to Scotland, is wrong in my judgment. This is not a question of cumulative impacts but of alternatives. It could arise in the context of an adverse effect on the integrity of a site and the existence of alternative solutions. But the premise for that has not yet been shown to exist. Again, there is nothing in the process envisaged by the SST which would preclude that being considered should circumstances require it.

234. Even if Mr Elvin were right that the DNS did constitute a plan, and an appropriate assessment had been required as a result of the screening process, I would refuse relief in the exercise of my discretion. I regard it as obvious that the Natural England letters show that the test in the Dutch cockle-pickers case has been satisfied in relation to the SWLW SPA. Quashing the decision on that ground would produce no different a result on the absence of likely significant effects, even if the public have not been consulted on the letters. Second, even if the other criticisms were right as to what the assessment should contain, all can be done as required before the Phase 1 project consent is granted, without any prejudice to the objectives of the HD or to the Claimants. It could well be done on a more informed basis since the route for Phase 2 and more environmental material on it would be available. There is simply no advantage in holding up the process on this ground at this stage to any body. With or without Bechstein's bats, the breaches of the HD which this supposes, are so readily remediable at a stage which the HD itself envisages will occur, that judicial discretion should not lead to a quashing of this decision.

Bechstein's bats

235. A separate issue was raised concerning this species. The Review of the Appraisal of Sustainability, RAoS, had also accepted, as a result of the consultation

responses, that the consultation route passed close to an area of ancient woodland, important to Bechstein's bats, a species protected under the 2010 CHSR, above. Surveys, management and monitoring of habitats and species for the purposes of impact assessment and mitigation would be undertaken, it said, as part of the EIA.

236. Bechstein's bats are listed in Annex II of the HD, as a species of Community interest the conservation of which requires the designation of Special Areas of Conservation, and in Annex IV, as a species in need of "strict protection". Article 12(1) of the HD required measures to be taken to establish a system for their strict protection, preventing the deliberate killing or disturbance of these species, especially during breeding, rearing and hibernation, and deliberate destruction of breeding sites. Article 16(1) permitted derogation from that requirement, if there were "no satisfactory alternative", if the derogation were not detrimental to the "maintenance of the populations of the species concerned at a favourable conservation status in their natural range", and where there were imperative reasons of overriding public interest.

237. Mr Elvin contended that the RAoS had dealt rather summarily with this problem; they were known to move across the proposed route for feeding, breeding and hibernation; so there was a high probability of their being killed, injured and disturbed. The impact of the route on bats had simply not been evaluated. The DNS adopted a policy which promoted derogation from the HD without considering or addressing the overriding public interest in Article 16 criterion for doing so, in further breach of the HD.

238. Mr Mould submitted that the RAoS adopted a proper approach to the bats, the EIA for the development consent stage would include detailed habitat and species surveys, and if an appropriate assessment were required it would be undertaken. Natural England were content with that approach. There was no evidence to support the Claimants' assertions about the impact on bats. The DNS did not itself authorise any acts which could disturb the bats, or any derogation. Natural England's views would be very relevant on this point at the EIA stage. There was nothing at present to show that the HD would be breached in that respect, in the light of *R (Morge) v Hampshire County Council* [2011] UKSC 2 [2011] 1 WLR 268, para 30 in particular. Since the HD did not apply at the present, the obligation in the CHSR effective on the SST at this stage was to "have regard to

the requirements of the Directives so far as they may be affected by the exercise of those functions"; Reg. 9(3). That obligation had been complied with.

Conclusion on Bechstein's bats

239. There is no evidence from the RAoS or elsewhere to support the contentions in Mr Elvin's skeleton argument in the terms there used. I am not prepared to infer that that is what the RAoS means by its more cautious language.

240. The screening process in the AoS, public consultation, and the noting of it in the RAoS has shown that the process worked in bringing to light an impact which may require an appropriate assessment. The answer seems to me to be akin to the position which would have arisen with the SWLW SPA if the further surveys remained to be carried out. A view will have to be taken by HS2L /DfT about whether this requires an appropriate assessment, for which purpose further survey work is likely to be required. When a view is taken, that will be challengeable if it is unreasonable as a matter of the promoter's judgment, on the proper application of the Dutch cockle-pickers case. But that stage has not been reached.

241. If such an assessment should already have taken place, doing it now would simply duplicate what will now have to be done before project consent is granted. There is no basis for supposing that any one is prejudiced by that omission. I would exercise my discretion against the grant of relief if there had been a breach of the HD. It would have been of the most inconsequential and fully remediable nature.

242. Accordingly, the various parts of this ground of challenge are dismissed.

3 The Hybrid Bill procedure

243. The Bucks CC Group with support from HS2AA and HHL contended that it would be unlawful for the SST to promote Phase 1 through a hybrid Bill because the procedures for such a Bill in Parliament would not meet the requirements of the Environmental Impact Assessment Directive, EIAD, as codified in 2011/92/EU from 85/337/EEC and others. His decision to do so should be quashed. That was intended to have the effect of preventing him from presenting such a Bill to Parliament.

244. It was not in dispute but that the Bill, when enacted, would contain the development consent for Phase 1 in the form of a deemed planning consent. The fact that the development consent was to be granted by an Act did not alter the requirement for compliance by Parliament with certain EIAD provisions for the consent to be lawful and effective. It would be for the national Court to rule on whether Parliament had complied with the applicable requirements of the EIAD.

245. In the end, and rightly, the Claimants did not pursue an argument that, even if they were right that the Parliamentary procedures would inevitably fail to comply with the EIAD, I should declare that it would be unlawful for the SST, a Member of Parliament, to present the Bill to Parliament, or to make some order preventing him doing so. *R(Unison) v Secretary of State for Health* [2010] EWHC 1456 (Admin), Mitting J, was recognised as demonstrating that such a course would be unconstitutional as an interference with proceedings in Parliament. It was rightly not contended that this Court should make any orders as to how Parliament should proceed, even though it would be for the Court to rule on the validity of the development consent enacted by Parliament, if a challenge were brought to it, on the grounds of non-compliance by the Parliamentary process with the EIAD's objectives.

246. The Claimants submitted in the end that, if I were clear that certain parts of Parliament's procedures would be deficient in complying with the EIAD, I should declare that those deficiencies existed. It would be for Parliament to decide what

to do about them. The parties could also appeal against any such declaration. Were I simply to express views not embodied in an order, there could be no appeal by those who disagreed. This suggested step would avoid the large waste of time and money inherent in Parliament considering a Bill through procedures which would inevitably fail to grant a lawful development consent, and which Parliament would have to reconsider, this time going through what the Courts would have declared to be procedures compliant with the EIAD.

247. Mr Mould submitted that it was not inevitable that the procedures which Parliament would adopt would fail to meet the EIAD, even if it adopted those which the Claimants currently put forward as likely. The full detail of the procedures which Parliament would adopt could not now be known anyway; different procedures might be adopted in the light of advice which those responsible in Parliament might give. The full effect of those procedures in relation to the EIAD should only be judged after the full process of the Bill, when the facts of all that had been done could be examined, and a decision on validity made, which could also take account of the Court's discretion. Were I minded to declare that any part of the envisaged procedures would be defective, I should give the House Authorities the opportunity to make representations about the remedy, since Parliamentary proceedings leading to the enactment of primary legislation were not amenable to judicial review.

The provisions of the EIAD

248. Article 1(4) of the EIAD prevents the EIAD applying to "projects the details of which are adopted by a specific act of national legislation, since the objectives of this directive, including that of supplying information, are achieved through the legislative process". Although this Directive has been transposed in large measure into domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 SI No. 1824, this particular provision is only in the Directive and it is to its provisions that the argument was therefore addressed.

249. In *Luxembourg v Linster* Case C-287/98 [2000] ECR 1-6917, the ECJ held that Article 1(4) only exempted development consents "where the legislative process has enabled the objectives pursued by the Directive, including that of supplying information, to be achieved, and the information available to the Parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project."

250. What was said in *Linster* has been repeated in a number of cases, including *Boxus v Region Wallonne* Case C128/09 and Others [2012] Env LR 14, and most recently in *Solvay v Region Wallonne* Case C-182/10 [2012] Env LR 27. There the CJEU also held that the project had to be adopted by a legislative act with sufficient precision and definition for the project as then adopted to include all the elements of the project relevant to the environmental assessment, and necessary for the environmental impact to be assessed. This assessment had to be carried out on the basis of appropriate information supplied by the developer, supplemented by the responses of the specific authorities with environmental responsibilities, and from the public. The members of the legislature had to have sufficient information at their disposal to meet Article 5(3) and Annex IV of the EIAD. This information was to be in the ES. It was for the national court to determine whether those two aspects were satisfied, taking account "both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates." Thus the EIAD only exempted from its requirements those consents adopted by a specific legislative act, "in such a way that the objectives of the [Aarhus] Convention and the directive have been achieved by the legislative process." The legislature had to do more than merely ratify an earlier administrative act.

251. The Opinion of A-G Sharpston in *Boxus* explained the effect of Article 1(4) in the light of the CJEU decisions: in the legislative process, direct public participation was replaced by the indirect public participation of a representative democracy. This process did not have to meet all the procedural requirements of an administrative authorisation. But that indirect participation still required the provision of the necessary information, its consideration, and a decision on the project which did not leave open important aspects for consideration after the grant of consent, in such a way that the legislature could not have examined all the elements relevant to the assessment of environmental impact. A-G Sharpston divided the issues into: input (broadly whether the information was sufficiently detailed and informative for an evaluation of likely environmental impacts to be

made); process, (broadly, whether the appropriate procedures were "respected", and the time for reading and debate sufficient for a proper examination); output (broadly, whether it was clear what the consent authorised and with what constraints).

The probable hybrid Bill procedures

252. Parliamentary procedures for the submission of a hybrid Bill include Standing Order 27A, requiring the bill to be accompanied by an Environmental Statement, ES, containing the requisite environmental information, together with a non-technical summary. Provision is made for copies of the ES and non-technical summary to be made available for inspection and sale. The ES would be presented to Parliament when the Bill was put on deposit there, and the representations which the public would then be invited to make on it would be reported to Parliament at the Third Reading before any decision to enact the Bill. The SST envisaged that the development consent, ie the deemed planning permission in the Act, if passed, would permit the detailed schedule of works to be carried out as shown on the deposited plans or within the marked limits of deviation. But it would not extend further than those works which had been subject to EIA or which did not need one.

253. The draft Scoping and Methodology Report for the ES had been subject to public consultation. Public consultation on a draft ES was expected for the summer of 2013, with a view to the introduction of the Bill by the end of 2013.

254. Thus, submitted the SST, the required "environmental information" would be available to Members of Parliament. Ms Lieven pointed out that Standing Order 27A had not been revised since the public participation requirements of the EIAD were changed in 2003 as a result of the Aarhus Convention; Mr Mould said that that issue was under discussion between the Government and the Parliamentary Authorities.

255. The SST anticipated that the Bill would follow the normal procedures for a public Bill, similar in each House, except that, in each House there would be an additional Select Committee stage after the Second Reading at which objectors who satisfied the requirements of Standing Orders could petition against the Bill and be heard by the Select Committee. The SST envisaged Parliament following a procedure "informed by" but not identical to the procedure followed for the Crossrail hybrid Bill, which had enabled the objectives of the EIAD to be met. The SST intended, for example, that the House of Commons be asked to vote on a statement of reasons at Third Reading, if the Bill were to be enacted, which had not been done on the Crossrail Bill.

256. The Select Committee would be an important part of the overall process in the eyes of the SST; "authorities concerned by the project by reason of their specific environmental responsibilities", who had to have an opportunity to express their views on the environmental information and the request for development consent, (Article 6), would have locus standi at the Select Committee. The range of persons with locus under Standing Order 96 was extensive since it covered those whose property interests were specifically and directly affected, trade bodies representative of those affected in an area, bodies representing amenity, educational, travel or recreational interests which were materially adversely affected, local authorities of any area affected injuriously, the inhabitants of such an area, commons Conservators and the like.

257. It was up to the promoter to take a locus objection; none had been taken on the Crossrail Bill. NGOs such as Save Britain's Heritage and the Ramblers Association had participated at the Committee stage. Published rules governing participation at an oral stage before the decision-maker were not incompatible with the objectives of the Directive.

258. But the Committee could not hear a petition which challenged the principle of the Bill, namely a high speed railway between London and Birmingham, which would have been approved for this purpose at the Second Reading - unless instructed by the House to do so.

259. The Claimants thought that had never happened, so petitions, said Ms Lieven, would be limited to matters of mitigation and minor route changes or station configurations. Mr Mould replied that the SST could propose at Second Reading, as had been done for the Crossrail Bill, that the Select Committee should report to the House any environmental impact issue which the practice of the House prevented the Committee from considering. Moreover, the principle was only set at Second Reading for the purposes of the Select Committee's remit. Parliament could decide to reject the principle of the Bill before or after the Select Committee stage. The principle was not finally approved by Parliament's decision on Second Reading that the Bill should proceed to Select Committee, nor by the terms in which such a Committee was conventionally instructed.

The asserted failings of the hybrid Bill procedure in relation to the requirements of the EIAD

260. The Claimants submitted that the requirements for public participation in Articles 5 to 9 of the EIAD could not be met if the public did not know what process, with what rights of participation, would be adopted. This was not known. The hybrid Bill procedure most obviously failed to comply with the EIAD objectives in the area of public participation. Article 6 (4) on early and effective opportunities to participate in the environmental decision-making procedures, and Article 8, the requirement that the results of consultation be considered in the consent procedure.

261. Article 5 deals with the requirement on the developer to supply information. Article 6 deals with the consultation of authorities with specific environmental responsibilities likely to be concerned, and with the need to inform the public, early in the environmental decision-making process, of where information could be obtained, and of the arrangements for public participation. (The Aarhus Convention requires that to be done in an adequate, timely and effective manner.) The public concerned should be given "early and effective opportunities to participate in the environmental decision-making procedures", and to express their views "when all options are open to the competent authority" before the

decision is taken on development consent; Article 6(4). Article 7 requires that where a project was likely to have significant effects on the environment of another Member State, the public of that other state should also be able to participate effectively in the environmental decision-making procedures. Article 8 requires the response to the procedures referred to above, to be taken into account in the development consent procedure. Article 9 requires the main reasons for the grant of consent to be stated.

262. Ms Lieven submitted that the possibility that the Select Committee might be asked to report to the House any environmental issue it had not been able to consider, fell short of enabling the Committee to consider the principle of the Bill. The Committee could not decide or report that the project should not continue in the light of the ES or consultation responses or petitions to it, or whether there were better alternatives. Since the principle was decided on by the House at the Second Reading, which could not have a right of public participation, there was therefore no effective opportunity for the public to participate, as required by Article 6(4), even more so since voting on the Bill would be whipped. "All options" were no longer open to the decision-maker after the Second Reading.

263. Standing Order 96 on locus for the Select Committee did not permit all members of the public to participate, nor NGOs. But the provisions of the EIAD on the "public" which may participate include associations or organisations or groups of people, and the "public concerned" means not just those affected but those "likely to be affected by or having an interest in the environmental decision-making procedures", which included NGOs "promoting environmental protection" and meeting any requirements under national law. The public also needed to know in advance what provision is to be made for its participation, and that could not be left until any decision of the Select Committee on locus.

264. There was no process either whereby the consultation responses to the ES, compiled in to a report placed in the House of Commons Library, would be taken into account by Parliament as a whole; lodging the responses to consultation on the ES in the House Libraries would not meet the public participation requirement.

265. It was highly unlikely that the voting MPs would all have read the ES, and the environmental information in its entirety including the public responses; the votes at the Second Reading would be whipped. The comments during the Committee stage would not be available at the Second Reading; Article 8 could not therefore be complied with. There was no requirement in Standing Orders for Parliament to give reasons for granting development consent; Article 9 could not be complied with, and a Government Command Paper would be no substitute for the reasons of the actual decision-maker.

266. Mr Elvin, in support of Ms Lieven on this issue, submitted that the Bill procedure could not define and constrain the development and mitigation measures in the precise and definitive manner required to ensure that the works as constructed were not materially different from what was assessed in the ES.

267. Mr Mould submitted that Article 1(4) was predicated on public participation through the operation of Parliamentary democracy. The language of the CJEU decisions showed that the intervention of the national court should come at the end of the process, after enactment, and not before the process had begun or during its continuance. The issue was not properly characterised as one of prematurity; the role of the national court under the EIAD simply could not be fulfilled in advance of enactment. It could not possibly be concluded now that the ES would fail to be equivalent to that which would have been submitted to, say, a planning authority, under ordinary procedures. The Court could not consider the representations yet to be made on the ES, any supplementary ES or comments on it, the report of the Select Committee or the Parliamentary debates.

Conclusions

268. In my judgment, it is impossible to say with certainty how Parliament will approach its task, either as a matter of procedure or substance. Standing Order

27A may or may not be revised. The Select Committee may or may not be given a remit as in the Crossrail Bill, even if it appears very unlikely that it would be invited to consider or recommend on petitions which went to the very principle of the Bill. Whether any persons or bodies who are entitled to participate within the terms of the EIAD will be refused locus at the Select Committee stage, remains unknown. Mr Mould is however right that rules limiting the scope of and participation by the public in an oral hearing stage (i.e. here the Select Committee) are not incompatible of themselves with the EIAD.

269. In substance, the manner in which ES consultation responses are made available to and considered by Parliament is unresolved. More obviously, the nature and substance of the debates in Committee and at Second and Third Readings are unknown. The Houses of Parliament may or may not be invited to provide reasons for their decisions. It is therefore impossible at this stage to say that the overall process will or will not satisfy the EIAD requirements.

270. I have also concluded that it would be unwise, and it would risk an interference with Parliament's constitutional position, if I were to declare that this or that aspect of its probable or possible procedures would fail to meet the objectives of the EIAD. I am not aware of all the niceties of Parliamentary procedure nor is the Court their guardian. I am not aware of how one aspect, if thought to risk non-compliance with the EIAD, could be resolved by a change in another. The process has to be judged as a whole, rather than by reference to parts. The significance of any failings will also have to be considered for the exercise of any discretion by the Court. It can only be judged, as Mr Mould submitted, as a whole at the end of the process. This, it seems to me, is the very strong purport of *Solvay* above, taking account of "the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and Parliamentary debates". I repeat that for emphasis.

271. I appreciate the force of the point that if the process now is bound to fail in law, it is a waste of money for the process to be carried through unavailingly, only to be repeated next time correctly. Of course, unless the case is unarguably clear that failure is inevitable, appealable rulings by me merely create the opportunity for delays to the Bill, potentially to no avail, if overall the process is EIAD compliant or objectors succeed on the merits. But I do not see the process as bound to fail in

law. Article 1(4) exempts specific national legislation from compliance with the EIAD if its objectives are nonetheless met. It is clearly intended to operate with the variety of legislatures and procedures among Member States. It is inconceivable that the UK Parliament would be unable to meet the objectives of the Directive. It has given no indication at all that it has set its face against compliance. It is the task of its skilled advisers and not of the Court, at this stage, to rule on what it should do to comply.

272. It is clear that the SST, and HS2L as promoter of the Bill, are aware of a number of issues which warranted consideration because they are being considered e.g. amendments to Standing Order 27A and the giving of reasons. The consideration of those and other issues will be sharpened no doubt by the degree of forewarning this litigation has afforded as to the areas of weakness perceived by the Claimants.

273. Mr Elvin contended that it was insufficient for compliance with the EIAD to be achieved as a matter of practice or policy; the compliant process had to be certain in advance, and Order 27A, upon which Mr Mould was said to have taken his stand, was itself sufficient to show that there would be non-compliance. I am not prepared to take Order 27A as fixed, nor as now showing the inevitability of non-compliance of the whole procedure and debate. Mr Elvin may or may not be right. The question of what certainty was required and how far in advance is much better examined in the light of events which have occurred and actual problems which may (or may not) have been experienced in consequence. Mr Elvin relied on *Commission v Ireland* case C-456/08 [2010] PTSR 1403. I regard the context of that case, certainty over effective remedy in public procurement, as not advancing this case where the Directive contains its own requirements, and compliance with which the CJEU has ruled can or should be judged overall, when completed.

274. On that basis, the least said the better. However, postponing such wisdom for a moment, Ms Lieven is clearly wrong in persisting in an argument that the principle of the Bill is fixed by the Second Reading remit to Committee: it only fixes the principle for the Committee stage. Mr Mould is right that the principle can be later rejected. Mr Mould is also right that, subject to the relationship between the ES and the Bill, development consent sought in the Act can constrain

the development and mitigation measures with sufficient precision and definition to that which has been assessed.

275. Finally, I have a reservation about the nature of the Claimants' arguments on public participation, which are best considered in the light of what actually happens. It is this: Article 1(4) exempts the Bill from compliance with the provisions of EIAD, provided its objectives are met. The Article 1(4) requirements for exemption cannot simply be turned into an obligation to comply with the EIAD, since the purpose of the deliberate exemption would be negated. A-G Sharpston in *Boxus* above, provides a clear analysis: the direct public participation requirements are replaced by the indirect public participation of a representative democracy. I did not find it easy to tell what difference, in the Claimants' submissions, could be drawn between what was required for a process to be exempt under Article 1(4) and for it to comply, just as an administrative process would have to, with the full terms of the EIAD from which ex hypothesi it is exempt. But this will, if necessary, be an issue for examination in the light of what actually transpires if and when the Bill is enacted by Parliament.

276. For the reasons which I have given this ground of challenge is dismissed.

4 The failure to consider cumulative effects for the purposes of Environmental Impact Assessment

Introduction

277. This ground arises out of the intention of the SST to proceed with two separate hybrid Bills for the two phases of the Y network. Bucks CC Group, HS2AA and HHL contend that the SST sees the two phases as two parts of the same project, does not seek to justify Phase 1 on its own, and is concerned to find a mechanism

in the Bill which would include a commitment to Phase 2. The Government had responded on 23 January 2012 to the recommendations in the Report of the Transport Select Committee on HS2, which sought a firm statutory commitment to Phase 2, by saying that it was committed to the full Y network, recognised that "stakeholders" needed to be reassured that the entire network would be delivered, and was therefore looking at all possibilities to provide that assurance, including the option of having a purpose clause in the Phase 1 hybrid Bill.

278. The Claimants contended that a lawful EIA under the Environmental Impact Assessment Directive, EIAD, 2011/92/EU as transposed into domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations SI No.1824, required the full environmental effects of the whole project, that is the Y network to be assessed, but the Government was proposing to do the two parts separately. The EIA for Phase 1, which would be deposited with the hybrid Bill would not be lawful since it would not include the environmental information for Phase 2 and would not assess it. This depends on what the EIAD requires and what is proposed by way of EIA.

The EIAD

279. Article 2(1) of the EIAD requires Member States to take the measures necessary to ensure that "projects likely to have significant effects on the environment" are subject to environmental assessment before consent is given. "Development consent" is the consent given by the competent authority which entitles the developer to proceed. It is not in issue but that Phase 1 and Phase 2 each require such assessment, even if taken as separate projects.

280. Article 5(1) requires Member States to take measures to ensure that the developer provides the information specified in Annex IV, which includes a description of, amongst others, indirect, secondary, cumulative, positive and negative effects of the development. Regulation 3 and Part 1 of Schedule 4 to the domestic Regulations reflect that requirement. The project, submitted Ms Lieven, was the Y

network; and, as another way of putting it, the cumulative effects of Phase 2 with Phase 1 should be considered in the Phase 1 EIA.

281. The CJEU has made it clear in many cases, that the EIAD has a very wide scope and broad purpose, which is relevant to how a Court should judge what constitutes the project, and how it should be astute to prevent "salami slicing", dividing a single project into components so as to keep each below the assessment thresholds, evading compliance with the Directive. In the domestic example of *R (Save Britain's Heritage) v SSCLG* [2011] EWCA Civ 334, [2011] 2 CMLR 48, a purposive interpretation of the Directive was given in relation to whether demolition fell within its scope. The broad purpose was that projects capable of having significant effects on the environment should be assessed, and so courts should lean towards their inclusion within its scope.

282. The question of how the scope of a project, which is to one degree or another linked to another project or should be treated as a part of it for these purposes, has been considered on a number of occasions. In *Brown v Carlisle City Council* [2010] EWCA Civ 523; [2011] Env LR 5, the developer sought planning permission for a freight distribution centre at an airport, while making it clear that it intended to carry out certain other works to the runway, air traffic control and terminal facilities relying on its permitted development rights. The Environmental Statement dealt only with the distribution centre. What made that development compliant, or arguably compliant, with planning policy was the way in which it would enable the airport to become operational, and to that end an agreement under s106 of the Town and Country Planning Act was required. But that linking, which made the distribution centre policy compliant, since it became part of the airport development as a whole, showed that the permitted development works were part of the cumulative effects of the distribution centre, all of which should have been assessed. There did not need to be a functional or operational link between the two sets of works for the works other than the distribution centre to be part of its cumulative effects. The decision was not made on the basis that these other works were part of the project.

283. The decision would have been otherwise if the distribution centre had been justified in its own right without any need for a commitment to the further airport development. The developer also had sufficient detail of his other proposals for

the airport in order to provide an assessment of their economic benefits, which undermined its contention that it had insufficient information to provide an analysis of adverse cumulative effects.

284. The Court was alive to the dangers, although arising on a discretion argument, of permitting the effects of the other developments to be assessed later and separately, since their cumulative effects could not then be taken into account in relation to the distribution centre which would have been permitted, and whose existence, however undesirable it might later be shown to be, would be a factor weighed in the judgment about the acceptability of the impact of the other works; the "baseline" would have shifted.

285. In *Bowen West v SSCLG* [2012] EWCA Civ 321, [2012] Env LR 22, the Court of Appeal had to consider whether an intended application for a major extension of a landfill site was an "indirect secondary or cumulative" effect of the actual application under consideration for a more modest one, such that the ES for the application being considered should have dealt with the intended larger application. It also had to consider whether the two were part of the one large project. It rejected the contention that the effects of the larger scheme, for which development consent was not yet sought, should have been assessed as part of the effects of the smaller one, and the argument that the two were part of the same large project, for overlapping reasons.

286. The Court did not decide that the latter issue was one of law or fact or if fact, what standard of review applied, since it took the view that the outcome was not affected by the test. On the facts, the project was the one contained in the application: the smaller scheme was a stand alone proposal, which was being considered on its own merits, which could and would go ahead regardless of the future proposal; the two were not in reality a single integrated project. There was also a want of significant detail about the larger proposal. It was very different from the linked proposals in *Brown*. The Court rejected the argument that the cumulative effects of the smaller project included the effects of the larger proposal, on the basis that this was an issue of fact for the decision-maker to which the conventional *Wednesbury* standard of review applied.

287. It also pointed out the distinction between the wide scope of the EIAD in CJEU jurisprudence, where the issue was whether an ES fell to be carried out at all and where the Court had been astute to prevent piecemeal applications being used to exclude larger developments from EIA, and the appropriate scope of an ES when it is actually being carried out in relation to the right project. This latter issue, which was the issue in *Bowen West*, (and is one of the issues here), was a matter of judgment for the decision-maker, reviewable on *Wednesbury* principles.

288. If consent for the larger scheme were to be sought, an ES would be required, and the developer would have to consider whether there were any likely significant cumulative or in-combination effects with the smaller proposal. There was no evasion of the need for an ES therefore of all the relevant effects of the two proposals were consents for both to be sought separately. The cumulative effects would only be the effects of the larger scheme itself or some effect factually arising from the two schemes together, which would all be examined in the ES of the larger scheme. The grant of planning permission for the smaller scheme would not foreclose or prejudice any decision on the larger proposal.

Submissions

289. Ms Lieven submitted that the correct EIAD approach would be defeated here were the Government to proceed with two Bills. The previous intention had been to proceed with a single Bill covering the whole Y network. The EIA of Phase 1 would not take into account the full impacts of Phase 2; there would be no EIA of Phase 2 when the Bill was lodged for Phase 1, and so its effects would not be known or assessed, even if the route of Phase 2 were known. The economic benefits of the whole Y network would be assessed and relied on by the promoter but not the environmental impacts of the whole Y network. Once development consent had been granted, the pass would have been sold for the consideration in Parliament of Phase 2, because of the commitment to the whole network; Phase 2 would follow inexorably politically and financially from Phase 1.

290. Therefore either the two phases should be treated as one single project, as they were so closely interlinked with each part justifying the other, or the EIA for Phase 1 should include the full cumulative effects of Phase 2.

291. Those cumulative effects would include the impact on receptors on the London-Birmingham section, and at Euston, of the increase in train numbers from Phase 2, the impact at the points where the two phases interlinked such as at Lichfield and on the Heathrow spur, and the increase in impact on receptors of a particular type such as a protected species or habitat. The absence of detail was entirely within the SST's control: he could cover both Phases in the one EIA, especially since the AoS for Phase 2 was now ready, and its consultation route was to be published soon.

292. Mr Mould submitted that the Phase 1 EIA, to be submitted with the Bill by the end of 2013, would encompass its cumulative effects, since that was the project for which development consent was to be sought. How cumulative effects were considered was for the SST, subject to a rationality challenge which could not conceivably be brought yet. The draft scoping report for the Phase 1 EIA, published in March 2012, in para 2.2.3, said that the effects on Phase 1 of the level of traffic when the whole network was at its maximum would be taken into account. Para 2.4.3 said that the effects on Phase 1 receptors of the construction and operation of Phase 2 in their vicinity would be taken into account.

293. The Claimants' assertion that the SST was obliged to seek consent for the entirety of the Y network, as a single project, was not supported by the Directive or authority. The question of whether an effective balance could be reached between advantages and disadvantages was for the future; the developer should decide in the first place how to do that. No identified relief was sought in this ground.

294. Mr Mould found support for the SST's approach in the Opinion of A-G Gulman in *Bund Naturschutz in Bayern eV and Others v Freistaat Bayern* Case C-396/92. The third question in that case, which the ECJ itself did not address, concerned whether sections of a new link road, being promoted separately but also forming

part of a much longer intended route, could lawfully be subject to an EIA which assessed only the environmental impact of the section for which development consent was sought or whether the road link as a whole had to be assessed. A-G Gulman was of the opinion that the latter was not required; the Directive required only an assessment of the project submitted for development consent, and was not to be interpreted so as to change the common practice in Member States whereby long road links were constructed in sections staggered over time. But the definition of the "project" was not to be the means of circumventing the objectives of the EIAD. The important question was whether the EIA of the specific project for which development consent was sought should take account of the larger project of which it formed part. The purpose of the Directive meant that, with a project like a road, account had to be taken in the EIA of that specific link, of the significance of the planned links yet to be the subject of an application for development consent. He felt no need in that case to be more specific.

Conclusion

295. I accept Mr Mould's submissions. The SST cannot be required, for constitutional reasons, to proceed with the Y network as a single Bill. Nor can I see that to do so means that the development consent would be unlawful because the EIAD would inevitably have been breached in the way either the Phase 1 or Phase 2 EIA would have been undertaken. But that is really only one way in which the Claimants put this point. The important issue is whether producing two EIAs for two phases of the Y network rather than one EIA for the whole network will mean that cumulative impacts of the whole fall out of assessment altogether or are considered only when it is too late for them to be given weight in the decision.

296. The Claimants did not point to a single impact, by topic or degree, which would be covered if the Y network were treated as a single project subject to a single EIA, which would lawfully be omitted from Phase 1 without being fully included as a cumulative effect of Phase 2 with Phase 1, and fully open for decision then.

297. Nor, although intrinsically less probable, was the converse shown of an effect of Phase 1 which would have a cumulative effect on Phase 2, which a Phase 2 EIA could lawfully omit, but which a single EIA would lawfully have to contain. I see no actual basis here for an argument that the baseline in relation to Phase 2 would have shifted, in the *Brown* sense, so that certain effects of Phase 1 on Phase 2 would be omitted with separate EIAs, but not with a single joint EIA. There is nothing to support Ms Lieven's assertion that the enactment of the Phase 1 Bill would inexorably lead to the passing of the Phase 2 Bill, beyond recognition of continued practical support for the Y network.

298. I see no reason to conclude now that the provisions of the EIAD will be breached in either phase through treating the Y network in two phases. This is very like the situation A-G Gulman considered in *Bund Naturschutz*. It will be a matter for judgment by the promoter of the Bill, in the first place, as to how the sort of topics raised by Ms Lieven are covered. The impact of the operation of the full Y network on the Phase 1 track, eg. by increased noise or disturbance to other receptors, could be seen as an impact to be assessed at Phase 2. But that could mean that the Phase 1 decision would be made without full account being taken of the likely eventual impacts on the Phase 1 network. These may therefore be topics for consideration at the Phase 1 EIA stage.

299. There is no evidence that the SST is actually proposing to do an unlawful EIA, reaching irrational judgments on what cumulative impacts of Phase 2 with Phase 1 need to be covered in the Phase 1 EIA. The lawfulness of the Phase 1 EIA is a matter to be judged when it is produced. There is nothing inherent in the process envisaged or in what has been said to suggest that this is comparable with *Brown*, in creating omissions from the assessment of a single project, or omitting the cumulative effects of the development for which consent was sought. The particular problem of what was seen as an overall development, part of which required consent and part of which did not, does not arise here. As in *Bowen-West*, it is the project for which consent is sought, Phase 1, which is to be assessed. How any significant cumulative effects of Phase 2 on Phase 1 are treated is a matter for future debate. If, as may be the case, the Phase 1 EIA goes further than necessary, that is not a cause for complaint by the Claimants.

300. Of course, I understand the forensic play made of the argument that the Phase 1 EIA and case will draw on the benefits for the whole Y network and ignore the impacts of Phase 2 where it has no cumulative effect with Phase 1. However, if this happens, to the extent that the benefits of the whole Y network are relevant to the assessment of significant environmental effects of Phase 1 and 2 above, the EIA will have overstated the benefits at Phase 1. The promoter will have to consider that aspect carefully. The effects on Phase 1 of Phase 2 may be included, whether necessary or not. The impacts of Phase 2 alone will be capable of a degree of description to the extent made possible by greater information then available, and to the extent requisite for the Phase 1 EIA.

301. Whether what emerges amounts to an EIA which is so deficient as not to be an EIA is something which can only be considered when it is available, or has been through the public participation process. This ground is therefore dismissed.

5 The Bucks CC Group consultation challenge

Introduction

302. The Bucks CC Group's fifth ground of challenge relates to the failure to carry out a lawful consultation. There are four limbs to this ground: (a) the absence of information available during the consultation process in respect of the routes north of Birmingham, (b) the absence of reconsultation on the Bucks CC Group's Optimised Alternative, OA, where the SST had considered further reports not discussed with the Group, (c) the refusal to provide the 51M Group with passenger loading data, for the purposes of the consultation process, which would have advanced the case for the OA, and (d) the absence of consultation on those changes to the consultation scheme announced in the DNS which caused significant disadvantages. Mr Elvin took the lead in relation to the latter point, and adopted Ms Lieven's submissions on the others.

303. The three part Consultation Document issued in February 2011 covered (a) the Government's case for the proposed high speed strategy and how it was to be implemented on the basis of the Y network, (b) how the initial route between London and the West Midlands had been identified, the main alternatives to it which had been considered but rejected and why, and (c) the questions on which the Government sought answers through the consultation process. This was a non-statutory consultation process.

304. The five questions relevant here asked whether consultees "agreed" (1) that there was a strong case for enhancing the inter-city rail network, (2) whether the whole Y network provided the best value for money solution for enhancing rail capacity, (3) with the phased provision of the network with links to Heathrow and HS1, (4) with the principles and specification for the new railway and the route selection process for the line between London and the West Midlands, and (5) that the proposed route between London and the West Midlands, including mitigation, was the best option for a new high speed rail line. Question 6 asked for comments on the AoS, and 7 related to compensation, which arises in a separate ground.

305. A number of other documents were made available to consultees: a Summary of the main document, the Appraisal of Sustainability, AoS, with its many Annexes and a non-Technical Summary, the Atkins Report on Strategic Alternatives to the Y Network, a Route Engineering Report and a revised Economic Case. Consultees were able to see the Government's position on the objectives underlying the proposals for HS2, on alternatives, including a new conventional line or upgrades to the existing lines, phasing the Y network and the use of two hybrid Bills, links to Heathrow and to HS1, the development of the route between London and the West Midlands, and the choice of termini.

306. There were some 55000 responses. These included those of the 51M Group promoting the OA, those of Bucks CC and others promoting specific route or termini changes, and the links to Heathrow and to HS1.

307. The legal principles on fair consultation are not in dispute, and do not vary with the legal basis for the consultation. They are set out in *R v North and East Devon HA ex p Coughlan* [2001] QB 213, paragraph 108:

> (a) The consultation must be undertaken at a time when the proposals are still at a formative stage;
>
> (b) It must provide sufficient information, in detail and clarity, for consultees to give the proposals intelligent consideration and an intelligent response;
>
> (c) There must be adequate time for the response;
>
> (d) The responses must be considered conscientiously and taken into account when the decision is taken.

308. The Court judges on an objective basis whether the process has been so unfair as to be unlawful in all the circumstances; *R (JL Baird) v Environment Agency* [2011] EWHC 939 (Admin), Sullivan LJ. A consultation process is not unlawful because it could be improved on, let alone with the benefit of hindsight. The person undertaking the consultation process has a wide discretion as to its scope, when in the decision-making process it is carried out, so long as it is still at the formative stage, and how it should be carried out- the more so where the process is nationwide and includes issues of a general policy nature; *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [2007] Env LR 29, paragraph 62.

Ground 5(a) The consultation in respect of the routes north of Birmingham

309. Ms Lieven submitted that the DNS constituted a decision to promote the full Y network, and to do so in two phases. Although only the details of the route were set out for Phase 1, the principle of the project proceeding to Leeds and Manchester (Phase 2) was established in January 2012 and was not open to reconsideration in any future consultation exercise. The Consultation Document did not consult on whether Phase 1 alone would be justified. Any fair reading of

the DNS showed that the decision was to proceed with HS2 as a whole and not a decision to proceed with Phase 1 on its own, whether or not Phase 2 came forward. The DNS and the supporting documents did not seek to make the case for Phase 1 alone. The Summary of Decisions did not include a decision to proceed with Phase 1 alone should that become necessary. Rather, the DNS, in section 4.3 on and at paragraphs 4.13 -14 in particular, offered assurances that the whole network would be constructed and that the Government would try to provide a level of commitment to that effect in the Bill.

310. Mr Hammond MP (as Secretary of State) said to the Transport Select Committee on 13 September 2011, when asked about assurances that Phase 2 would go ahead: *"Once you have built [Phase 1], the pure economic logic drives you to extend the network. Even if you did not have a political commitment, economic logic would get you there*." On the Secretary of State's own guidance the Benefit to Cost Ratio, BCR, for London to Birmingham is "low". DfT Guidance categorises 1 to 1.5 as "low". Mr Hammond told the Transport Select Committee that if a BCR fell much below 1.5, he would be putting it under some very close scrutiny. If there were not the compelling capacity case on the London to Birmingham section, a large part of the high speed rail case would be undermined, but if the line ended at Birmingham, the case for high speed would be "very much less compelling" than for the Y network, which also allowed for onward running to Scotland.

311. This meant, according to Ms Lieven, that those who would be affected by the routes to Leeds and Manchester were consulted on the principle of the Y network without any information as to whether or how they would be affected or to what degree. The SST intended to consult on the route north of Birmingham in 2014, although there has since been some modification to that timing. By the time they had become sufficiently aware of the detailed routes that they could see how and to what degree they were affected, and thus had enough information about the proposal to make an informed and intelligent response, it would be too late for them to challenge the principle. Yet the principle could be affected by the degree of impact which the detail of the routes might reveal. Those on the London to West Midlands route had been able to respond on the principle with a much clearer picture of the detail of the impact.

312. The notion that consultees were able to comment on the proposal to extend HS2 to Leeds and Manchester was unrealistic. Those affected by Phase 2 were unaware of those effects, were incapable of assessing their impact and would therefore have had no way of even knowing whether they needed to respond to the 2011 consultation in order to protect their interests.

313. The Consultation Summary Report showed that the largest number of responses by far came from those affected by the route from London to the West Midlands, with very few along possible lines from Lichfield to Leeds or Manchester, albeit with concentrations of responses around the end points in those cities. Only half the potentially affected authorities to the north of Lichfield responded, by contrast with virtually all of those between London and the West Midlands, 16 of whom had objected to the principle of HS2. 69 Parish councils responded along the Phase 1 route, compared with only 2 along the potential Phase 2 routes. The responses to Question 7 on compensation were 80 times greater in number on the Phase 1 route than along the Phase 2 routes.

314. The failure to consult on routes for Phase 2 at the same time as the principle of the network meant that it would be impossible for consultees on Phase 2 to argue that the impact of Phase 2 in terms of environmental damage and harm to property outweighed the benefits of the scheme. The Secretary of State could not take these matters into account in the decision now under challenge to proceed with HS2, because neither she nor any consultees could know what the environmental consequences would be. The impacts of the Y network as a whole could not be used to argue against the whole network, or the northern part. At the same time, the Government's economic and overall benefits case for HS2 drew upon the whole Y network, without the drawbacks for the whole being ascertainable.

315. The SST would either have committed himself to the Y network or would have conducted the consultation exercise on a false basis that Phase 1 was but Phase 1 of the whole, when it would in fact be the only part ever built. These problems were avoided by the previous and practical approach of having a single Bill after consultation on the whole Y route in two stages. This suggested either that the outcome of the consultation would be predetermined or that the process was unfair. Consultees must know what it is they are being consulted about, otherwise the consultation is on a false basis.

316. The lack of legally sufficient information for consultees in 2011 in respect of Phase 2 was not overcome by the expected later consultation on the routes of Phase 2, because at that point the proposal would no longer be at a formative stage. Consultees would only be able to respond in relation to changes to the route, within potentially very limited parameters, and environmental mitigation. They would not be able to say that there was no business case or no environmental case for a high speed railway in their locality. A willingness by SST to listen to such uninvited comments on the principle of the Y network as might be made on that consultation was not the same as consultation at the formative stage, where his mind had not already been made up.

317. Mr Mould emphasised the broad discretion enjoyed by the SST on the scope of this consultation and the stage at which issues were to be consulted on and how. It comprised two elements. The first was a consultation on the broad transport, planning and socio-economic case for a high speed rail network serving the West Midlands, the North and North West. Consultees were able to comment on the proposal to extend the railway to those destinations, many consultees did so and their responses informed the DNS.

318. The second element to the consultation was a consultation on the preferred route for the first phase of such a network. The second element would be replicated once preferred routes were published for the network north of Lichfield, without disabling those affected by that route from genuinely influencing its course.

319. Although consultees would not be invited to revisit the principle of a network that extended northwards and north-westwards, responses that asserted the inability to route the railway without unacceptable impacts on the environment or property would have to be considered. Such responses were logically relevant to the issue consulted upon i.e. whether the preferred (or indeed any alternative) route was on balance acceptable.

320. That approach, which makes clear to consultees that there would be a further round of public consultation following the formulation of detailed route proposals for Phase 2, was consistent with the principles of fair consultation. Overall, consultees would have had a proper opportunity to respond on:

> (a) the case for a high speed rail network extending from London via the West Midlands to Leeds and Manchester;
>
> (b) the detailed alignment of a high speed railway from the West Midlands (including a link to HS1); and
>
> (c) the detailed alignment of a high speed railway from the West Midlands to Leeds and Manchester (and a spur to serve Heathrow).

321. Each of these issues would have been the subject of public consultation at a time when they remained at a formative stage and the public would have been provided with sufficient information as to the subject matter of the consultation to enable them to respond intelligently on that subject matter.

322. If the consultation had only covered (a) above, on the basis that the Secretary of State would decide upon the policy of developing high speed rail as a component of national transport infrastructure before deciding on the proposed route, it would not have been unfair to those potentially affected by proposals for the route of a high speed railway to have resolved on the policy before promoting the route. Conversely, in a subsequent consultation on the proposed route, it would be open to the public to respond that the environmental impact of the preferred route was so damaging as to lead to the conclusion that it was not an acceptable basis for delivering the Secretary of State's policy for high speed rail. In short, the 2011 public consultation simply combined that staged process in the case of Phase 1 of the Y network.

323. Mr Mould drew parallels between this and the circumstances in the Eco-towns case, *Bard Campaign v SSCLG* [2009] EWHC 308 (Admin). Walker J saw sense in the circumstances of that case for the principle of the provision of housing in

that form to be dealt with first, and its locations afterwards, even though the latter would affect the opinions which those affected had about the former. The SSCLG would be bound to take account of developing material considerations or a changing scene which might require a further round of consultation. He said that this meant that policy might have to be reconsidered at a later stage.

324. The SST and Parliament would be well aware that those north of Lichfield had little detail about the routes at the stage of the 2011 consultation. Parliament would be in a position to refuse to pass the Bill or to wait the outcome of consultation on the Phase 2 routes or decide only to take the two Bills together. The initial ES for Phase 2 would be available by the time the Phase 1 Bill was deposited. Parliament would be able to grapple with whether it was satisfied that Phase 1 could proceed with the degree of assurance available in respect of Phase 2, or whether the overall impact of Phase 2 was too great to warrant it.

325. It was also wrong to treat the Government, through its support for the Y network, as accepting that Phase 1 could not be justified on its own. There was a compelling capacity case, as Mr Hammond had pointed out to the Select Committee. The DNS referred to the benefits which would still accrue were Phase 1 to be a standalone project in paragraph 49 of the summary of strategy decisions. This said:

> "The case for Phase 1 is further reinforced by its role as the foundation for the second phase of the network, whose delivery would see the overall value for money of the project increase further. However, even as a stand-along project, there is a strong case for proceeding with this initial line, as it provides the most effective solution to long-term capacity constraints on the congested southern end of the West Coast Main Line, and offers benefits in excess of its costs."

326. And in paragraph 3.29, in the Introduction to chapter 1 of the DNS, it said: "Even as a standalone project, the London to West Midlands phase of HS2 delivers economic benefits in excess of its costs, as well as valuable strategic benefits to the country." A key additional benefit was that it provided the foundation for a future wider network, securing much larger benefits.

Conclusion

327. I largely accept Mr Mould's submissions. He is right that the scope and structure of a consultation of this nature gives a wide discretion to the SST. It is not inherently so unfair as to be unlawful to have a first stage at which the principle of a proposal is considered, followed by a second stage for consultation on the detail of its impact. Although I accept without hesitation that knowledge of the detail can affect the nature and degree of opposition to the principle, and that the results of the consultation in all probability would have shown greater opposition in principle if the routes to the north had been identified in detail, that does not make such a process so unfair here as to be unlawful.

328. As Mr Mould pointed out, what happened in this process was that in fact the detail of Phase 1 was considered alongside the principle of the Y network. It would have been lawful for the detail to have been consulted upon after consultation on the principle. It cannot then be unlawful for principle and detail to go together in relation to Phase 1 in the first consultation. That neither makes it unfair for the SST not to do the same expressly in Phase 2 for eventual Phase 2 consultees, nor does it make it unfair for the Phase 1 consultees who objected in principle not to have the benefit of the probable greater degree of opposition that publication of the details of the routes to the north would have engendered.

329. I do not accept Ms Lieven's characterisation of the decisions in the DNS either. There is no decision by the SST fixing the principle that there should be a Y network. She took a decision to seek development consent for a Y network in two phases. What the SST did in the DNS did not fix any principle at all. He can change his mind if he wishes, in any event. The DNS was obviously not the point

at which the principle of the network was fixed; it could not be, since the DNS was not the grant of development consent.

330. It will be for the decision-maker, Parliament, to decide whether it wants the Y network, and if so whether it requires one Bill or two, or whether there should be some provision in a Phase 1 Act which encourages Phase 2, or which inhibits Phase 1 without Phase 2. If it regards one Bill as essential, it can reject the Phase 1 only Bill. Parliament will decide how far it wishes to, or is able to commit itself to, the whole Y network at the Phase 1 Bill stage. It will be for Parliament to decide the issue.

331. Although there will be no question at the Phase 2 consultation about the principle of the Y network, the SST has said, through Mr Mould, that he will consider those responses which question the principle of the whole network. He regards them as relevant, and so as material which he cannot ignore in considering the consultation responses. But whether he is legally obliged to do so or not, and whether he in fact does so or not, the principle of the Bill will be open to challenge by those opposed to the Y network when it is before Parliament, even if not through petition to a Select Committee.

332. The SST has decided that she will promote the Y network, but she did not decide that Phase 1 should not be promoted if it were to be the only part of the network constructed. Indeed, she could not sensibly have done so and then decided to lay before Parliament two separate Bills for two Phases. Given that the passage of the second Bill is not guaranteed simply because the first may have been enacted, she had to form her own view about whether Phase 1 could be promoted separately. Although Ms Lieven cites passages which show that the SST wished to see the whole Y network constructed, and it is not surprising therefore that she sees Phase 1 as part of the whole, she expressed the view quite clearly, in the passages Mr Mould cited, that the case existed for Phase 1 as a standalone, even if that were far from her preferred outcome. That may or may not persuade Parliament to pass the Phase 1 Bill. But I do not see that the 2011 consultation has been conducted on a false basis or that the Phase 2 consultation would be conducted on a predetermined basis.

333. In any event, this claim is not a challenge to the fairness of a consultation which has yet to take place, but to the one which has taken place. It was not unfair and this head of the consultation ground of challenge is dismissed.

Ground 5(b) - Failure to re-consult in respect of the further reports commissioned by the Secretary of State on the Optimised Alternative, OA

334. The second limb to the consultation ground contends first that the SST was under a duty to re-consult 51M on the OA because her reasons for rejecting the OA were largely based on reports from Network Rail and Atkins Consulting which were not shown to 51M or to Mr Stokes, the strategic rail consultant engaged by Bucks CC, and which he says raised issues which he could have rebutted easily. The second related ground was that the DNS decision rejecting the OA was based on a criterion or significant factor not raised in the Consultation Document, or in the others issued with it, as one of any significance: the importance of increasing commuting capacity into London.

The facts

335. One of the documents published with the Consultation Document itself in February 2011 was a study entitled "High Speed Rail Strategic Alternatives Study: Strategic Alternatives to the Proposed Y Network", prepared by Atkins. This evaluated a number of different packages of upgrades to existing routes as possible alternatives to HS2. Mr Stokes regarded one of these, RP2, which involved enhancements to the West Coast Main Line, WCML, as the most promising alternative to HS2. As Mr Graham said, RP2 had been known about and available for consideration since March 2010. The OA was developed by Mr Stokes based on RP2, but although the Atkins work provided useful information and validated certain assumptions, he did not regard their work as having optimised these alternatives, in particular by lengthening trains and changing the balance between standard and first class accommodation to increase capacity.

336. Mr Stokes, along with a railway timetable consultant, was responsible for a considerable number of technical documents submitted as appendices to 51M's consultation response. One Appendix dealt largely with the OA. It was based on incremental changes: lengthening most of the WCML trains to 12 coaches, reconfiguration of one coach to standard class, and infrastructure improvements at particular locations. The benefits claimed for this included a capacity increase on standard class by 215%, well above the background growth forecast for the WCML, which could be put in place more quickly, flexibly and cheaply than HS2, while benefiting a large number of towns on the route. A service pattern for the north-bound evening peak was proposed, with an "illustrative" but "robust" timetable for long distance and commuter services.

337. After submission of 51M's consultation response and the consultation period had closed, 51M wrote to both the SST and to the Chairman of HS2 Ltd on 16 September 2011 proposing a joint review of the OA under independent chairmanship. On 19 October 2011, the leader of Bucks CC wrote to the then SST seeking an early meeting to discuss the OA. On 26 October, Mr Graham wrote back to him saying:

> "If any clarification of the material provided by the 51M Group is required then we will be in touch. Out of fairness to all consultees, however, we are now limiting our engagements with interested parties given that the consultation has closed. I am sure that you will share our desire to ensure the integrity of the recent public consultation exercise".

338. Before the DNS was published, the SST took further advice on the OA, although she did not have a meeting with 51M or Mr Stokes, nor did she or those whose advice she sought seek clarification about it from them. The Government commissioned two reports in view of the importance of the issue of enhancements to the existing network, and the conflicting views of consultees.

339. The first report was an updated analysis by Atkins Consulting of its economic analysis of the alternatives most often cited, including RP2 and the OA from 51M. Mr

Graham's third Witness Statement, in paragraphs 114-125, describes how the analysis was done. The central benefit to cost ratios, BCRs, for the London to West Midlands part of HS2 was 1.4, for the full Y 1.6-1.9, and for 5.17 for 51M's OA. (These figures also appeared in the DNS). However, the overall level of benefits from the OA was substantially lower, of the order of £6-8bn compared to £19bn from HS2 Phase 1. The central BCR for the OA was sensitive to infrastructure cost increases and rolling stock operational cost increases. The DfT also commissioned an analysis from Atkins of Wider Economic Impacts, WEIs, which were at least three times greater with HS2.

340. Ms Lieven again pointed out that the Secretary of State for Transport had told the Transport Select Committee on 13 September 2011: "*As rail projects go, a BCR of 2.6 is quite reasonable. If it were to fall much below 1.5, I would certainly be putting it under some very close scrutiny.*"

341. The second report was from Network Rail, since it would be in a position to assess cost, feasibility and operational impacts, with its experience and role in relation to the current rail network, which OA would enhance. This "Review of Strategic Alternatives to High Speed Two", although produced in November 2011, was published with the DNS and the Atkins report. It was not confined to the OA. The summary identifies the key points against the OA: insufficient capacity to meet forecast suburban commuter services at the southern end of the WCML, likelihood of remodelling at Euston Station, long periods of disruption while the infrastructure additions were constructed, high utilisation of lines impeding route performance, and the increase in long distance high speed connectivity on some flows at the expense of other intermediate flows which would worsen severely, leaving some stations without a service in some cases. The summary conclusion was that :

> "The proposed interventions deliver considerably fewer benefits than a new line, particularly with regard to reduced journey times between urban centres and the ability to use the resultant freed capacity on the classic network to develop new markets and provide for continuing freight growth. So whilst some of the proposed enhancements may offer limited and short term opportunities for improving capacity on some areas of the route, the requirement for a new line to relieve capacity in the longer term remains and therefore would have to be delivered, in addition to these proposals, in any case."

342. The conclusion of the more detailed analysis was:

> "The previous section outlined the analysis undertaken of the 51M proposals. Though the analysis has shown that they do provide additional capacity on the WCML: for a variety of reasons these proposals are not the best long-term strategy for the route.
>
> The additional capacity provided by the 51M outputs does not match the demand profile on the route as it leaves over 1,300 people standing on the suburban services in the high-peak hour in 2026, increasing to approximately 2,200 in 2035. This is a worse situation than today, as approximately 800 people currently stand in the high-peak hour on these services. Therefore, this option does not solve the main driver for a capacity intervention on the route, which is the overcrowding on suburban services at the southern end of the route in the peak."

343. Ms Lieven relied on the reference to current commuter capacity as "the main driver" as supporting her case that the crucial thrust of the consultation had changed by the time of the DNS. Mr Mould commented that this was the language of Network Rail and not that of the SST.

344. The Foreword to the DNS said that at its heart, HS2 was about the "everyday but vital issue of making sure that the railway system of this country has enough capacity to enable people to make the journeys they choose. HS2 is the right answer for passengers- for those who travel on crowded inter-city trains…and for commuters who will eventually be unable even to get on their trains at peak times".

345. The DNS said this, in its summary of high speed rail, about the effectiveness of incremental upgrades compared with a new high speed railway, in answer to the responses of 51M and others putting forward a similar case:

> "The fastest increase in demand on the rail network over recent years has been in long-distance travel, and this growth is forecast to continue. Growing demand is placing increasing pressure on the capacity of Britain's key rail routes. The Government's assessment is that the short-term fix of further upgrading of the existing network is not a sustainable long-term approach for our key north-south lines. A new strategic approach is required.
>
> Given the limitations of Britain's mixed-use rail network, which combines commuter, inter-city and freight services sharing the same tracks and results in a sub-optimal utilisation of track capacity, growing demand for rail services will have wide-ranging impacts on the passenger experience. Analysis by Network Rail indicates that the most significant pressures are likely to be seen first on commuter services, where the level of demand is highest and standing is already common, spreading to long-distance services as passenger numbers continue to grow. Any increases in passenger services on the most crowded lines will also limit the scope to respond to forecast growth in key rail freight markets, meaning that more lorries are likely to be seen on our roads and valuable decongestion and carbon reduction benefits will be foregone."

346. This was considered in more detail in Chapter 3, in which the Atkins and Network Rail Reports were summarised.

> "The analysis by Network Rail indicates that even if inter-city demand growth can be accommodated through an approach of this kind, albeit at some cost and with high levels of crowding on many peak services, doing so would squeeze out the potential for capacity enhancements vital in supporting suburban commuter markets. …This crowding would be likely to affect Milton Keynes, Rugby and Northampton amongst others. …
>
> Network Rail's analysis also highlights potential problems with crowding levels on long-distance services over the long term. …The load factors on long-distance services under the 51M

> proposal would be lower (though still higher than today), but this would be counterbalanced by higher levels of crowding on suburban services. Under both scenarios, many long-distance travellers would be forced to stand during the evening peak. This would be a particular problem for long-distance services calling at Milton Keynes Central and Watford Junction.
>
> Since all of the approaches considered by Network Rail require the usage of all available train path capacity on the West Coast Main Line, the only viable solution to these suburban crowding issues would be to reallocate capacity away from long-distance services, further exacerbating crowding on those routes."

347. Generating additional capacity by upgrading the Chiltern line to carry all London-Birmingham services would not offer benefits close to its high costs. Although enhancements would cost less than a new high speed line, major works would still be required, including platform lengthening at many stations, and Network Rail thought it likely that very substantial works would be required at Euston, substantially more than the undeliverable low-cost approach considered by Atkins. These enhancements would do little to improve connectivity between major urban centres; but would entail additional significant disadvantages, and the intensive service patterns could affect long term reliability and maintainability, though with lower sustainability impacts.

> "The Government's view is that any sustainability and cost advantages are outweighed by the substantial disbenefits of enhancing existing lines. Furthermore, even if some options may offer good value for money, they fail to offer an effective long-term solution to crowding issues and therefore cannot be considered a viable alternative to new lines. There is a significant risk that an approach of this kind would simply create years of delay and disruption for passengers and freight services, and even after that only give rise to a railway that it is still overcrowded, delaying but not avoiding the need for new lines. For these reasons, the Government does not favour this strategic approach to addressing the long term rail capacity constraints."

348. The "Review of the Government's Strategy for a National High speed Rail Network", published in January 2012, covered the ground the title suggests, making further points against enhancing the network in the way 51M had supported in the OA, and in other ways, as an alternative to a new high speed network.

349. The debate on the merits of the OA continued through the medium of this litigation. The aim of the further evidence was not to persuade me that either side was right in its assessment of the OA, since it is not my task to assess it, but rather to persuade me that fairness required reconsultation and there would have been matters worth the DfT considering.

350. Mr Stokes, in his first Witness Statement, replied to the Network Rail criticism: the service pattern with its effect on suburban commuter services was illustrative and if the concern had been flagged up, that point could have been identified and a service with greater capacity illustrated; he disagreed that any remodelling would be required at Euston, which could have been clarified; the construction disruption would be less than for the upgrade of WCML had been and less disruptive at Euston than HS2; the level of line utilisation would be higher but not such as to make the usage unreliable, and was less than envisaged for HS2 even at high speed; the illustrative proposal was not intended to show the complete service with all the stations served, which could easily have been explained. Mr Stokes was critical of Network Rail's understanding of the commuter flows into London and of OA's proposals for them. Forecast growth could be met by lengthening more trains from 8 to 12 coaches, and by the construction of a grade-separated junction at Ledburn in Bedfordshire, works included in the OA. He also contended that the BCR for the OA was understated, and that for HS2 overstated.

351. Mr Graham's in his third Witness Statement rejoinder is critical of the points raised by Mr Stokes, giving what is likely to have been the response which Network Rail or the DfT would have given, had they discussed with Mr Stokes the points he raised in his Statement.

352. Mr Stokes' third Witness Statement takes up the cudgels again, criticising the answers given by Mr Graham. He said that all this showed the need for Network Rail or the DfT to have engaged with him during the consultation process or during the preparation of the two reports used to respond to the OA.

353. I turn to consider the issue of commuter capacity in the Consultation Document, and others in the light of the contention that what was said in the DNS, and the two reports which the SST considered in rejecting the OA, as set out above, showed that it was an essentially new factor unfairly given significance.

354. Mr Stokes said that his work and 51M's consultation response did not focus on commuter capacity on the southern end of the WCML into Euston since it was on long distance traffic that the consultation itself was focused. In the light of the Consultation Document, 51M understood that the main capacity justification for HS2 was to provide long distance capacity increases. Question 1 of the Consultation Document asked: "*Do you agree there is a strong case for enhancing the capacity and performance of Britain's inter-city rail network to support economic growth over the coming decades?*" They saw minimal reference in the Consultation Document to any part of the rationale for HS2 being to increase commuting capacity into Euston.

355. The documents issued with the main Consultation Document included the "Strategic Alternatives to the Proposed Y Network" by Atkins Consulting and "The Economic Case for HS2" produced by the DfT. I do not accept Ms Lieven's assertion in her written reply that Atkins relied on long distance traffic with no mention of commuter capacity, with the implication that it deals only with long distance traffic, and that commuter traffic was therefore irrelevant to the SST's consideration. Atkins used a long distance model but its conclusions referred to crowding on the approach to London, which would only arise from stops approaching London which permit longer distance commuting, and also referred to increases in local as well as in strategic demand. I accept that most of the "Economic Case" is directed to the benefits to long distance traffic from HS2, but the effect of released capacity is considered and is part of the Wider Economic Impact.

356. Mr Graham described commuter capacity as "an important factor" in the consultation process. From an early stage and in the 2010 Command Paper, it was said that the capacity released on existing lines by the provision of a new network would be used to expand commuter, regional and freight services. The Foreword to the Consultation Document said that released capacity on existing lines would be used for additional commuter and regional services. The Document noted that commuter traffic was important and growing, especially over longer distances into London from Milton Keynes, Rugby, Northampton, Kettering, and Peterborough, for example. Significant enhancements for commuters had been adopted to improve the capacity of the existing network for all users, but these were unlikely to be adequate in the long term; Chapter 1 "The Fast Track to Prosperity". That chapter also specifically refers to growth not only in the long-distance market but also in the franchised operators' services in London and the South East, and regionally. The growth in long distance travel was also increasingly underpinned by "significant increases in usage of these services by commuters from towns such as [those listed above]".

357. There are several references in Chapter 2, which sets out the case for a high speed rail network, to the way in which a new network would release capacity on the existing network which would be used, in part, for the growing demand for commuter services, supporting the "deep labour markets, which are vital to London's economic success". Paragraphs 2.35 and 2.36 state:

> "It is particularly important to note that such a network would not only deliver capacity improvements for those people travelling on the new lines themselves. For example, on the London-West Midlands corridor, a new high speed line would release capacity on the West Coast Main Line for additional passenger services to towns and cities such as Northampton. …
>
> The Government's favoured Y-shaped network would also release substantial capacity on the East Coast and Midland Main Lines, permitting an increase in commuter and regional traffic on these routes - especially on the crowded southern sections where significant growth in commuter demand has been forecast."

358. Paragraph 2.49 states that the largest part of the wider economic benefits relates to London and Birmingham, which arise mainly from the reuse of the existing network for commuter and local services.

359. The section of the Consultation Document, leading up to the question whether the national high speed rail network provided the best value for money solution to enhancing rail capacity, had included an analysis of alternatives to high speed rail, one of which was enhancing the existing networks. It referred to the one enhancement package developed in the associated Atkins report, for which benefits exceeded costs in this way:

> "["RP2], which would have a capital cost of approximately £13 billion, would not be able to match the increases in capacity delivered by new high speed rail lines, although it would see crowding reduce on long-distance services. Furthermore, because it assumes that any new capacity generated is allocated to long-distance services, it would provide little additional capacity for growth in commuter, regional or freight markets."

360. To Mr Stokes, these references were but brief and failed to present commuter capacity as an issue which consultees had to address. Nonetheless, Mr Graham described the 51M consultation response as showing an awareness of the need to respond to the demand for commuter services since it had referred to the growth in that traffic, and its service specification had covered inter-city and commuter services in the same degree of detail.

The legal principles relevant to reconsultation and change in criteria

361. It is not in dispute but that the question of whether a fair consultation imposes a duty to re-consult where new material emerges during the consultation process, which has

not previously been available for consultation, is highly dependent on the particular factual situation in question. It may be seen as an aspect of the obligation to provide consultees with sufficient information for them to understand the proposal being consulted on and to make an intelligent response.

362. The Court of Appeal decision in *Edwards v Environment Agency* [2006] EWCA Civ 877, [2007] Env LR 9 illustrates the point. It concerned whether the Environment Agency, in carrying out consultation in relation to pollution control, ought as a matter of common law fairness to have disclosed two internal reports on desk top studies of atmospheric pollution at the plant which had been carried out by a unit within the Environment Agency during the course of the decision-making process. The Court held that the Agency should have done so, but the Court refused relief in the exercise of its discretion. It distinguished *Bushell v Secretary of State for the Environment* [1981] AC 75. The House of Lords had held that the Minister's use of the expertise, and technical and factual knowledge of a department's officials, was to be treated as part of the decision-making process, since their knowledge was to be attributed to him, and did not require disclosure for the purposes of further consultation.

363. The Court of Appeal took the view that *Bushell* was not laying down some absolute rule about consultation on internal reports which would always override the requirements of fairness. Some significant factual material of which the parties were unaware might come to notice through departmental inquiries.

364. Auld LJ at paragraphs 102-3 summarised the law in this way, with which Maurice Kay and Rix LJJ agreed:

> "In my view, the reasoning of Lord Diplock in *Bushell* is plainly of general application to holders of public office or public bodies such as the agency, charged with making administrative decisions in which the public have an interest and an entitlement to be consulted. Many or most of such public officer holders or bodies have their own internal expertise and staff to turn to for advice and guidance in

> reaching their decisions. The decision when made, just like that of a government minister, may be the product of contribution from a number of members of staff working to the decision-maker or the corporate body.
>
> In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in *Bushell*, require a decision-maker to disclose its own through processes for criticism before reaching its decision. However, if, as in *United States Tobacco* (see per Taylor L.J., as he then was, at 370-371, and at 376, per Morland J.), and in *Interbrew* (see per Moses J. at pp.33-35 of the transcript), a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it. See also the remarks of Schiemann J. in *R. v Shropshire Health Authority, Ex p. Duffus* [1990] 1 Med L.R. 119, at 223 as to the changing scene that a consultation process may engender and the consideration by Silber J. in *R. (on the application of Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640, at 39-44, of the possible need, depending on the circumstances, for further consultation on matters and issues that the initial consultation may have thrown up."

365. The nature of the two reports should have led to their disclosure, although they were obtained after the consultation process for the purposes of decision-making:

> "106 In short, the non-disclosure of the AQMAU Reports left the public in ignorance, until the Agency's grant of the permit, of the only full information as to the extent of the low level emissions of dust and the only information at all on their possible impact on the environment. I agree with the Judge that such information was potentially material to the Agency's decision and to the members of the public who were seeking to influence it, and that failure by the Agency to disclose it at the time was a breach of its common law duty of fairness to disclose it."

366. Mr Mould argued that this decision must be read in light of Lord Hoffman's observation in *Edwards* in the House of Lords, [2008] UKHL 22, [2008] 1WLR 1587, at paragraph 44, that he would not have come to the same conclusion, (although the issue had not been raised in the printed case) since first the relevant Directive specified with precision what should be disclosed, leaving no room for a broader common law duty, and :

> "Secondly, the AQMAU documents were part of the Agency's decision-making process, prepared after a lengthy period of public consultation. If the Agency has to disclose its internal working documents for further public consultation, there is no reason why the process should ever come to an end."

367. I mention briefly *R v Health Secretary ex p US Tobacco* [1992] 1 QB 353: Regulations banning oral snuff were quashed because the SSH had not disclosed for the purposes of consultation the fact and substance of advice from a committee of independent experts on which the proposed ban had been based; the conclusions had been provided but not the reasoning on which they were based. The advice of the Committee had not changed for some years but the SSH's appreciation of it had. Ms Lieven also referred to my decision in *R (Devon County Council) v SSCLG* [2010] EWHC 1456 (Admin), where there was a crucial and unheralded change of position in the way in which the decision was reached from that clearly and repeatedly stated in the consultation process.

368. I also note, and Mr Mould relied on, the cases which emphasise the need, in judging what fairness requires, to balance the interests of consultees with the wider public interest in enabling the decision-maker actually to make his decision. In *R v Shropshire Health Authority ex p Duffus* [1990] Med LR 219 at 223, the Divisional Court, Schiemann J with whom Lloyd LJ agreed, said:

> "In determining whether there should be further re-consultation, a proper balance has to be struck between the

> strong obligation to consult on the part of the health authority and the need for decisions to be taken that affect the running of the Health Service. This means that there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt."

369. This was echoed in *R (Maureen Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) at paragraph 45, where Silber J, after citing from *Duffus*, said:

> "A consultation procedure, if it is to be as full and fair as it ought to be, takes considerable time and meanwhile the underlying facts and projections are changing all the time. It is not just a question of an iterative process, which can speedily be run through a computer. Each consultation process if it produces any changes has the potential to give rise to an expectation in others, but they will be consulted about any change. If the courts are to be too liberal in the use of their power of judicial review to compel consultation on any change, there is a danger that the process will prevent any change – either in the sense that the authority will be disinclined to make any change because of the repeated consultation process which this might engender, or in the sense that no decision gets taken because consultation never comes to an end. One must not forget there are those with legitimate expectations that decisions will be taken."

370. This was approved by Sullivan LJ in *R (JL Baird) v Environment Agency* [2011] EWHC 939 (Admin). But, as Ms Lieven submits, part of the public interest in consultation is the scope it offers for improved decision-making, based on a fuller appreciation of the facts and arguments.

The submissions

371. Ms Lieven submitted fairness demanded re-consultation on the OA in the light of its asserted or agreed advantages: the acceptance by Atkins and the DfT that the BCR for the OA was 5.17:1, in contrast to that for HS2 Phase 1 of 1.6:1; the OA uplift in capacity from 2007/8 well in excess of the forecast increase in demand set out by Atkins; the OA cost estimate of £2.06 billion in contrast to HS2's cost of £36 billion; and the avoidance of the need to demolish a large area west of Euston.

372. In light of those advantages enjoyed by the OA, the SST was under a legal obligation to give 51M an opportunity to respond to the key criticisms of the OA made by Atkins and Network Rail, and of which 51M had had no previous notice: insufficient capacity provision on commuter routes into Euston; the remodelling at Euston station which the OA was said to entail; the long periods of disruption along the WCML while the OA was built, and the negative impact on route performance and on intermediate stations.

373. Ms Lieven contended that each of these criticisms is capable of a full answer by 51M, if it had been given notice of the criticisms. For example, in respect of the commuter services, the service pattern set out in the 51M consultation response was only intended to be illustrative and did not represent the maximum service which would be provided on the slow lines in commuter peak. The level of disruption assumed by Network Rail in its report, and therefore by the Secretary of State, was both seriously exaggerated, and wholly failed to take into account the massive disruption at Euston from the HS2 works. The simple answer to commuter capacity would be to lengthen more trains and maximise the number of trains on the slow lines. Mr Stokes had not dealt with this because he had focused on fast lines. This misunderstanding could easily have been overcome had the SST provided him with an opportunity for the answer to be given.

374. Ms Lieven accepted that the SST was entitled to commission the Atkins and the National Rail reports to seek further advice. But if the SST were to reject the OA, despite its manifest advantages, on the basis of expert reports that raised new issues and that 51M had not seen, then fairness demanded that 51M had an opportunity to respond to them. Consultees were faced with a large number of documents and

complex arguments and had to make a judgment as to where the weight of their research and responses would lie. 51M's professional team was much smaller and obviously less well resourced than HS2 and DfT. 51M were seen as prime objectors, being the principal local authorities, putting forward the main policy alternative, which was rejected on the basis of expert reports commissioned to deal with it, to which 51M had no chance to respond.

375. This was not simply a case of conflicting professional judgements, where there was a need to bring the debate to an end. There had been no debate between Mr Stokes and Network Rail; Network Rail had simply refused to engage at all with 51M despite being expressly asked to. The SST may stress the need to make a decision, but she had had the Network Rail report for some time, and had made a deliberate decision not to show it to 51M to clarify points.

376. Ms Lieven next contended that there was a clear change in the key criteria against which HS2 and necessarily any alternative would be judged. The questions in the Consultation Document did not point to concern over commuter capacity or the need to reinforce commuter capacity being key parts of the justification for the HS2 proposal. That was not to say that there were no problems with existing commuter capacity on the WCML, but the Consultation Document did not ask about the issue.

377. By contrast, the DNS stated in paragraph 18 that analysis by Network Rail "indicates that the most significant pressures are likely to be seen first on commuter services…" This was a total shift of emphasis from meeting the need on long distance services to meeting the need on commuter services. Mr Mould summarised the complaint well: that the goalposts shifted in respect of commuter capacity, which moved from being a subsidiary factor to one that was deployed unfairly for the purpose of outflanking the significantly superior economic case presented by the OA.

378. Mr Mould submitted that there had been no unfairness in not reconsulting 51M on the change in criteria. The real complaint was that, had 51M been reconsulted, 51M would have been able to demonstrate what it described as "the manifest advantages" of the OA, and how it would overcome the drawbacks to it identified by Network

Rail. The SST in reality had judged incremental upgrades overall to be less effective in delivering the long term capacity and wider benefits sought. 51M were professionally advised by experienced railway consultants. They must have expected the SST to look critically at the overall ability of the OA to achieve these objectives, if necessary with the assistance of experts such as Atkins, and Network Rail as the network operator. Seeking such advice is consistent with the very purpose of consultation. The ability of an upgraded existing network to deliver those objectives could hardly be judged effectively without attention to its overall impacts, including on commuter and other services that would continue to share the lines. Conversely, the improvements in such services which might be made possible through released capacity resulting from new high speed lines were identified as one of the potential benefits of HS2.

379. There had been no significant change from the proposals consulted upon in the February 2011 consultation. The DNS including the passages relied on by Ms Lieven at paras 18-19 of the summary, was not really stronger than the Consultation Document on one important advantage of HS2 being the scope for enhancing commuter capacity on the existing lines, using the capacity released by HS2. But if it were, that would not of itself suffice to show that there had been unfairness in the absence of re-consultation.

380. The OA was the main policy alternative to HS2. The case for it could be made to Parliament, even if it could not be made to the Select Committee. The debate would be as effective as debates in the planning committees of local authorities.

Conclusion on the OA and the reports

381. I start with the issue of commuter capacity, as a change in the basis upon which the DNS decisions were made from those to which consultees were alerted in the Consultation Document and others issued with it, and relevant to its context. It is both a separate issue and part of the claim that there should have been a reconsultation on the two reports obtained after consultation and for the purposes of the decision in the DNS rejecting the OA.

382. I do not propose to go through all the passages in the Consultation Document and others, which I have set out at tedious length, since the position becomes clear, in my judgment, on reading them. It is plain that the need for commuter capacity, and the advantage which HS2 would provide in releasing capacity on the existing network for an increase in commuter and freight trains was sufficiently clearly raised. I do not think that it can properly be characterised as an unheralded new point, let alone one Government had promised would not be part of the decision. The facts here are wholly different in nature and degree from the *Devon CC* case, to which Ms Lieven referred.

383. Of course the principal case for HS2 was not that it would release capacity on the existing network, although that was an advantage of increasing rail capacity in that way. The principal case related to time savings, "connectivity" and other wider economic benefits. But among the benefits was the opportunity to use the released capacity on the existing network for slower trains which stopped more often: commuters and freight. Indeed, whatever may be the overall merits of HS2 that is one which is obvious enough. However, when an alternative enhancement case is considered, as with the OA, the fact that that release of capacity will not take place may legitimately have greater significance for the decision-maker in considering and rejecting the OA. The OA is obviously not a high speed rail network, and the absence of released capacity in that way would obviously require addressing by OA proponents. The important advantages for a proposal may not be the same as the important disadvantages of alternatives, and they may import a different perspective.

384. So while I would accept that the issue assumed greater importance in the response to the OA than it did in the promotion of HS2, it was an issue which was sufficiently clearly raised as an advantage of HS2, and an issue to be considered. The nature of the OA in comparison with HS2 would obviously raise the issue for consideration in the response to 51M, even if not dealt with in the 51M submission in consultation. I see nothing so unfair as to be unlawful in the way in which that issue was raised in the Consultation Document, and then considered in the DNS, or in the two reports on the OA and other like alternatives.

385. I do not accept Ms Lieven's submission that there should have been reconsultation on those two reports either. It is not at issue but that the DfT was entitled to obtain those reports for the purpose of considering the consultation responses. Indeed, it marks a proper part of consultation since it shows that the OA was being given conscientious consideration.

386. There is no principle of law that such reports should lead to reconsultation, whether or not the consultee has asked as here to participate in some further process before the decision on the consultation responses. The Courts have been very careful before holding that a consultation has become so unfair as to be unlawful because of the absence of reconsultation, when events or information have changed or new material has become available. They have long recognised the impact which too ready an enforced reconsultation would have on the expectation by consultees and public authorities that timeous decisions would be made. Indeed, it could discourage obtaining further expert reports, if that led to reconsultation of itself, and that would reduce the value of consultation in informing public authority decision-making.

387. The decision is fact sensitive, and cannot be made on the basis that it would have been better or wiser as litigation ensued to have reconsulted. The absence of reconsultation has to be so unfair as to make the whole process of consultation unlawful.

388. *Bushell* is not a sound basis for holding the absence of reconsultation here not to be unfair. The material in *Bushell* concerned government policy which could not have been challenged even if the Inquiry had been re-opened. The Minister was entitled to receive the policy advice of the civil servants, which was part of his Department's fund of expertise and knowledge. That is not the position here. The Department commissioned special reports from outside experts to help it to understand and reach a decision on a particular response, or sort of response, raising enhancement alternatives, not precluded by Government policy.

389. This is, on the other hand, also different from *Edwards*, taking the Court of Appeal decision as unaffected in authority by what Lord Hoffman said, which merely

revealed a disagreement, obiter and not fully argued. The general passage at paragraph 103 in the judgment of Auld LJ should not be read as laying down the threshold at which fairness requires reconsultation, as opposed to exemplifying circumstances in which it may do so. The significance of the undisclosed reports in that case is set out in paragraph 106. As I shall come to, I do not regard the significance of the contents of the reports here, and the stage in the decision-making process reached as comparable.

390. I accept that the OA was the main alternative to HS2, in the sense that it was a proposal for the enhancement of the existing network, and that it was put forward with wide public support, and expert analysis. I also accept that 51M would not have been in a position financially, by time or by expertise, to cover all the aspects of the case against HS2 and for the OA, equivalent to the way in which the Government could prepare its case and respond to objectors. But I am not prepared to hold that that should lead to a different and lower threshold of unlawful unfairness being adopted in practice.

391. Nor can the fact that the OA has some advantages, some admitted and some disputed, of the sort identified by Ms Lieven, (better BCR, capacity increase in excess of forecast need, much lower cost, and development at Euston confined to the existing station envelope,) alter the point at which the absence of reconsultation on the two reports becomes unfair.

392. The particular issues which she identified as those which the two reports and DNS newly introduced as drawbacks to the OA were: insufficient commuter capacity, the need for remodelling at Euston, disruption to the WCML while the OA works were carried out, and the negative impact on route performance and service provision as faster trains competed for train paths with slower, stopping ones. She did not identify the points as one of degree of detail but as new issues.

393. I have already dealt with the first and main one. Commuter capacity is not a new issue and could have been dealt with in the 51M consultation response.

394. I do not know whether the need for remodelling at Euston for the OA was brought out for the first time in the two reports and DNS, since RP2 has been contemplated for some time, but I shall assume so. It was not referred to at all, one way or the other so far as I can see, in the OA Appendix to the 51M consultation response which focused instead on the disruption to Euston which HS2 would cause. Mr Stokes disagrees with the SST's judgment that OA disruption at Euston would extend significantly outside the existing station envelope, albeit that it would be less than for HS2. This disagreement continued through the litigation.

395. All that would have happened on reconsultation is that Mr Stokes would have made his disagreement known, and I see no reason to believe that it would not have produced the same response as now given by Mr Graham. These issues do not have to be resolved by negotiation, private meetings and discussions. There might have been a further report from Network Rail, or some other analysis, generating the same point about reconsultation in respect of any new information in the further refined response. Taken in the context of the way in which the OA response was dealt with as a whole, I do not regard this as making the consultation so unfair as to be unlawful in the absence of a further round of consultation. In effect, even had I done so, I would have refused relief as a matter of discretion: the litigation has produced that further round, and the outcome remains indecisive. This illustrates the limits on reconsultation: a decision is required.

396. The fact of disruption to the WCML while the OA works were carried out was not a new point, but it was in any event such an obvious one for consideration in the consultation response promoting the OA that reliance on it by the SST cannot be unfair. To the extent that the degree was greater than Mr Stokes would accept, and so is a point of disagreement, such disagreement is an inevitable part of the process of consultation, evaluation of responses, and decision-making. It involved no unfairness.

397. The effect on performance and loss of services arose from the "illustrative" service pattern which Mr Stokes put forward. He would have wished to emphasise to the DfT that it was just that, as the response said, and if to be scrutinised in the way it was, an

alternative would have been put forward, resolving those issues at least to Mr Stokes' satisfaction. This is not so much a new point, as an alleged misunderstanding of the consultation response, and the status of the service pattern, notwithstanding the word "illustrative".

398. I do not regard that point as requiring a reconsultation. There may be cases where the failure to understand a response means that it has not conscientiously been considered. But that is not so here. The DfT was entitled to take the service pattern, albeit illustrative, as representing a workable example of how the OA was likely to work, and it countered the drawbacks identified. Mr Stokes could have submitted one without those drawbacks.

399. Ms Lieven also referred to the analysis done by Mr Stokes of the costs and BCRs, suggesting that the Economic Report had understated the advantages of the OA. This rather illustrated the concern that reconsultation would become a ceaseless process once further reports were commissioned to meet responses.

400. In reality, Mr Stokes wanted to have a dialogue about the OA before the DNS with DfT. Consultation, as Mr Mould pointed out, is not negotiation; Mr Stokes is not party to the decision-making, and a decision has to be reached. The consultation was not in my judgment unfair for want of a reconsultation.

401. There is a further point. Even if there might have been case that there ought in fairness to have been a further round of consultation on one or more aspects with 51M, and inevitably with others and supporters of HS2, it is important here, as in relation to other grounds, to remember the stage in the decision-making process at which the issues on reconsultation arise. This was not a consultation which would lead to the concrete decision being made, which when acted on would be the effective decision implementing a concrete proposal, with all the advantages and disadvantages claimed and feared. That is often the case with consultations, but not here. The decision being consulted on was whether to proceed to the next stage in the decision making process and if so with what proposal. It was a consultation by the promoter of a project as to which project if any he should decide to promote. The concrete

decision, as to whether to grant development consent, has yet to be made. The making of that decision, the Parliamentary process, will afford a variety of opportunities for the public to pursue the OA, even if by lobbying MPs, and indirectly through what MPs say in debate. I assume that the OA will not be discussed at the Select Committee stage since it involves an objection to the principle of the Bill.

402. Moreover, the decision-maker on the grant of development consent, Parliament, would be a different body from the one which had undertaken this consultation, so this is not the last opportunity to influence the decision-maker.

403. Accordingly, even if I had taken the view that there was an issue which otherwise merited reconsultation, I would not have held it so unfair here not to have a reconsultation, because of the stage at which this process has reached. In my judgment it would require very particular and strong circumstances for that to happen, at this stage.

404. There was, however, a theme underlying Ms Lieven's submissions here, and it surfaced often in her and Mr Elvin's submissions on other topics, which I deal with here. It is that this consultation stage was the real and only effective opportunity for the public to have its say on the proposals. Parliamentary debates would be too general, MPs would not be in a position to master the detail of the proposals, their drawbacks and of alternatives, the Select Committee which could look at detail was confined to those changes which did not go to the principle of the Bill, and the Bill would be whipped through. Many MPs would have no local concerns or knowledge. Mr Mould suggested that if Councillors on a local authority planning committee could grasp what were often complex issues, MPs could.

405. It would in my view be constitutionally improper for me to reach a decision on the basis that Parliament and its procedures cannot fairly and adequately deal with the issues which would arise on this Bill. It is not for me to express a view in a judicial capacity on the willingness and abilities of MPs to perform their functions, but rather to assume that they will approach their legislative duties conscientiously. I cannot in any event act on the sort of unevidenced concerns and anxieties upon which the

Claimants rely, and evidence on the point would have been odious to the judicial function. Of course, to the extent that consideration of the lawfulness of any development consent enacted by Parliament falls to be measured against the requirements of the EIAD, the available information, the use made of it, and content of the debates may have to be considered. But that is a different issue entirely.

406. This aspect of the consultation ground is dismissed.

Ground 5(c) - Failure to provide passenger loading data

407. The Bucks CC Group, with the support of HS2AA, argues that there was a material unfairness in the DfT failing to provide the passenger loading data for the years from 2007 as part of the consultation information. This data is closely linked to 51M's promotion of the OA.

408. 51M wished to challenge statements justifying HS2 such as that in the Foreword to the Consultation Document in which the SST said:

> "But today's railways face a huge capacity challenge. Rail passengers are familiar with overcrowding, used to long queues and are almost certain to have found themselves standing on a long distance journey at some point. And demand is set to rise sharply in the years to come. On the West Coast Main Line, in particular, new rail infrastructure will be essential."

409. This remark foreshadowed a number of other references in similar vein. The Executive Summary to the Consultation Document, under the heading "Standing Room Only" said that some of the country's key rail routes were forecast to be completely full in peak hours in 20 years time:

> "High levels of crowding are already being seen, particularly in the peak, across a growing proportion of the network. Many services on the West Coast, East Coast and Midland Main Lines are already extremely full. Despite the capacity increases provided by the West Coast Route Modernisation programme, long distance services on this route are regularly overcrowded. Almost half of all long distance Midland Main Line trains arriving into St Pancras International in the peak have passengers standing.

> This picture of rising demand is underpinned not only by growth in inter-city travel but also very significant increases in long-distance commuting from places such as Milton Keynes, Northampton, Peterborough and Kettering."

410. But the consultation material was, in Mr Stokes' judgment, somewhat thin on empirical data demonstrating that that was so, or why and at what times of day. There was only limited data available from Network Rail's "Route Utilisation Strategies", published in July 2011, near the end of the consultation process. These were very general, and the data was not related to specific trains, peak and off peak, or the split between standard and first class, and the available capacity.

411. There was, however, another known set of annual data, produced by the Train Operating Companies, TOCs, and supplied by agreement to the DfT. This was specific in those respects, and would have enabled growth since 2008 to be measured. This information was not made available during the consultation process. Mr Stokes, in his first Witness Statement, saw the data as central to the case for the OA and its ability to meet current capacity requirements, and future growth, and to help 51M respond to the first two consultation questions which covered the case for enhancing rail capacity and doing so by means of a new high speed rail network. The want of this data in the consultation material inhibited, he said, 51M's response to capacity issues.

412. 51M's first request for the data was made in a letter dated 30 September 2011 to the DfT, two months after the consultation period had closed but before the DNS was published, and at a time when the two reports responding to the OA would have been under consideration. The request was refused on 26 October 2011. There had been an earlier Freedom of Information request by HS2AA to HS2 on 16 May 2011 for information about detailed current loading data. HS2L responded on 31 May 2011 to the effect that it did not hold the information; try the DfT. The DfT has no record of any such request.

413. 51M's consultation response referred to HS2AA's request and asserted that Virgin Trains as the TOC on the WCML, did have detailed train by train loading information. This was clearly a reference to the data at issue in this ground. The comment contrasted the references to the need for capacity in the peak period, by

HS2 supporters, with the absence of data to support such a point, a point which 51M contested in degree and cause. It wished to contend that there was a low level of crowding, a very low level of crowding in first class, and the crowding related to the timing of off-peak fares. The rate of increase in growth of traffic on the WCML might also now be flagging after the upgrade works.

414. During preparation for this litigation, Bucks CC Group asked for the data for passenger loading information on the WCML and ECML for the years 2008-2011. The DfT supplied the data for 2011 on the undertaking that the data would be confined to its lawyers and Mr Stokes, who took the view that the data supported his contentions to the Court about the OA. Bucks CC Group unsuccessfully sought the data for the other years, and to be released from the undertaking as to confidentiality. It made a specific disclosure application which I dealt with.

415. The DfT resisted on grounds of relevance and confidentiality. It seemed to me that the only role which such data could legitimately play in the litigation, since the litigation was not concerned with forcing disclosure for the purposes of a consultation process which had closed, was to prevent the SST contending, in response to the claim that the data ought to have been disclosed as part of the consultation process, that there was no evidence that it would have supported the Bucks CC Group's case anyway.

416. The issue was compromised by the acceptance by the SST on 1 November 2012, embodied in an agreed Order, that " (1) The passenger loading data sought is the clearest evidence of current capacity constraints; and (2) that data itself is likely to have provided strong support to 51M's argument that the optimised alternative was capable of meeting all current (but not all reasonably foreseeable future) capacity requirements"; the relevance of the data to future capacity requirements was agreed to remain at issue, as was the need to provide it to 51M in the interest of a fair consultation.

417. Mr Graham accepted in his fourth Witness Statement that the Bucks CC Group was broadly correct in saying that this data would provide an accurate picture of loadings on relevant train services, including peak and off peak loadings, at weekends, of the split between first and standard class, and of the level of growth since 2008, though the early years of the data were of lesser quality than later.

418. The SST accepted, by the time the claim was heard, that this claim for confidentiality on a proper reading of the agreements with the TOCs had been overstated, and could not be sustained. So that did not feature as part of its case that the data was not disclosable for the purposes of consultation. The SST's case rested on relevance. This data had not been used by HS2L in the justification for HS2, nor in its modelling of future demand, save in one very limited respect.

419. Mr Graham explained in his third Witness Statement that the modelling of future long distance demand had been done using the PLANET suite of models. Three sets of forecasts had been done, two using 2007-8 as a base year, generated in 2009 and 2010, and one using 2010-11 as a base year. These had been published respectively with HS2L's 2009 Report, with the February 2011 Consultation Document and thirdly with the DNS. In each case, a "Demand and Appraisal Report" and a "Demand Model Analysis" was published providing a more detailed overview of the modelling results, of the structure and operation of the modelling suite, and changes since the previous version. The raw output was also available.

420. The base year data used to "populate" the models was drawn from the rail industry's LENNON ticket sales database. Mr Graham described this as a detailed and comprehensive database which provided a reliable picture of passenger travel for modelling purposes. But as it did not always show the specific train used, it did not permit a calculation of peak loadings to be made directly.

421. The aim of the modelling was to consider "future demand for long-distance rail", and it forecast on an all-day basis. Given that the forecasts indicated a high level of crowding in the long-term throughout the day, it was likely that even higher levels would be seen in peak hours:

> "An all-day approach of this kind is appropriate in making a strategic assessment of growth in demand for long-distance rail travel, as demand in peak and off-peak periods is not as sharply differentiated as for commuter rail. It is this overall

> long-term trend in passenger demand growth which is at the heart of the Government's case for HS2."

422. The local demand component of the models, forecasting demand into and out of London and Birmingham, modelled demand on the three hour AM peak, estimated by the model as a proportion of the overall demand.

423. The passenger loading data from the TOCs was not used as part of the data to "populate" the models, but the 2007 and 2010 data was one of two sources used for model validation i.e. to test the performance of the model against data not used in setting it up. There is a detailed report explaining this.

424. It also explains the view of the modelling consultants that the TOC data, while suitable for use in validation, would have been unsuitable for use as a basis for demand forecasting, since the LENNON data was likely to be more accurate to create the particular model desired, PLANET Long Distance. The model had to be robust over a much longer period than the 20 years HS2 would take to complete, far longer than short to medium term rail industry planning horizons. The forecasting had to look at what caused the significant changes in demand, and forecast how those relationships might change in the future. Long term data series had to be used, and the risk with short term data, say from 2008, was that short term issues would have distorted it, including for example short term slower economic growth.

425. Ms Lieven submitted that, for all that, the political case for HS2 put forward by the SST placed a great deal of reliance on existing conditions, particularly on the WCML; the Consultation Document referred in a number of passages to the services already being "extremely full" on the WCML, ECML and Midland Main Line, and to long distance services on the WCML being "regularly overcrowded". These statements on existing overcrowding were not merely presentational, as suggested by Mr Mould. The Network Rail Alternatives Report relied on the short to medium term demand on commuters as being an important reason to reject the OA, rather than being told by the SST that this demand was irrelevant to the case for HS2.

426. The loading data would have enabled 51M comprehensively to rebut the suggestion that existing problems justified HS2, by supporting the OA's ability to meet reasonably foreseeable medium term growth. It was accepted by the SST as the best data on existing capacity issues and would have shown that: there was virtually no existing overcrowding; where there was it was a product of pricing policy; and relatively minor incremental interventions could deal with all predictable growth.

427. The SST's answer as to how the data had been used rather missed the Bucks CC Group's point that 51M would have used it to show that the current problem relied on by the proponents of HS2 was less severe than claimed and was susceptible to solutions other than HS2, OA in particular. Although 51M could still assert through the consultation that the OA met the appropriate level of need, they were seriously disadvantaged in doing so by not being able to rely on the TOC data. The data was necessary for a properly informed response to be made to the consultation, and the Secretary of State's failure to provide this material as part of the consultation exercise caused material unfairness. It was not for the SST to decide that consultees might misunderstand or be confused by the data.

428. Mr Mould pointed out that the Consultation Document explained that the SST had sought to forecast long term passenger demand growth. The technical basis for those forecasts was available in supporting documents published both prior to and during the 2011 public consultation, including the fact that the use of passenger loading data had been limited to validating the model.

429. The consultation material and supporting information provided 51M with the opportunity to challenge the suitability or adequacy of the modelling and forecasting approach taken by the Secretary of State. Simply put, meeting current capacity constraints or reasonably foreseeable medium term growth was not the objective in the SST's assessment of the case for high speed rail; it was meeting the long term capacity challenge.

430. The clear focus of the Consultation Document was the existence of a long term capacity challenge, and how that should best be met. Short term measures were discussed in the Document. There would have been no purpose in providing data on current usage when that was not the focus of the consultation, and it risked taking the mind of consultees off the point about which they were being consulted on.

431. If consultees had felt that the absence of this data had seriously impeded their response, they would have raised it before or during the process. Mr Stokes was aware of the existence of such data before the consultation process began. The Court should not intervene where the material is not relevant to the proposal and its justification, but was relevant only to a consultee's alternative, and the professionally advised consultee has not asked for it. The data had not been withheld because of confidentiality, but because it did not relate to the long term issues which were being consulted on. 51M could say in its consultation response that the focus should be on what the TOC data would show. I note however, that this point is also taken by HS2AA.

432. The current problems on the WCML were referred to, not because the aim was simply to solve those, but because they were manifestations already of the longer term problem, which was what the consultation was about.

Conclusion on the passenger loading data

433. The passenger loading data did not have to be disclosed, among the very many papers which were published setting out the case for HS2 and how the thinking on it had developed, in order for the limited use made of it in the case to be understood. The various documents described above explained how the demand forecasting was done, the current data used to "populate" the models, that the focus was on long term demand forecasting and why. It explained the limited use made of this data set in the forecasting work. These documents were all published, and those consultees and advisers to whom the nature of the supporting data for the SST's views was of interest were all able to understand it. The existence of this data was in any event already known to Mr Stokes, and the request made by HS2AA suggests that it was aware that such a data set existed. So the provision of sufficient information about the case for the proposal did not require this data to

be produced to consultees. It was simply of no more than passing relevance to a technical aspect of the SST's case.

434. Any contention that it should have been of greater relevance is a point going to the rationality of the decision, or the materiality of the factors considered. That is not the point here.

435. Should the data have been provided as part of the consultation since it was of relevance to and, on one perfectly sound view, at least rather tended to undermine the general world picture of present crowding on the WCML which featured as part of the case for HS2 in the Consultation Document? Mr Graham has accepted its accuracy and helpfulness in providing a picture of current capacity constraints and loadings by service, peaks and class. No other comparable data set was provided in the consultation process.

436. I do not think that those characteristics make the consultation unlawful in the absence of its public production to consultees. The mere fact of relevance cannot require production in the consultation process, failing which the process becomes so unfair as to be unlawful. That would impose an awesome burden on consulters, and simply is not necessary to meet the requirement that sufficient clear and precise information about the proposals be provided to permit of an intelligent and informed response.

437. I see the force of the point that this data tended to undermine a part of the case for HS2. But, experience of overcrowding and standing to the extent that it occurred would have been part of the WCML passengers' experience and knowledge, albeit individually at an anecdotal rather than surveyed level. Their responses, collected through HS2AA, or indirectly through 51M's members, would have been sufficient to raise the question of how sound a point was being made. Crowding was not information, which below a certain statistical level, was known only to the SST, even if the content of the data was not known to consultees.

438. I accept that the main thrust of the case for HS2, as in the Consultation Document is on making provision for future growth needs, which are already being felt to a degree, rather than on solving an existing problem which of itself already requires the provision of HS2. Although I do not think that consultees would have been confused by the production of the data, the DfT has a valid point when it says that the aim of consultation was to receive responses on how future growth should be catered for, if at all. Undermining its point about present overcrowding would have been agreeable for opponents of HS2, if that is what it enabled them to do, but would have missed the real target. I do not regard that as a basis upon which the non-production of the data made the consultation so unfair as to be unlawful.

439. The crucial issue, as it seems to me, is whether the data should have been released because it would assist a consultee's alternative, the OA, and as part of that would have assisted its argument against part of the future capacity case for HS2. I do not see this as comparable to *Edwards*, where vital data to the decision, on any basis, was only available to the consulter, but important for consultees as well in order to understand the effect of the proposal. Mr Stokes was able to put forward the OA; and support his contentions about capacity. The DfT had knowledge of what the data showed. The data did not confound but supported what he said, so it would have reinforced the case by reference to material which the DfT had and knew offered support to the line he was taking.

440. There comes a point at which a consulter cannot provide the necessary information for an informed response, if he withholds relevant information, the detail of which is known only to him but which is adverse to the proposal. It may be difficult always to draw a clear line between that information and information which supports an alternative, and thus an objection to the proposal to be put forward as a consultation response. There is a real difference between the two in terms of what is required for adequate information about a proposal, sufficient to give an informed response. The consultation process cannot involve disclosure akin to litigation.

441. But the basic test remains applicable: does the consultee have sufficient clear and precise information about the proposal and the reason for it to give an informed and intelligent response which grapples with the issues it raises? In my view, the Claimants did, without provision of the loading data. If that test is satisfied, the consulter is not obliged to go further in providing consultees with material in order to advance an objection.

442. A specific request for particular and relevant information may alter the point at which the consultation becomes unfair if it is withheld without good reason, and when the consulter can see what role the consultee sees it playing in responding. However, Bucks CC group did not ask for it during the consultation period, although aware of it and referring to it. HS2AA made a request in time for the material to be used in the consultation process, but did not pursue the request to the right Department. I imagine it would have been refused on two bases, relevance and confidentiality; the latter has been shown to be wrong. Relevance of itself is not enough. I would not have reached a different decision on this aspect had it been refused on that ground.

443. The point I made in relation to the stage of the decision-making when dealing with the consideration of the reports received by the DfT after the closure of the consultation period applies here as well. I would not have quashed the DNS anyway, in the exercise of my discretion, since the Claimants now know through the litigation how the DfT would respond in any further round of consultation on this point. Relief would be pointless.

Ground 5(d) - Failure to re-consult on amendments to the route which caused significant disbenefits to particular properties and individuals

444. The basis of the challenge to the DNS on this ground is that there was no SEA of or public consultation on the changes to the route introduced in response to consultation in the DNS, or consideration of reasonable alternatives to them.

445. I have already referred to the authorities on reconsultation, and do not need to repeat them. I add a further reference to what Silber J said in the *East Kent Hospital* case, above, at paragraph 43:

> "43. A matter of crucial importance in determining whether the defendants in this case should have re-

> consulted on the proposals under challenge was the nature and extent of the difference between what was consulted on in the consultation paper and the proposal accepted in the March 2002 decision. Clearly, if all the fundamental aspects of the decision under challenge had not been consulted on but ought to have been, that would indicate a breach of the duty to consult, while at the other extreme, trivial changes do not require further consideration. In approaching this issue, it is necessary to bear in mind not only the strong obligation of the defendants to consult, but also the dangers and consequence of too readily requiring re-consultation, as those dangers also flow from the underlying concept of fairness, which underpins the duty to consult."

446. There was no issue but that whether fairness required reconsultation was an issue for the Court to decide.

447. Chapter 5 of the February 2011 Consultation Document set out the proposed route in some detail, including its sustainability impacts, and why DfT thought it better than the main alternatives. It posed as Question 5: "Do you agree that the Government's proposed route, including the approach for mitigating its impacts, is the best option for a new high speed rail line between London and the West Midlands?"

448. The consultation responses were then considered. The January 2012 DNS stated in chapter 6 that the proposed route corridor was the best option for the new line. (There had been for example consideration of a route corridor more closely aligned to the M40). The consultation responses on the route in local areas had led to the route being examined again, and subject to the alterations identified, it was the best route. The DNS listed 13 changes, largely to mitigate impact. The benefits of the changes were described.

449. The Summary, para 77, explained :

> "HS2 Ltd has reviewed options for altering the route in a number of different locations, and recommended a package of route refinements, including substantial additional tunnelling in the Chilterns Area of Outstanding Natural Beauty and around Ruislip. The Government has agreed with these recommendations, which are described in more detail in the Review of Possible Refinements to the Proposed London to West Midlands Route, and they will be incorporated into the route as it is developed in preparation for the hybrid Bill."

450. Paragraph 3 of the Executive Summary to the "Review of Possible Refinements" prepared by HS2 as a report to the DfT, (the Review), stated: "Taken together we consider that these changes would be a considerable enhancement to the consultation route." Impacts would be reduced in terms of land take for operation or construction, noise, property demolition and land take. There would be a reduced impact on communities and on the landscape of the Chilterns AONB. The EIA process and the hybrid Bill process would provide further opportunities for refinement of the route and further mitigation. (Mr Elvin put weight on the words "considerable enhancement" as supporting his contention that the changes were acknowledged by the DfT and HS2L to be significant.)

451. Ms Lieven summarised these changes as 4.5 miles of new tunnelling, 3.5 miles of additional "green" tunnelling, route alignment adjustments, and changes to the depth of cuttings and height of embankments.

452. Mr May, a transport planning consultant, provided a Witness Statement on behalf of the Bucks CC Group, in which he commented on the significance of the changes made to the consultation route by the DNS. This was relevant to the assessment of whether or not there should have been further consultation on them. Mr Crane, a solicitor and Director of HS2AA, commented, at the end of his Witness Statement, on the substantial implications which the changes would have for HS2AA. The Review itself, when discussing the various changes, recognised that several of the changes brought some adverse impacts as well as benefits.

453. Mr Elvin provided a note which set out his contentions on the changes of concern. In a number of places in it, he said that the evidence of those witnesses had not been challenged by any evidence from the DfT or HS2L. That is correct, although Ms Munro of HS2L noted, in her Witness Statement, that the comments of Mr May would be taken into account in the further development of the route.

454. I have not covered all of the locations since, in at least three instances, the note in my view somewhat understated the benefits asserted in the Review, and Mr May's evidence was less certain or clear on the effects which would arise. Indeed, I thought the essential submissions which Mr Elvin made in this ground were untenable in respect of those changes, although it is possible that in those locations properties would be affected which were not affected by the consultation route or affected to the same degree. I turn then to the principal locations of revision.

Chilterns Tunnel

455. This revision includes a substantial realignment of the Chilterns Tunnel. The Review, paragraph 4.3.7, gives the reason: the revision "*would significantly re-align this tunnel below ground to avoid the aquifer and merge the two tunnels in this section into a single longer tunnel avoiding the need for a section of deep cutting to the north of Amersham."* Several other benefits are identified.

456. But "*the significantly increased tunnel spoil … would need off-line disposal. It would also produce more embedded carbon emissions and moderately increase material consumption to construct.*" Moreover, the new route would impact on four ancient woodlands, one Grade II listed building and one scheduled monument.

457. Mr Elvin commented that, although the number of properties adversely affected would be reduced, others would be newly affected. Mr Crane provided strongly worded evidence on the adverse impacts on ancient woodland, and other

drawbacks. Mr May stated that there would be greater visual impact from gantries with the reduced cutting depth also proposed.

458. Mr Elvin submitted that there had been no SEA of the impacts of the new DNS route in this location (including, for example, environmental assessment of reasonable alternatives that might avoid or have had a lesser impact on the ancient woodland) nor had the public or individuals adversely affected for the first time had an opportunity to comment upon it.

Trent and Mercea Canal and WCML reconnection

459. At this section of the route, the vertical alignment over the canal had to be raised to around 5m to allow proper navigability of the canal; paragraph 2.1.1 of the Review. Mr May's assessment was that the alignment had in fact been raised by up to 10m. The Review accepts that the route would also be moved 100-150m closer to an industrial estate, affecting a small number of industrial buildings. Mr May thought there would be a significant increase in noise and visual impacts, which it was agreed the AoS had marginally underestimated anyway.

460. Mr Elvin submitted that the individuals and businesses affected by these revisions had not had an opportunity to comment on them, nor had there been a SEA of their effects.

Middleton

461. This section of the route has been moved 50m east to obtain benefits described as "marginal"; paragraph 2.3.3 of the Review. But it brought certain disadvantages e.g. in screening noise and visual impacts. Mr May said that the new route would

go through the property of several businesses which employ up to 50 people, which would now definitely need to be compulsorily purchased.

462. Mr Elvin submitted that, given that the preference for this amendment to the route is described as "marginal", the affected parties might have been able to persuade the SST not to adopt it if they had been given the opportunity to comment or if there had been SEA of this amendment and its reasonable alternatives.

Balsall Common

463. There is a proposed realignment by 100m to the east to this section of the route for "marginal" benefits; paragraph 2.8.3 of the Review. Mr Elvin submitted that the same sort of points as he had made in relation to Middleton applied here.

Newton Purcell and Twyford

464. A reduced radius curve had been introduced here to keep the route away from Twyford, and to permit more room for works of mitigation. Paragraph 3.6.3 of the Review commented that "*specification of an exceptional curve in this area would result in a requirement for more intensive maintenance, which would be undertaken at night*". Mr Elvin submitted that there had been no assessment of the relative environmental impacts of this night-time activity compared to the alternatives and the people affected had not been given an opportunity to comment. His note said "This is despite the fact that this section of the route is recognised as "*one of the more difficult places to mitigate*" (paragraph 3.6.3)." That, in my judgment, is a clear misunderstanding of the point being made: it is because of those difficulties that the realignment to create greater scope for mitigation was introduced in the first place; night time maintenance was the lesser drawback.

465. An alternative and substantial re-routeing was considered but not recommended because it would "*give rise to impacts on communities and farmland that would otherwise not have been impacted by the consultation route*" (see paragraph 3.6.6) which, submitted Mr Elvin, contrasted with the approach to e.g. the Chilterns Tunnel. But the comment clearly relates to the degree of change and new impact.

Greater London – Northolt Corridor

466. A new 2.75 mile tunnel is proposed. The Review identified the benefits (paragraphs 5.2.4 to 5.2.6). The adverse impacts include the demolition of a small number of properties already at risk from the consultation route, the loss of any potential for screening existing rail noise by the noise barriers which the consultation route for HS2 would have included, but HS2 would have been removed from the corridor with a significant reduction in the number of properties experiencing noticeable or worse noise levels from HS2. Tunnelling would result in high volumes of spoil, all of which would require off-line disposal.

467. Mr May's judgment of the degree of property acquisition may or may not have been the same as the Review's but it was more detailed. The owners have been notified that their homes may or will be acquired compulsorily, but have had no chance to influence the consultation process. Mr Elvin submitted that no attempt had been made to assess or consult upon the impacts e.g. in highways terms of transporting off site the very considerable spoil generated by a 2.75 mile tunnel in this urban area.

468. Ms Lieven submitted that as some of these amendments would have a substantial impact on individuals and businesses through, for example, compulsory purchase of properties, and the construction of embankments and railway structures within 100m of buildings, there was a clear interference with the property owners' rights under Article 1 of the First Protocol to the ECHR. As the owners of the properties affected had no knowledge prior to publication of the DNS on 10 January 2012 that their properties would be so affected, and had no opportunity to make representations on the matter, this was contrary to the procedural protections inherent in Article 8 and A1P1 ECHR.

469. Fairness demanded that the adjustments to the route should have been made available to consultees so that they had an opportunity to deal with them before a decision was taken. The amendments to the route had substantial impacts and were new matters upon which the Secretary of State should have re-consulted, at the very least with those individuals and communities directly affected. The failure to do so resulted in material unfairness.

470. The prospect of a petition before a Select Committee could not affect the principle of HS2. A change should be judged from the perspective of the individual affected, rather than against the effect of the change on HS2 as a whole.

471. Mr Mould submitted that a purpose of the 2011 consultation was to enable the SST to elicit information tending to support changes to improve the environmental performance of the published route. It was within the reasonable contemplation of the public that the 2011 public consultation on the line of the route for Phase 1 might result in alterations that decreased the impact of the proposed line on some neighbouring property interests and/or neighbouring occupiers but increased its impact on others.

472. The overall effect was positive i.e. there would be an overall reduction in impacts. If fairness required further consultation, the overall process might never end. The observations of Schiemann J in *R v Shropshire Health Authority ex parte Duffus* and Lord Hoffman in *Edwards* above applied with particular force in relation to this ground of challenge.

473. Affected persons would have the chance to object to the proposed line of route both as part of the EIA process and in Select Committee. In addition, the amendments to the route did not amount to a fundamental difference to the scheme consulted on.

474. For these reasons, the overall process accords procedural protections to affected property owners in accordance with A1P1 ECHR.

Conclusion on route amendments

475. I deal first with the common law fairness of the consultation. I cannot accept Mr Elvin's submissions. What is required for fairness depends on the subject matter of the consultation and the effect of the decision reached after it. The part of the consultation relevant here was about the proposed route; it was obvious that alternatives for certain sections would be proposed. The consultation would have had no point if the promoter were to set its face against making changes to the route in the light of what the responses revealed. So it was well within the contemplation of consultees as well as those who did not respond that there could be changes to the route. It cannot have been supposed that such changes would all be beneficial for everyone; far more likely is that such changes would be at the expense of greater impacts than before for others but in a way which was nonetheless judged overall to be worth accepting.

476. There was no promise, or even a suggestion in the Consultation Document, that there would be a further round of consultation on such changes. So changes without a further round of consultation are consistent with how the process was to be conducted. No process of advertising consultees' alternatives for counter-objections was proposed.

477. I accept that if a proposal changes as a result of the consultation process so that the proposal now affects those who were not previously affected or affected so seriously, and who did not feel a need to respond at the first stage because their interests were not affected, fairness may require a further round of consultation. But that very much depends on the decision-making process.

478. The upshot of a consultation process may be that the decision will be implemented by actually making the change proposed, with its advantages and disadvantages, with no further powers required to do so, and no opportunities for those now

affected to have their say. If the upshot of the DNS was that HS2 would be built on the now proposed route, without further procedures, there would be real force in Mr Elvin's submission. Where as here, the upshot of the decision in the DNS is that, subject to further work, the route in the hybrid Bill will be that which has emerged from the consultation process, I see no case for a further round of consultation at all. All that has been decided is the detail of the project which the promoter intends to place before another body for its decision: ie the detail to be in the hybrid Bill to be enacted or not by Parliament. I can see a considerable deterrent to accepting changes in a consultation process in a case such as this, if it is going to require a further round of consultation before a decision can be reached on the details of the project to be promoted.

479. Moreover, the sort of points which those newly affected might wish to raise on a reconsultation are those which would fall within the scope of the Select Committee's usual remit. There is nothing unfair at common law in the absence of further consultation on these changes. This who object to the changes are not prevented either from pursuing their point outside the formal consultation framework.

480. The ECHR does not require a further round of consultation in these circumstances, and I was referred to no authority to suggest that it was.

481. Mr Elvin's submission on SEAD was that it was the DNS itself which constituted the plan or programme. I have concluded that the DNS is not a plan or programme. The modifications to the consultation route which are planned or programmed in the DNS, cannot be modifications to the plan: they are the plan on Mr Elvin's case. The suggestion, if I understood it right, was that the reasonable alternatives to the changes ought to have been dealt with as part of an SEA leading up to the DNS. That rather reinforces my view that the DNS is not a plan within the SEAD. That sort of detail can readily be dealt with in an EIA to the extent necessary. Nor does it seem to me that Mr Elvin can confine the argument to the changes which emerged from the consultation process: they must cover reasonable alternatives to all sections of the route, at quite a detailed level. That is what an EIA should cover to the extent necessary.

482. I also advert to a constitutional issue which was not raised as a bar to relief. I have grave reservations about the constitutional propriety of relief preventing a Member of Parliament laying a Bill before Parliament, public or hybrid. If there had been unfairness so as to make the consultation unlawful, I would have required argument as to whether such relief would have been proper. A declaration as to the lawfulness of the consultation process would have been the only likely relief. But it would probably not have been proper to require it to be remedied before the deposit of the Bill.

6 Bucks CC Group: Public Sector Equality Duty

Facts

483. At the heart of Ms Lieven's case is the fact that the impacts of HS2 would be felt in the Regent's Park Estate to the west of Euston Station principally by Bangladeshi Asian residents, and at Washwood Heath near Birmingham by Black, Asian and Minority Ethnic residents. In each location, those ethnic groups were higher in proportion than the average in each of the two Boroughs affected. The former would have to be rehoused, following the demolition of existing housing to make way for the westward expansion of Euston Station to accommodate the HS2 Terminus, and the latter would be affected by the construction and operation of a new rolling stock depot.

484. The AoS Appendix 4 described itself as a screening report to "provide an initial appraisal of the extent to which groups vulnerable to discrimination and social exclusion may be differentially" adversely affected by HS2. It identified what it termed "priority equality groups" and "the potential for significant adverse impacts" on them. Ethnic minorities were one such priority group, and those living in the top 20% most deprived wards were another. Both areas fitted that latter priority group as well. Appendix 4 described the background to an Equality Impact Assessment, EqIA, the methodology of the process, and the role of a screening process as its initial stage. If this initial stage showed that there could be a differential impact with potentially adverse effects, or that further information was required to draw robust conclusions, a full assessment would follow. But the presence of a particular "equality group" in any given location would not necessarily constitute a differential impact; for that, there had to be a higher degree of sensitivity or vulnerability to the impact as compared with the general population.

485. The five steps in the screening process were: establishing the aims of HS2 and their relevance to the SST's duties to promote equality, establishing "priority equality groups" by gathering information, identifying the potential impacts on them, identifying disproportionate adverse impacts because of increased representation in a particular area of a priority equality group, and finally deciding whether further information or a full EqIA was required. There had been an initial consultation process with local authorities to enable location specific issues and impacts to be identified.

486. The outcome of the screening process was described. The two areas which I have referred to were described as having potential significance because of potential impact on properties.

487. The key impacts to the west of Euston Station were the loss of high–rise council blocks involving the relocation of some 500 people, as well as the demolition of some low rise terraces. Other council blocks would also be newly exposed to railway impacts. There would be some impact on community facilities during construction; some 20 small businesses, and a Post Office facility employing local people would have to relocate. The area was one of the 20% most deprived areas in the UK by reference to a number of factors; its Asian population (with a significant Bangladeshi component) was 34% compared to the Borough average of 10%; and the proportion of children was slightly above the Borough average. "Preparation of a full EqIA could help to determine the scale of impact on the surrounding population and is therefore recommended." (Para 3.4.3 AoS App 4). The evidence of Ms Hayward, a Councillor and Cabinet Member for Communities, Regeneration and Equality from the London Borough of Camden, described the impacts in stronger terms.

488. At Washwood Heath, 32 residential properties were likely to be demolished in addition to others required for the Birmingham spur; several businesses would have to relocate. It too fell within the 10% most deprived areas by reference to factors which included unemployment. The BAME population by ward varied between 65% and 34% compared with a borough average of 19%.

489. Appendix 4 recommended that the full EqIA would need to take particular account of those two locations. Its findings were incorporated into the main AoS.

490. Appendix 3 to the AoS was a Socio-Economic Report, which provided some further detail in relation to deprivation around Euston Station.

The initial submission

491. Ms Lieven's initial contention was that the SST ought to have carried out an EqIA but had failed to do so before reaching the decisions in the DNS. Such a failure was a breach of the duty in s149 of the Equality Act 2010, in that the SST had failed to have due regard to the matters set out there, or to a material consideration or had acted irrationally. The focus however was on s149 and "due regard". The decisions had been made, and keeping the impact on equality issues under review would mean that the requisite due regard had not been paid before the decisions affecting them were made.

492. S149 (1) provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to-
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who have a relevant protected characteristic and persons who do not share it."

493. The relevant protected characteristics include race and age. The protected characteristic of race is not minority ethnicity, whether judged nationally or by reference to some more local area. Nor is "priority group" based on ethnicity a statutory concept.

494. On enquiry, Ms Lieven told me that her case was that the absence of a full EqIA before the decision in the DNS represented a breach of subsection (c), rather than a breach of (a) or (b), and that it was (c) which she relied on. It was always involved if an ethnic minority group was significantly adversely affected, she submitted.

495. S149(5) provides:

> "(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-
>
> (a) tackle prejudice, and
>
> (b) promote understanding."

496. Ms Lieven did not refer me to that provision and so did not suggest that there had been any failure in those respects, particularised for their importance to (c).

497. I could not discern from her submissions how she related subsection 1(c) to the facts of the case, or to her claim that compliance with s149 required a full Eq1A before publication of the DNS. I had difficulty seeing how it could be thought to foster good relations between those who shared the protected racial characteristic and those who did not, to move the terminus from the location preferred by the

promoter to a less effective one on the grounds that in one location there was a higher proportion of ethnic minority residents than in another, or a proportion higher than the borough average in one location but not another.

498. Although I can see that, to the extent that the OA would avoid property demolition outside Euston Station that is an advantage it can claim, I do not see how it is a greater advantage because of the ethnicity of those involved or how approaching a comparison between HS2 and the OA in that way could be required in order to show due regard for subsections (a) or (c) purposes.

499. Mr Mould submitted that the SST had had due regard to the matters in s149(1), that the duty would continue to inform the detailed development of the project. Consideration was given in Appendix 4 to how the impacts might be addressed. No decision to proceed with the project had been made since it was for Parliament's decision through the Bill process. Sufficient had been done for the stage reached in the process; the impacts had been identified, consulted on and taken into account in the DNS. I accept Mr Mould's submissions and reject Ms Lieven's case as originally put.

The reply submissions

500. Ms Lieven's submissions in reply were different. She said she relied on both subsections 1(a) and (c) of s149 but her focus was now for the first time on s19 of the 2010 Act. She alleged that there was potential indirect discrimination at Euston which required the SST to consider whether a "particular equality group" was affected, there ethnic minority residents, and whether it had a "higher degree of vulnerability", for example because the area experienced socio-economic deprivation, as it did according to the AoS. There was prima facie indirect discrimination therefore, within s19 of the 2010 Act, which the decision-maker had to consider through an EqIA, and then consider whether the decision was a proportionate means of achieving a legitimate aim. That meant that the SST had to consider whether there were alternative means of meeting the policy aim which avoided or reduced the discrimination. This should have been done before the DNS. It would also have been relevant to the consideration of alternatives, especially the Bucks CC Group Optimised Alternative, since its case is that that would not have involved expansion outside the existing station envelope at

Euston. (The latter is not accepted as demonstrated fact by the SST.) It added to the argument that it was unfair not to reconsult on the OA.

501. Mr Mould put in a written response to Ms Lieven's changed position, at my invitation. He pointed out, rightly, that the case on potential or actual indirect discrimination was wholly new: in reality this was now a claim that s19 was breached, rather than s149(1)(a). It was also without merit. Assuming that the DNS was a "provision, criteria or practice" within s19, it would only be discriminatory in relation to the ethnicity of those in the vicinity of Euston Station, if "it puts, or would put, persons with whom B [the ethnic minority residents to the west of Euston] shares the characteristics at a particular disadvantage when compared with persons with whom B does not share it". If it is discriminatory, the SST has to show that it is a proportionate means of achieving a legitimate aim; s19(2)(d). It does not have to be the only means of doing so, nor does the Court have to decide whether it is the best one.

502. They were not put at a disadvantage in that way; the analysis of alternatives to the westward expansion of Euston Station to provide for a new high speed rail network terminus in London amply satisfied the requirement in s19(2)(d) should it arise. There was no obligation to carry out an EqIA, nor is one necessary to show that "due regard" has been had.

Conclusion on the public sector equality duty

503. I have already dealt with the argument under s149(1)(c). The belated reliance on S149(1)(a), the duty to have due regard to the need to eliminate discrimination is equally misconceived. As Mr Mould pointed out in relation to s149(1)(c) as well, the AoS Appendix 4 shows due consideration being given to equality issues for the stage reached in the decision-making process, identifying issues of potential significance which will be further considered later. There is no requirement anyway for an EqIA to be carried in order to fulfil the s149 duty. At this stage in the decision-making and so far as relevant to Ms Lieven's case about the two specific locations, (and she focused almost exclusively on the area west of Euston Station,) the only decision taken by the SST in relation to them is that development consent will be sought from Parliament for a proposal adversely affecting those two locations. It is a decision as to what the proposal is to be, and

how consent will be sought for it; it is not the decision, which will be for Parliament, that that is the proposal which will be built. Again, I could not discern how Ms Lieven related s149(1)(a) to the facts of the case.

504. Her case under s19 of the Equality Act 2010, which is where the thrust of this ground ended up was made far too late for it to be given proper consideration, including by the Bucks CC Group, if there was anything in it. It would require an application for permission to amend. If properly sought, it might have called for further evidence. I refuse permission to amend for those reasons.

505. I see no clear merit in it either. The adverse effect is entirely related to the fact that individuals live there, and nothing remotely to do with their ethnicity. I also accept Mr Mould's short analysis of the application of s19: the proposal does not put the ethnic minority residents west of Euston Station at a "particular disadvantage" compared to other ethnic groups. The ethnic minority residents are disadvantaged compared to residents who are not affected, who could equally well be of the same or some other ethnicity, minority or majority by whatever calculation is appropriate in this case. They are disadvantaged simply because of where they happen to live. It is also difficult to see why this effect would have different legal consequences if the proportion of the ethnic minority were not larger but at or less than the borough average by ward, particularly in the context of a linear, national project.

506. I also accept Mr Mould's point that, should the issue get that far, s19(2)(d) provides a complete answer. The case for the HS2 London terminus being at Euston Station is clearly set out in the DNS at paragraphs 5.29-5.31, and its related documents.

507. This ground is dismissed.

7 Bucks CC Group's rationality challenges

508. This ground of challenge contends that the SST erred in law in failing to take into account material considerations or in reaching an irrational decision in respect of:

(a) underground line capacity through Euston;

(b) the link between HS1 and HS2; and

(c) the Heathrow spur.

509. I take these in turn. (The claim of disproportionality was inappropriate. The claim that reasons were inadequate was rightly not pursued).

Ground 7(a) Euston underground line capacity

510. The Consultation Document, in paragraph 5.4, dealt with the issue of passenger dispersal on the Underground at Euston. The Northern and Victoria lines would be heavily crowded by 2033, with or without HS2. HS2 would add a relatively small number (2%) to the total number using all Underground services through Euston. HS2 would work closely with TfL as part of its wider strategy for improving Underground services.

511. 51M, in its consultation response, referred to this issue. HS2 would generate new passengers, and Phase 2 would divert large numbers of passengers from King's Cross and St Pancras to Euston. Many passengers from HS2 would use the Underground lines through Euston for their onward journeys. TfL had told the Transport Select Committee on 28 June 2011 that the Victoria and Northern lines at Euston, already among the busiest, could not cope with the extra demand, and so, without extra steps being taken, HS2 could not operate. The only solution was the provision of Crossrail 2, the Chelsea-Hackney underground line, at a cost of £9bn or more; (newer estimates are in the range £10-£15bn). It was thought that

the DfT accepted that this line would be necessary anyway, but the 51M response argued that it would certainly be necessary with HS2, and that it would be irrational to proceed with HS2 without an unequivocal commitment to Crossrail 2 being ready when HS2 opened. Its route had already been safeguarded.

512. 51M's consultation response and submissions drew upon what TfL had submitted as its consultation response. According to TfL, general growth and HS2 would increase demand on the Victoria and Northern lines through Euston by about 250% in the three hour morning peak, by 2033. Some waiting times would exceed 10 minutes. Table 3 in the TfL consultation response showed significant increases attributable to Phase 1 in 2033, and the overall figures for onward underground travel from Euston nearly doubled with HS2 Phase 2. In its letter of 30 September 2011, taking up a point raised by HS2 at the Transport Select Committee, TfL estimated to HS2L that the waiting times for Victoria and Northern line trains could reach 30 minutes, even after upgrades to the Victoria line. The Chelsea–Hackney link had to be in place before peak demand from HS2 occurred.

513. 51M warned that Euston underground station would have to close at peak times for passenger safety, affecting all passengers and not just those from HS2. TfL made similar points; thus the benefits of HS2 would be lost.

514. In the DNS, the DfT stated at paragraph 5.30:

> "A further concern raised was the potential impact of HS2 passengers on the London Underground network at Euston station. In terms of network capacity for onward passenger travel, the numbers of passengers at Euston added by HS2 during the three hour morning peak is likely to be around 2% compared to the number of passengers already forecast to be on London Underground services passing through London. We are confident that Euston offers sufficient opportunity for accommodating these additional passengers; HS2 Ltd have advised us that they would work closely with TfL as part of its wider ongoing strategy for modernising and improving underground services." Euston was still the right place for the London terminus.

> (I also note that the 2% relates to the total numbers joining the Underground at or already on the Underground trains passing through Euston, and on all lines, not just the busier Victoria and Northern lines. The TfL figures relate only to those getting on or off at Euston, as I understand them).
>
> Mr Mould pointed out that both the Mayor of London and TfL supported Euston as the London terminus.

515. Ms Lieven contended that neither the DfT nor its professional advisors have suggested that TfL's view of the capacity problem in the underground at Euston is incorrect, and that the SST, in the Composite Defence and evidence, did not seek to argue that the Bucks CC Group's analysis was incorrect. The SST accepted that these matters need to be resolved, but had merely responded to this issue in the letter of 20 February 2012: "*The Secretary of State accepts the need for High Speed Two and TfL to work closely on the issues of Euston station passenger dispersal, the demand implications for the Y, station layout and design and construction planning and phasing.*" The SST's position before me and in the evidence was a little more advanced than that would suggest.

516. Ms Lieven submitted that the very high forecast growth at Euston without HS2 did not make it rational to promote a scheme increasing still further the number of passengers coming into the station. The solution to the problem would require a scheme to be identified, costed, and committed on a timetable to meet the need. It was irrational to proceed with HS2 in the absence of such a solution, that is Crossrail 2. It was not her case that the SST must promote a Bill for the Chelsea-Hackney line, or indeed any other solution at this stage, but must be able to show that such a solution exists, its costs taken into account. Alternatively, were there no Government commitments to a solution in that way, the very real disadvantages for the HS2 passengers and all other passengers who would use the Underground at and through Euston anyway, should have been taken into account in deciding whether HS2 was a worthwhile scheme.

517. The passenger dispersal issue needed to be fully addressed now in Phase 1, in the ES and in the Bill, since it would require works to Euston Station, which would be far less disruptive if done at the same time as the other works to the station, even if the solution were not brought forward until Phase 2. The DNS minimised the problem by suggesting that it was primarily an issue of background growth and therefore a matter for TfL, and gave every indication that the SST intended to

avoid the issue by relying in Parliament on discussions with TfL, and some solution in the future.

518. Any rational Secretary of State would have established a solution, costed it and consulted upon it, before making the decision to proceed with HS2. It was not rational to plan for HS2 without knowing how passengers would disperse at Euston without dissipating the time savings HS2 was intended to generate, and having in place the solution. The DNS stated, paragraph 4.9, that affordability was a key consideration with expenditure being phased to limit the amount of public funding required in any year, yet HS2 needed the expensive Crossrail 2 if its benefits were to be realised. The true costs of the project should be faced up to by Government.

519. Parliament would not really deal with this issue at Second Reading; MPs would not wish to debate passenger flow figures at Euston and the relative responsibilities between HS2 and TfL. It could not be dealt with in the Select Committee since it would go to the principle of the Bill.

520. Mr Mould submitted that the SST had plainly considered the solutions to capacity restraints at Euston. The SST had had regard to the issue of passenger dispersal, the relative contribution of HS2 to overall passenger demand on the Underground, and the need for the responsible planning and transport authorities to fulfil their functions by jointly planning measures to enable the London transport network to accommodate future passenger flows into and from Euston station.

521. The DfT evidence showed that the most significant factor affecting future Underground capacity at Euston by far was growth unrelated to HS2. The increase in the number of people using the Underground at Euston amounted to around 3% growth in the morning peak resulting from full operation of the 'Y' network; (2% from Phase 1). TfL in a letter of 30 September 2011 to HS2 thought that the effect of Phase 2, which is when the transfers of passengers from St Pancras/Kings Cross would occur, would be closer to 5%.

522. The more significant potential solutions proposed by TfL in 2009 included an upgrade to the Northern line, removal of London Overground services from Euston, the diversion of some WCML services on to Crossrail, and TfL's preferred answer of Crossrail 2, a strategic priority in the 2011 London Plan. HS2L was considering those partial solutions which fell within the scope of HS2, including the improvements to the Underground ticket hall at Euston and the possible link to Euston Square station. Crossrail 2 was for TfL to take forward, and the DfT was committed to working with TfL on resolving the issue, said Mr Graham. There was an ongoing process of engagement with TfL on these issues, to which Ms Munro, chief Executive of HS2L, also referred. (The proposed interchange at Old Oak Common seems to me to have been taken into account already in the analysis of the growth in passengers arriving at Euston.)

523. The fact that capacity issues at Euston would be given further consideration as the scheme developed reflected the status and purposes of the DNS. The DNS was founded upon the SST's consideration of the information and representations following public consultation. The SST accepted the need for HS2 Ltd and TfL to work closely on the issues of Euston station passenger dispersal, the demand implications of the Y network, station layout and design and construction planning and phasing. That these matters remained to be resolved did not render irrational the decision to seek legislative powers for the construction and operation of the proposed high speed railway.

Ground 7(a) Conclusion on Euston underground capacity

524. There is clearly a problem of underground capacity at Euston which Government accepts will have to be dealt with in the future, with or without HS2. The TfL and DfT figures for the contribution made by HS2 passengers to the problem are not in obvious conflict once what the different percentages relate to is understood. The percentage is selected according to the point which the user seeks to make. But the crucial point is not that HS2 will add to a problem which requires solving, and how that addition is expressed, so much as what effect the problem at Euston has on the justification for HS2. And it is not just passengers from HS2 who would be affected, arriving at high speed and dispersing at slow speed on the busiest lines, but all those other passengers arriving at conventional speed and joining or leaving the Underground at Euston, and indeed passengers, passing through on very crowded lines.

525. However, that does not make it irrational for the SST to promote legislation for HS2 when no definite solution has been identified, let alone committed for provision to a known timetable. Two judgments, at least, are possible. It would not be unreasonable to adopt the approach urged by Ms Lieven. Some might regard that as wise, and to leave matters as they stand as foolish. But that would not make doing so irrational and so unlawful. It would not be unreasonable for the approach urged by the SST to be adopted: the problem is acknowledged regardless of HS2, although sharpened by it; solutions are being worked on, possibilities have been identified, and time exists for them to be brought about. There is no need now for the solution to be committed. That is not irrational and some might regard it as wise. The risk that the solution might not be in place by the time that it was needed for HS2 passengers is pre-eminently a matter of political judgment, as is the weight to be given to the risk.

526. Which course is followed is for the political judgment of the SST in the first place. Parliament may or may not be persuaded to accept the current approach adopted by the SST. That is a matter for Parliament. That emphasises that this is not a judgment to be tested in the courts for rationality, but a political judgment, the wisdom or foolishness of which anyone can debate while holding reasonable but differing views. If a solution is not put in place as needed, that will have been because of political decisions. This does not involve ignoring any material considerations. I reject this aspect of the challenge.

527. It also seems to me likely that, even if I had concluded that the SST's decision to proceed with the Bill, before a solution to the capacity problem had been found and resolved upon, to be irrational, no constitutionally proper relief could prevent such a Bill being presented. I appreciate that the question of relief was one on which the SST pointed out that the House Authorities might wish to make submissions, but the issue does go to the heart of the justiciability of this ground. So I mention it. It could not be for the Court to hold that the Bill if enacted would be irrational; and I do not see how any invitation to Parliament to reach such a decision could be held unlawful either. This seems to me to be a bar to relief preventing the deposit of the Bill on any of the three grounds relied on here, and a probable strong point against even declaratory relief. This applies to all three aspects of the Claimants' rationality challenge.

Ground 7(b) Link with HS1

528. The SST decided in the DNS that Phase 1 would include a direct link to the Continent via the High Speed 1 line to the Channel Tunnel, since it could only be achieved at that stage. This link was to be made via a new tunnel from Old Oak Common to Primrose Hill where it would join the existing North London Line, NLL; paragraph 4. 41-45.

529. Ms Lieven submitted that this link raised three issues which went to rationality or the consideration of material factors: the lack of a business/transport case for the link; the very serious impacts it was likely to have on the NLL; and the major impact it was likely to have on the area of Camden Town close to the NLL and the road network through the area.

530. The report "High Speed Rail for Britain" prepared by HS2L for the Government in March 2009 stated at paragraph 3.8.12:

> "Running direct services to Paris or Brussels…via a connection to HS1 would bring Birmingham within three hours and attract a significant market share, but the market would not be enough to fill a 400 metre train a day in 2033. Direct services to destinations north of Birmingham would attract a smaller market share but are competing in a bigger market and might fill another train a day." The case would be improved with the wider high speed network in the UK.

531. The DfT "Economic Case for HS2" of February 2011 was in much the same vein. The Consultation Document favoured a direct link leaving the HS2 Euston line at Old Oak Common, in single track "classic speed" tunnel to Primrose Hill where it would join existing lines, including the NLL, leading to the HS1 north of St Pancras. Chapters 3 and 5 explained a little more but did not set out the anticipated demand or the effect which meeting it by direct trains would have on the operating capacity of HS2 to London or on the NLL. Paragraph 5.7 said that HS2L was working with Network Rail and TfL "to ensure that [three trains per

hour in each direction linking to HS1] would not affect the operation of the North London line". Question 3 asked whether consultees agreed with the phased delivery of HS2, with the link to HS1.

532. 51M carried out a detailed analysis of the HS1 link as part of its response to the consultation and concluded that there was no business case for a link to HS1 since direct trains from Manchester or Leeds to Paris would not even cover the direct operating costs of the train. But the link to HS1 would increase HS2's capital costs, reduce its capacity into Euston and reduce overall reliability. Mr Stokes' first Witness Statement referred to the concern expressed by TfL, in "its professional view" in 2010 about the impact on the NLL: even the maximum possible of one train per hour in each direction would be difficult to timetable because of the existing services and the gaps required between each train.

533. Camden LBC's consultation response on the HS1 link noted:

> "There is concern about the impact of the degree of alteration which would be needed to the existing North London line to allow the operation of High Speed trains. The impact of these proposals on Camden's other transport networks and development sites and open spaces adjacent to the line is not currently clear. There is insufficient information as to how the construction would be phased or a proper assessment on the impacts."

534. The Mayor of London's consultation response to the HS1 link raised similar problems with the proposed use of the NLL, stating:

> "[The link between HS1 and HS2 using sections of the existing North London line]…would involve high speed trains operating on existing tracks for a short distance, currently used by the Overground services and freight trains. This would mean high speed trains slowing down considerably on the approaches to, and as they pass through, this section. This would affect journey times of services from, say, Birmingham to Paris and is highly like

> to have a negative effect on the introduction of through services from the UK regions to the Continent.
>
> This proposal would also impact on the reliability and performance of the London Overground, limiting existing services as well as the potential for future enhancements in capacity and frequency on this line. This line…is subject to major growth pressures in the future. The major bottleneck is the Camden Road junction. There are currently only two tracks through this busy section of railway which facilitates around 10 train paths per hour per direction in the off-peak (including freight).
>
> Analysis undertaken by TfL and Network Rail suggests that a maximum of 1 high speed train per hour per direction could use the link without the need for new infrastructure on the North London Line (NLL). This is severely at odds with the HS2 Ltd aspirations of running three trains per hour, per direction along the link. Even with 1 train per hour passing along the NLL, there would most likely be considerable performance issues on both the NLL and HS2 services.
>
> The Mayor believes very strongly that if a link between HS2 and HS1 is necessary then this should be delivered in a way that does not impact on current Overground operations or prevent future enhancements on this line taking place. The current proposal to utilise existing infrastructure does not achieve this and further work is required to examine options for a HS2/HS1 connection that avoid introducing this conflict. Potential solutions to this problem include additional bridge spans and tracks for North London line Overground services over Kentish Town Road or even avoiding this line altogether. The current proposals are opposed by the Mayor."

535. The DNS said at paragraph 4.41:

> "Enhancing the integration of Britain's transport infrastructure is a vital objective. Integration increases the efficient movement of goods and people, directly supporting economic growth. On this basis, the economic and wider strategic benefits of seamless connectivity between HS2 and HS1 line to the Channel Tunnel are potentially very important. The Government believes that a

> direct link between these two nationally-significant pieces of infrastructure is an important objective, and intends to implement the link in phase 2 of the project. This will enable trains to run directly between HS2 and HS1, without the need for passengers to change trains. There are clear strategic advantages from ensuring that a new national high speed rail network in Britain is integrated with the only existing high speed line in this country, particularly given that HS1 would then directly connect HS2 with Europe's growing high speed rail network."

536. The strategic advantages were elaborated: business supported the growth potential from a direct link into HS1 from the North and Midlands; many European countries had plans to extend their high speed networks, and rail was becoming more important across Europe making a "strong strategic case" for the connection. It offered other "connectivity benefits": future HS2 services could stop at the stations served by HS1.

537. Paragraph 4.46 continued:

> "Some consultation responses questioned whether the speed and capacity of the proposed link were sufficient, and whether it would impact on existing services using the North London Line, HS2 Ltd has reviewed these issues following the consultation (see *Review of HS2 London to West Midlands Route Selection and Speed)*. On the basis of this analysis, the Government remains content that the link provides sufficient capacity to meet likely demand for the foreseeable future. And, whilst initial work by HS2 Ltd suggested that existing services on the North London Line would not be impeded, the Government has commissioned HS2 Ltd to continue discussions with Network Rail and Transport for London to further test this position.
>
> As with other elements of the HS2 network, as the project progresses, the Government will also explore opportunities for third party funding contributions for this link."

538. Paragraph 4.48 described the HS2-HS1 link as "an important component of a high speed rail strategy for Britain."

539. The Review Document referred to in paragraph 4.46 contains nothing of relevance which I could see or to which my attention was drawn. HS2L's "Economic Case for HS2: Updated Appraisal" of January 2012 said that the economic case remained positive as it had been in February 2011, paragraph 6.1.5, before other wider benefits were allowed for.

540. The DfT's "Review of the Government's Strategy for a National High Speed Rail Network", also published in January 2012, dealt with the link at section 7.4. While noting that consultation responses had cast doubt over the economic case for the direct link, because of the level of demand set against the cost of construction and operation, that was but one of five components in the overall business case for any project. There was a strong strategic case for the link which contributed to the robustness of the overall case; the omission of such a connection would risk sacrificing a wide range of opportunities. The CBI, and a large number of businesses, supported the link because it would help Britain to remain an attractive place for business. It would provide an attractive alternative to some short-haul air journeys.

541. Sufficient frequency of service would be required to make the service attractive; HS2L's work indicated a maximum of three trains per hour in each direction over the link. No decision had yet been reached on service specification but it would be used to ensure maximum possible advantage for passengers. So far as existing NLL services were concerned:

> "HS2 Ltd's assessment is that the HS1 line has sufficient unused line capacity to accommodate the envisaged three trains per hour in each direction that would run on to HS2, without the need to remove any existing services. In summary, these developments would only have the effect of increasing choice and the levels of service for passengers."

542. HS2L's January 2012 "Review of Possible Route Refinements to the Proposed HS2 London to West Midlands Route", paragraph 5.4, said that work between HS2L, TfL and Network Rail had identified a number of potential options which would ensure that the existing services on the NLL were not "impacted." This had been factored into the cost estimates. It would continue to develop these solutions and recommend one for incorporation into the Bill.

543. Ms Lieven submitted that the proposed link to HS1 would create major disadvantages for existing passengers on the London Overground network, and within the area of Camden Town. If needed to provide capacity, four tracks through Camden would cause huge disruption, yet once the decision was set there would be very little that residents and businesses could achieve in any future consultation. Ms Hayward's evidence for Camden LBC highlighted the problems which upgrading the NLL through Camden Town would create, with its densely populated streets close to each side of the line; the Engineering Report, part of the 2011 consultation, adverted to the number of bridge widenings and modifications, and track and platform changes which would be required.

544. The Government had wholly failed to address the business case for the HS1 link in its decision, or the implications of the very low levels of usage predicted, and so it was irrational for the SST to decide to proceed with the HS1 link, at a cost of £0.9bn. It was also irrational for the SST to decide to proceed with a Parliamentary Bill, with no opportunity for any independent scrutiny, without having determined how the problems for passengers and freight with using the existing NLL, highlighted by Camden Council and the Mayor, were to be addressed. Alternatively, the SST failed to take into account the uncontested evidence set out in the 51M response (and that of Camden and the Mayor of London) and in her own supporting documents. Mr Graham did not seek to contradict any of the points made by Mr Stokes. It was simply not enough to say that further work would be carried out to "test" the issue. The SST did not have the support of TfL for this approach.

545. Mr Mould responded that the SST had not published an individual business case for the link to HS1, nor did she have to. She was entitled to have regard to wider strategic objectives such as those discussed at paragraph 4.41 of the DNS and in the Review of Strategy. The criticisms made of the proposed link were expressly considered and rejected in the DNS, and the related documents. This conclusion was reached on the basis of the analysis referred to in the DNS and in Mr Graham's evidence. It was a conclusion that the SST was entitled to reach.

546. The decision to include a link to HS1 was a rational response to the range of transport planning, social and economic objectives considered by the SST in paragraphs 4.41 to 4.48 of the DNS. Paragraph 4.46 of the DNS reinforces the rationality of the SST's decision and reflects her consideration of consultation responses. The need to continue to appraise the likely performance of the proposed direct link in consultation with Network Rail and TfL, in the context of the detailed development of the project, was self-evident.

547. The SST was entitled to decide to promote the scheme at this stage and was correct to note that further work would be required as the scheme developed. The problem had been identified, and it needed to be resolved if the powers sought were to be obtained. If no solution was found through discussion with the other relevant bodies, the SST would have to think again. A good deal more work had to be done to make it an acceptable reality, said Mr Mould. Bucks CC Group's concern about "four tracking" and its impact was a matter for consideration, if necessary, as the project developed.

548. But it was not perverse to decide to seek powers at this stage, especially as it could not be left to Phase 2 without unacceptable disruption. Nor would there be any point in a remedy being granted by the Court which prevented the issue being examined by DfT and HS2L.

Ground 7(b) Conclusion on the HS1 link

549. I do not accept that material considerations have been ignored by the SST. The consultation responses were given conscientious consideration. The DNS and related decision documents did not have to go through the responses as if a decision letter following a Public Inquiry. The real question is whether the response to the problems is rational.

550. As with the underground capacity problem at Euston, the real question is whether the decision to promote the Bill including the HS1 link in Phase 1 is irrational and unlawful. There is nothing irrational in promoting the Bill on the basis of the overall case for the link, passenger levels and the absence of a "business case", notwithstanding. Those are all merits arguments about which reasonable people may differ.

551. The effect of operating the link on the existing passengers and freight services on the NLL is at issue: the SST concluded that there was sufficient capacity for HS2 trains on the link without impeding existing services; but further work would be undertaken. There is a difference of view between SST and TfL and the Claimants. This is not a case where the SST agrees that there is a problem to which a solution has to be found, but which has not been identified or resolved upon. Unlike the Euston underground capacity issue, there is a dispute about whether the problems raised by TfL and the Claimants would arise. It may be that further work will support what the Claimants say, that the works required for a sufficiently capacious link will be far greater and more damaging than at present accepted by the SST. It is not my task to resolve that. It is impossible for me to conclude that the Claimants have proved their case on capacity and impact on existing services.

552. I see nothing irrational in the present decision to proceed with the Bill, while doing further work. That work may make the position clearer by the time the Bill is presented to Parliament. The SST is content to make the case, for better or worse, to Parliament that all will be well enough to enact the Bill.

553. It will be for Parliament to decide whether there would be sufficient demand to make the link worthwhile, and whether constraints in the tunnel and on the NLL would make the link of so little value that it should be removed from the Bill. It would also be for Parliament to decide whether the promoters have made out the case that the disruption to existing services is acceptable or whether to refuse to enact the Bill because of the impacts or the need for far greater work than at present envisaged to the tunnel and NLL. I reject this aspect of the rationality ground of challenge.

Ground 7(c) The Heathrow spur

554. The DNS records the SST's decision that "Route options for a direct spur link to Heathrow Airport should be developed to form part of Phase 2 of the Y network". Like Phase 2, no route has been published for this spur. The Summary of Decisions explained:

> "Diverting the main HS2 line via or close to Heathrow would be costly and would disadvantage the vast majority of HS2 passengers. The Government therefore favours a direct spur link to the airport, which could radically improve its accessibility from the major cities of the Midlands and the North. The options for such a spur link will be considered by the Government as part of Phase 2.

555. The Report prepared by HS2L "High Speed Rail: London to the West Midlands and Beyond", in 2009 said at paragraph 3.3.10:

> "…the total market for accessing Heathrow from the West Midlands, North West, North and Scotland is currently around 3.7 million trips [per annum]. Our modelling suggests relatively little of this would shift to HS2, with the rail share increasing by less than 1 percentage point (about 2,000 passengers per day or just over one train load each way)."

> The estimated cost for the spur was £2.5-3.9 billion. A spur solution to access to Heathrow would cause the loss of one complete train path to London for every train terminating at Heathrow, making the spur an unattractive option, which was not considered further.

556. The Consultation Document proposed a direct link to Heathrow, with the aim of releasing short-haul capacity, to "transform" the accessibility of Heathrow from the Midlands and the North, and contributing to Heathrow as a multi-modal transport hub. The spur would be designed so that it could become a loop back on

to the main line in the future to enable through services via the airport to London. Whilst only Phase 1 operated, an interchange at Old Oak Common on to the Heathrow Express would be the best option. Demand for the direct link would have grown sufficiently by the implementation of Phase 2, but the spur junctions would sensibly be built as part of Phase 1. This was elaborated on and alternatives were canvassed in Chapter 3. There was no further analysis of demand, capacity and opportunity cost.

557. 51M analysed the case for a link to Heathrow in its consultation response. It noted at paragraph 130:

> "The Consultation Document does not give any information on the proposed pattern of services to Heathrow or HS1. It appears likely that no serious work has been done in connection with this – an extraordinary position in relation to a proposed investment of £3.4-4.8 billion between them. The Economic Case for HS2 does include a "service specifications for the Y network" but this does not show any trains to Heathrow or HS1."

558. 51M continued, paragraph 131:

> "A frequent, regular service would be essential in order to achieve the scale of modal shift discussed above. The minimum pattern is an hourly service from Birmingham, joining at Birmingham Interchange with trains from Manchester and Leeds on alternate hours, giving a two hourly frequency for each branch of the 'Y'. This pattern would give a total of 17,600 seats each way over a sixteen hour day, resulting in an unsustainably low average load factor of c.13% seats occupied. It is clear that an operation of this nature would not therefore contribute towards the cost of maintaining the infrastructure. There is no possibility of any return on capital for either the rolling stock used for Heathrow services or the investment in the spur itself."

559. 51M then set out a more detailed critique of the case for a link to Heathrow and concluded that the Government had provided no quantitative evidence to support its case. In summary:

> (a) Analysis of the potential market for direct services to Heathrow showed that these would make heavy losses, even ignoring infrastructure costs.
>
> (b) Operation of services to Heathrow would make the fragile reliability of HS2 significantly worse.
>
> (c) The link would have no benefit in terms of carbon emissions, as it would free up slots for more long haul flights, with higher emissions.
>
> (d) Operation of Heathrow services would have a major opportunity cost for the project as a result of reduced services to Euston.

560. In essence, the usage level for the link would be extremely low but it would add very significant complexity and risk to the operation of HS2 – especially as the case for HS2 was based on 18 trains per hour, a level not achieved on any high speed rail network anywhere in the world.

561. Ms Lieven also relied on a number of the SST's own documents. The "Economic Case for HS2: Updated appraisal of transport user benefits and wider economic benefits", January 2012, (which supported the DNS), at paragraph 3.2.5, calculated that 6,500 passengers a day, for two trains an hour each way, gave an average loading of 102 passengers a train, a load factor of 18%. She submitted that there did not appear to have been any consideration of the implications for the overall service in terms of reliability of a Heathrow link, nor any analysis of the business case for the link.

562. Recent disclosure from the Treasury Solicitor dated 23 March 2012 produced a document, said to be an HS2L internal briefing note to the Chief Executive of HS2L in November 2011, which included a section headed "The economic case for the Heathrow link". The conclusion of this note on overall value for money states:

> "The quantified benefits of a Heathrow link and station are relatively small compared to the costs. The level of demand is small compared to the core market of London and this creates a challenging trade-off in terms of the optimal use of capacity. It is unlikely that the quantified BCR within our modelling will exceed 1:1 and is likely to be substantially below this.
>
> However, there are unquantified benefits and strategic arguments. We are likely to slightly underestimate demand to Heathrow airport itself (as there could be an increase in total passengers at Heathrow – something we have not assumed), and it is clear that stakeholders place a very high value in being able to access Heathrow: arguing this can lead to significant regional economic benefits."

It noted that the quantified BCR was likely to be less than 0.3:1.

563. The SST did not suggest that 51M's analysis of the predicted passenger numbers was incorrect. Paragraph 428 of Mr Graham's third Witness Statement acknowledged that the number of travellers forecast to use the link is "relatively small, and the costs of building it are high", because of the tunnelling required. He outlined the "broader benefits" as already summarised in the Consultation Document, but Ms Lieven submitted that Mr Graham had not addressed the degree to which, if at all, these benefits would accrue from the interchange to Heathrow at Old Oak Common via Crossrail/Heathrow Express in any event.

564. Ms Lieven submitted that no rational Secretary of State could proceed with an infrastructure project costing upwards of £2 billion with inevitable widespread amenity damage including existing blight, without even grappling with what she described as the overwhelming evidence that the project was utterly misconceived. It was not rational to spend over £2 billion of public money on a rail service predicted on the Secretary of State's own material to have only 18% usage, and a BCR of 0.3:1, poor value for money on the SST's own guidelines.

565. Alternatively, the SST had failed to take into account the uncontested evidence set out in the 51M response and in her own supporting documents.

566. Mr Mould accepted that there was no incremental business case for the Heathrow spur – nor indeed was there an incremental business case for the link to HS1, or for each individual leg to Manchester and Leeds. The case advanced for the Heathrow link did not depend on quantified benefits or a favourable BCR when taken alone; it depended on wider benefits and strategic arguments. The Secretary of State was not irrational in promoting a scheme on that basis.

567. The claim that "the link would add very significant complexity and risk to the operation of the service" had been considered by the SST. The operation of an 18 trains per hour service had been the subject of detailed assessment by HS2L. The SST was entitled to conclude that the broad level of service set out in the DNS was capable of being delivered.

568. In light of the explanation given in the DNS, the SST's decision was a rational response to the range of transport planning, social and economic objectives considered by the SST in the DNS.

Ground 7(c) Conclusion on the Heathrow spur

569. The approach of HS2AA and the Bucks CC Group to this topic is of course rather different from HHL's. The former question the value of any link to Heathrow; the latter want what it regards as a much better one.

570. I do not accept that the SST has omitted material considerations in reaching the decision in the DNS. He simply does not agree on the need for a business case or normal BCR, nor on the degree of impact which the link would have on the operation of HS2 which earlier reports from his side of the fence have been concerned about. The SST is not bound into a decision-making framework by the sort of arguments which Ms Lieven deploys. He is entitled to take what he regards as a broader view and to promote a project which has a low BCR for other benefits as he sees them. There is clearly an issue over the degree of interference with the operation of HS2, which he has at present resolved by saying that the broad level of service is capable of being delivered on HS2. It is therefore to him a level of service which makes it worth promoting the Bill. There is nothing remotely irrational in the DNS or in the decision to promote the Bill on that basis.

571. Parliament may or may not be persuaded by the arguments of either side on the degree of interference with the rest of the operation of HS2, in the light of the concerns expressed on the promoter's side of the argument. It can also make its own mind up on the risk of interference that would be run for the low level benefits measured by BCR but set against its own view of the wider benefits. This ground is dismissed.

8 Heathrow Hub Limited's challenge

572. HHL's challenge had two limbs. The first concerned the impact of the decision in the DNS on the anticipated consultation process and decision making on the Government's aviation strategy. The second concerned the way in which its consultation response had been considered. I deal with the first one first.

Ground 8 (a) The DNS and aviation strategy

573. The DNS decision that the link between HS2 and Heathrow should be via spurs, built as part of Phase 2, off the high speed line on its alignment in the preferred corridor, also involved the rejection of a direct route for HS2 passing by Heathrow and linking to the Great Western Main Line, GWML. I have already set out the

summary of that Decision. What HHL have termed the Heathrow hub station is the location at which HS2, on the direct route alignment favoured by HHL, would link to Heathrow and the GWML. The first ground raised by HHL is that, in excluding such a route for HS2, in advance of the aviation strategy consultation, the SST unlawfully fettered her discretion, or pre-determined the outcome of that strategy or breached HHL's legitimate expectation of full consultation at the relevant stage on the aviation strategy.

574. The SST accepted that future high speed rail and the future of aviation in the UK were interlinked, and that "the strategic case for ensuring that Britain's high speed rail and aviation hub strategies are effectively integrated will remain strong"; Composite Defence paragraph 240 and DNS paragraph 4.26

575. Mr Warren QC for HHL put the legitimate expectation he said HHL enjoyed in relation to aviation strategy in a number of ways. HHL had a legitimate expectation that the future long-term aviation strategy "would be fairly developed having regard to the possibility of high speed rail directly connected to Heathrow". HHL had a legitimate expectation that "genuine consultation … on [all the options for maintaining the UK's aviation hub status except a third runway at Heathrow] would take place in due course". I interpolate the words necessary to understand the formulation used at paragraph 41 of Mr Warren's skeleton argument. Later he put it as a legitimate expectation of genuine consultation "on the breadth of future aviation strategy".

576. The only document which he relied on as the source for any of these expectations was the DNS itself. Mr Warren referred me to many passages in it, in which the Government dealt with aviation strategy. I take as a good example paragraph 4.39, but 4.40 is also directly relevant to the legal argument:

> "4.39 In addition, as the *National Infrastructure Plan* recognised, there is a clear case for maintaining the UK's international aviation hub status. The Government will develop a long-term aviation strategy which will set out how we intend to address the UK's airport capacity challenges, while ensuring aviation plays its part in delivering environmental goals and protecting the quality of life of local communities. The Government will publish a

> consultation on this strategy in spring 2012. This will explore all the options for maintaining the UK's aviation hub status, with the exception of a third runway at Heathrow. There will remain a strong strategic case for ensuring that Britain's high speed rail and aviation hub strategies are effectively integrated. The Government will, therefore, continue to review how HS2 can best support its plans for maintaining the UK's hub status. An important element of this will be the scope for third party funding contributions to the costs of linking HS2 to the country's hub airports.
>
> 4.40 The Government has asked HS2 Ltd to develop detailed route options for a spur from the main HS2 line to serve Heathrow Airport. As outlined in Part III of this document, it is expected that plans for the spur will then be subject to public consultation. Depending on the conclusions of that consultation, the spur would be included in the hybrid Bill proposed for the second phase of the Y network."

577. Mr Warren described paragraph 4.39 and a number of others as clear and unequivocal statements, which justified the claimed legitimate expectations. It is clear that the DNS excluded the development of a direct high speed rail link via a Heathrow hub station, which HHL regarded as one of the most important options for maintaining the UK's aviation hub status in general and that of Heathrow in particular. Thus, the legitimate expectations were breached, since that option could not be put forward during consultation on the aviation strategy.

578. The legitimate expectation argument is untenable. The DNS, upon which Mr Warren is wholly dependant, has to be read as a whole in order to see whether any claimed expectation arose. The DNS decided on a route for HS2 which prevented such a direct through route for HS2 at Heathrow, or Heathrow hub as promoted by HHL, and provided instead for spurs. It is impossible to read the DNS as containing a promise of consultation on future aviation strategy which kept open the option of a direct through HS2 line at Heathrow for the purposes. The aviation strategy consultation, when it comes, is clearly going to take place against the backdrop of the rejection of that option in the DNS. The legitimate expectation of consultation on aviation strategy is of consultation with no direct through route at Heathrow for HS2. The expectation asserted is no more than a complete misunderstanding of the DNS; the legitimate expectation claimed was breached in the very document which was said to create it.

579. The contention that the DNS fetters the discretion of the SST at the stage of the aviation consultation to adopt a Heathrow hub strategy with a through route for HS2 or pre-determines the issue is equally misconceived. True it is that such a rail line could not be the subject of discussion in the aviation strategy consultation, since the decision that it should not be provided would already have been taken. But that is not an unlawful fettering of discretion or pre-determination. It is simply taking a decision on rail strategy, even though it closes off a possible rail option which has some bearing on the arguments about future aviation strategy for Heathrow. The Government is entitled to make a decision on rail strategy at this stage, even though, as it is well aware, that decision will not be open for debate later, subject to any Parliamentary decision on the Bill.

580. I cannot see the basis upon which that gives rise to any unlawful fettering of discretion, and no legal analysis was provided to show how it could be. This is not a case in which decision A prevents the lawful consideration of the exercise of statutory powers in relation to decision B; *British Oxygen Ltd v Board of Trade* [1971] AC 610, read fully, cannot support Mr Warren; the passage at 625E was rather taken out of context. One may debate the merits of waiting or not, as Mr Warren's arguments tried to do, but that is not a legal issue. It cannot possibly be said that the only lawful way for the Government to proceed in its decisions on the HS2 route between London and Birmingham is to wait until the aviation strategy has been consulted on and resolved. I suspect that had the HHL proposal been adopted in the DNS, it would have resisted any suggestion that, since the through link was an unnecessarily expensive and damaging way of providing a link which could equally as well have been provided by spurs, HS2 should be delayed until the decisions on aviation strategy had been taken.

581. Mr Warren's argument was not improved either by reference to Decision 661/2010 adopted pursuant to Article 172 of the Treaty on the Functioning of the European Union. The Decision relates to guidelines for trans-European transport networks. Article 5 of the Decision requires the integration of rail and air transport, and rail access to airports to be a priority. Mr Warren submitted that the DNS jeopardised the attainment of this EU policy objective, and the fettering of the decision struck against "a core principle of EU law". There was no elaboration of that striking assertion. It is obvious that the integration of rail and air was an important consideration in the DNS; the concern was about the best way to do so when all factors were considered, including cost and level of usage of direct trains, the delay to the passengers who would not alight at Heathrow, and the journey from the station to the airport. The decision could not be regarded as irrational. I was referred, primarily in the context of the consultation ground to *R*

(Medway Council and Others) v SST [2002] EWHC 2516 (Admin) and *R (Hillingdon LBC) v SST* [2010] EWHC 626 (Admin). Those are very different cases from the one which Mr Warren sought to make in this ground. This ground is untenable.

Ground 8(b) The consideration given to HHL's consultation response

582. HHL's other main ground relates to the consultation process. In short, HHL argues that the consultation process carried out by the Secretary of State was unlawful in three respects: parts of HHL's consultation response were not taken into account by the SST, and the consultation was not undertaken at a time when there was still an opportunity to influence the decision. Third, the consultation was based on flawed information.

The failure to consider the full HHL consultation response

583. First, and what seems to me by far the most important aspect of this ground is that the SST had failed to take into account the full consultation response of HHL, among others, as was accepted in a letter dated 20 July 2012. The parts ignored were material, submitted Mr Warren, and potentially significant for the decision on the link to Heathrow.

584. He argued that for this reason alone, the DNS ought to be quashed and the decision reviewed with proper access to the relevant documents. Government policy on consultation, the Aarhus Convention and domestic authorities were prayed in aid. This was a formal consultation. There was no suggestion that HHL need not participate since its case was well known; instead, the question of connections between HS2 and Heathrow was a topic of consultation, which must have been approached with a mind prepared to consider the merits of the consultation responses. Indeed in its letter of 15 December 2011, of which more later, the DfT promised that any information on the HHL proposal provided in the consultation exercise would be given "due consideration".

585. HHL would not have locus before the Select Committee on the Bill, so this consultation process was its last chance to influence the process. The hub option would be closed off by the Phase 1 decision. Nor, save if its first ground succeeded, which I have decided it does not, would there be any further opportunity during the consultation on aviation strategy.

586. I accept that on the face of it, the omission to consider an important response on an important topic would provide a strong case that the consultation was unlawful in that respect, and the unlawfulness should be remedied. The purpose of the consultation would also be defeated if the DfT approached the responses with a closed mind; the process would be unlawful.

587. The SST responds that the proposal was well known to the Department, which raises a question of how far the Minister who took the decision was aware of it, or was dependant on incomplete briefings by officials. The full response from HHL was not a detailed or technical one but short and full of unproven assertions with which the DfT disagreed. Many other consultees had raised the through route which was essentially the HHL point. Dialogue by Design (DbD), which collated, analysed and reported on the consultation responses, had examined the omitted pages and had concluded that it would not have affected the content or balance of its Consultation Summary Report.

The facts

588. HHL's concept of a Heathrow hub was for an interchange between the HS2 line, GWML and Crossrail, as well as coach services, on a greenfield site at or near the existing Iver Station. It would be constructed in Phase 1, and would necessarily involve a different alignment for part of HS2 both near Heathrow and further north, curving south west of the consultation route. HHL envisaged that this interchange would also be able to carry out the passenger processing functions of a terminal, so that the onward journey (some 3 miles) to the on-airport terminals would be made "airside" and via fixed infrastructure in some form of people mover.

589. Not all of the various concepts of an HS2 line "through" Heathrow or for a hub, which others may have promoted, have been precisely the same as HHL's. HHL and its former parent company Arup's have long seen the potential for some form of hub at Iver to connect Heathrow with HS2, and have engaged with DfT officials, HS2L and others for some years in promoting it. HHL's proposal, however, is for an altogether more ambitious interchange than Arup's.

590. The potential for an interchange station between HS2, Crossrail and the GWML also providing access to Heathrow, a spur, and routeing a new line via Heathrow were among the options which DfT asked HS2L to consider in January 2009. HHL provided detailed information to HS2L. HS2L's December 2009 Report, referred to above, assessed the merits of the various options, including the potential for an HS2 interchange at Iver on the GWML, giving access to Heathrow, as Arup had proposed. It thought that the high speed market to Heathrow was likely to be small, which meant that the greater number of passengers would not be Heathrow bound, and would suffer delay if they were on trains which were routed via and stopped at Heathrow. The December 2009 report concluded that the most promising options for serving Heathrow by high speed rail were an interchange at Old Oak Common via Crossrail and the Heathrow Express, or a station at or near Heathrow on a loop from HS2, connecting to the airport and GWML.

591. Arup met with the then SST on three occasions between December 2009 and March 2010. The March 2010 Command Paper, responding to the HS2L report, concluded that, although there could be a case in the future for a direct high speed link to Heathrow, the link should be provided initially via an interchange at Old Oak Common. Lord Mawhinney was commissioned to provide an analysis of the longer-term case for a direct link.

592. Before he reported, HS2L was commissioned in June 2010 to develop route options for Heathrow including a through route of the sort proposed by HHL, (but not of the same total character as an interchange terminal). The Mawhinney report supported the initial high speed connection being via an interchange at Old Oak Common. It did not recommend a through route for HS2 at or near to Heathrow, but an underground link to Heathrow's Central Terminal Area, CTA, from the Old Oak Common interchange.

593. The HS2L report of September 2010, Chapter 1, supplementary to its December 2009 report, examined in some detail the range of options, including a through-route via a station at Iver on the GWML, much the same in terms of location as proposed by HHL, or at Terminal 5 or close to the Northern Perimeter Road. The CTA link proposed by Lord Mawhinney was rejected as too costly. The onward routes were examined. It concluded that spur options were, with the connection at Iver, the cheaper of what were all expensive options. The connection at Iver would also require further expenditure to provide a transport connection for the passengers from the station to the airport terminals. The spur was considered to be the best option economically, with the least interference to non-airport HS2 passengers.

594. On 20 December 2010, the SST announced in Parliament that the strategy to be put forward for consultation was the spur, to be constructed as part of Phase 2, with an interchange at Old Oak Common to the Heathrow Express and Crossrail till then. (The renewal of the former's track access rights would be required, I was told, for an interchange to include it). The SST mentioned but did not support what he referred to as "Arup's proposals for a transport hub near Iver."

595. The February 2011 Consultation Document accordingly included the spur proposal, but without its route details, since they had not been developed. The costs were included in the "Economic Case for HS2" published also in February 2011.

596. HHL submitted a 9 page response. It was not fully considered by DbD. What appears to have happened is that there was an unannounced word limit on the online consultation form in relation to each answer. Only the truncated response was considered by DbD. The more detailed answers to consultation Question 3, the relevant one for these purposes and which carried the weight of the argument in relation to the hub over some 4 pages, were not considered by DbD. Nor was the full response considered by DfT officials. The general objection to the proposed links to Heathrow were clear enough but all the points of detail by way of opposition to it and expressing the advantages of the proposals of HHL were omitted. Whatever the cause, there is no doubt but that this omission occurred, and it was not HHL's fault. I add at this stage that it is clear that the fault lay on the SST/HS2L's side of the fence, though there was no break in mid-sentence in HHL's response as considered to alert the reader.

597. Between November 2011 and January 2012, HHL had further communications with the SST and officials by letter and at a meeting with Mr Goading, Director General at the DfT, to explain with slides the advantages of HHL's proposals over those of HS2L.

598. The DfT letter of 15 December 2011 said that the SST, DfT and HS2L were "aware of the proposals advanced by HHL", as Mr Graham's fourth Witness Statement confirmed. HHL also made written and oral submissions to the Transport Select Committee (TSC) Inquiry into the Strategic Case for High Speed Rail. HS2L responded to HHL at the TSC's invitation. It contrasted its interchange with HHL's wider proposal and terminal facility. Its main reasons for not adopting HHL's proposals were: the significant time (7 minute) penalty for non-airport bound passengers, who would be in the great majority; for airline passengers, an on-airport location or one closer to the airport than Iver would be more attractive; the Old Oak Common interchange would be more attractive for passengers going to destinations in London, who would not transfer to Crossrail at Heathrow.

599. BAA and a number of airlines also supported the through route in the consultation process, as now did the Opposition. BAA supported a link to T5 or in the CTA.

600. The DNS decision was to provide an interchange at Old Oak Common initially, and then a spur link as part of Phase 2. It said in paragraph 69 of the Summary:

> "One alternative which achieved particular prominence was an option for a direct route via Heathrow and the M40 corridor. The Government does not consider that this would offer a better solution than the route put forward for consultation. It would be impossible to locate a station close to one of Heathrow's main terminals, with the key potential station locations being either adjacent to the airport's Northern Perimeter Road, or some three miles further north, adjacent to the Great Western Main Line at Iver. Either of these possible locations would be some

> distance from Heathrow terminals and would entail new transit facilities to the terminal areas, providing a journey experience little better than an interchange. In addition, a direct route via Heathrow would entail increased construction costs and substantial journey time penalties for the great majority of HS2 passengers travelling to and from central London. For these reasons the Government does not support a route of this kind."

601. This was elaborated on in Chapters 4 and 5. It is clear that the DNS saw the link to HS2, whether by a through route or interchange and spurs, as helping to establish Heathrow as a multi-modal hub, and achieving a direct link between the two. At 4.31-3, the DNS referred to the consultation responses which raised the question of a through route, and said:

> "The case for running the main HS2 line via Heathrow was raised in consultation responses. HS2 Ltd has carefully looked at the case for serving Heathrow in this way. This is discussed in more detail in Chapter 5. The outcome of this further consideration, coupled with the evidence presented in consultation responses, has not altered the Government's conclusions. Whilst a through-route may bring benefits to the relatively small proportion of passengers who would use HS2 to access Heathrow, these would come at the loss of much larger benefits to the majority of passengers travelling into central London. HS2's projected passenger mix shows that many more people would be using the service to access London than Heathrow.
>
> HS2 Ltd's analysis has also indicated that it is possible under the spur option to locate an HS2 station directly at one of Heathrow's main terminals, which would not be the case if the main route was diverted to serve the airport more closely. In addition, the extra costs associated with routing the main HS2 line close to Heathrow could be higher than the costs of a spur to the airport from the main line. For these reasons, the Government favours a spur rather than a through route as the best option for providing direct high speed access to Heathrow.
>
> A spur of this kind could, however, be designed to be capable of extension in the future into a loop back onto the main HS2 line."

602. The terminal referred to as the Heathrow spur station location is Terminal 5, regarded by the SST as the only feasible terminal; the Mawhinney report CTA station proposal was rejected on the grounds of cost and technical difficulty.

603. The January 2012 "Review of the Government's Strategy for a High Speed Rail Network" dealt further with HS2 connections to Heathrow in paragraphs 7.3.33-7.3.42, in the light of other consultation responses, such as those from BAA and British Airways, favouring a through-route to Heathrow. This elaborated the disadvantages to the operation of HS2 of stopping trains for a Heathrow through route interchange and the relatively small number of passengers who would be advantaged.

604. There is further analysis in section 3.4 of the "Review of HS2 London to West Midlands Route Selection and Speed", also published in January 2012. In paragraph 3.4.7 it said:

> "We believe, therefore, that a through route would only be practicable with a station remote from the main terminal areas. We had previously examined two options, one adjacent to the Northern Perimeter Road of the airport and one near Iver, some three miles further north adjacent to the Great Western Main Line (GWML). Neither could easily be integrated with passenger facilities and other public transport connectivity of Heathrow Airport. Passengers would need to be conveyed by a new system of people movers or bus-ways. Such an option would not match the passenger benefit of an on-airport station, integrated with airline passenger facilities.
>
> We are confident therefore that in respect of serving the airport, the option for a spur to Heathrow from the consultation route to the airport itself performs better than a through route stopping close by the airport. Since it allows services to travel directly to a passenger terminal at Heathrow, it gives the opportunity of services in codeshare form with integrated luggage and ticketing. A spur route also allows dedicated airport services, which could be more suitable for such arrangements. A spur could take passengers to a station fully integrated into the passenger

> facilities of the future Heathrow itself making a more attractive proposition for interlining passengers."

605. This Review also dealt with the impact on non-airport passengers (4 minute penalty for trains not stopping and 8 for trains stopping at the interchange) and the effect on capacity of operating a high frequency, selectively stopping, high speed railway, at 3 minute intervals; one complete train service would be lost for each stopping service, unless all trains stopped. The interchange with Crossrail at Iver would not provide as effective a means of passenger dispersal in London as it would at Old Oak Common.

606. In July 2012, after the omissions came to light, DbD produced a matrix analysis of the topics raised in the omitted responses. That conveys nothing of the substance of the points raised. A short paragraph deals with the spur. HHL's point is expressed as being that connecting Heathrow should have been part of the initial route selection, leading to a more integrated solution. DbD also referred to the previously unconsidered response by the London (Heathrow) Airport Consultative Committee (LHACC) which is said to have expressed similar views, it appears, to those of HHL as summarised. The through route would maximise economic benefits and model shift from air; the link should be part of Phase 1, integrated rail/air ticketing was a possibility.

607. On 17 July 2012 the then SST made a written statement to the House of Commons (139-140 WS) about the omitted responses. She said "Inclusion in the original analysis [by DbD] would not have… affected the considerations which informed me in taking my decisions following the consultation." This statement covered all the omitted responses without any elaboration.

608. HHL's solicitors made inquiries on 25 July 2012 of the Treasury Solicitor, after the failures in relation to the consultation responses came to light, as to what material the SST had in front of her when the decisions were taken. The SST had not been at any of the meetings. The substance of the DfT response on the DNS had not been put to HHL at the meetings or in letters.

609. The reply on 26 September 2012 was that the principal sources of information she had were the draft decision documents and "a limited number of submissions from officials". It went further: the DNS and supporting decision documents were a "detailed account of her decisions and her reasoning in the light of [the] advice [from DfT and HS2L officials]".

610. However, that letter also disclosed the submission made to the SST by officials in July 2012 on the consultation responses omitted from the DbD analysis. The submission said that both HHL and LHACC made the case "for diverting the main HS2 route to run via or close to Heathrow Airport in preference to the spur to Heathrow proposed in consultation." It then summarised her reasons for choosing the spur: only the spur would allow in practice for an interchange station to be sited at one of the terminals, (T5); the benefits of re-routeing the main line would be outweighed by the disadvantages to non-airport bound passengers; the additional costs would be less once the cost of transit from interchange to the terminals was taken into account, any environmental benefits would be small and insufficient to outweigh the advantages of the spur.

611. It then commented "Neither the Heathrow Hub nor the LHACC submission provide any robust challenge to these arguments". HHL had provided no evidence that the 3 minute journey time penalty would be outweighed by wider benefits, and HS2L's analysis suggested a greater time penalty. HHL disagreed with HS2L that the spur would be cheaper overall, but assumed private sector funding and ignored the cost of "connectivity" to the airport. HS2L disagreed with HHL's suggestion that the Old Oak Common interchange would be omitted, because of the much greater role which that interchange would play in the dispersal of passengers in London without using Euston Station. The "Review of the Government's Strategy" had dealt with the question of the adequacy of the information, especially environmental information about the spur.

612. Two LHACC points reflect in part concerns of HHL as well: broader range of users from the surrounding areas with a through route and damage to Heathrow in international competition without it; but its first point still showed that airport users would be the minority of HS2 users, and there was no evidence to support its claim that the absence of a direct link in Phase 1 would be damaging to Heathrow's international competitive position.

613. The DfT remains unwilling to disclose what documents, other than the draft DNS and other decision documents, including DNS Part II "*Review of Evidence from Consultation Responses"*, the SST actually had in front of her. A lengthy request by letter dated 5 October 2012 under the Freedom of Information Act had led to a refusal on public interest grounds of disclosure of the array of official documents sought.

The effect of the omissions

614. The argument that the DfT was aware in fact of the points from other meetings and sources, and that other consultees had effectively made the important points anyway does require the missing parts to be considered. I have also set out at the same time the response by Mr Mould to the points, and Mr Warren's reply.

615. The consultation response plainly assumed that the reader knew in July 2011 what HHL's proposal was, since the response does not describe it in any detail; indeed it expressly states that the details have been provided to Government and DfT. Half of it comments on the disadvantages of the spur proposal, and half puts forward the case of HHL's proposal. The final comment which the DfT /DbD would have seen was that HHL contended that the consultation proposals for connection to Heathrow were incoherent and would fail to stand up to scrutiny. What was missing was the reasoning behind that claim.

616. The points made against the spur were:

(a) HS2L's analysis did not consider interchange penalties faced by airline passengers with luggage and level changes, before the spur was provided; there would be level changes and a considerable walk at Old Oak Common (on which Mr Warren's submissions focused this point); **SST**: January 2012 Strategy Review 7.3.40: the Old Oak Common interchange change would be a simple cross platform change with a journey time of 11 minutes to the CTA;

(b) the absence of access from the west and the risk that Heathrow Express' access rights would not be renewed leaving the interchange dependant on Crossrail; **SST**: Strategy Review 7.3.22: other work between Network Rail and BAA was looking to provide a link from GWML to Heathrow, now supported by Government, for the benefit of air passengers from the West and for other passengers from the West using the Phase 2 interchange to use HS2 to the Midlands and North; Old Oak Common would also provide an interchange to the GWML; some of this point was in the part of the response considered by the DfT;

(c) the uncertain assumption that the political will and funding for the spur would continue through to Phase 2; **SST**: this is not accepted and it will be in Phase 2, but it was possible that Phase 2 would not happen;

(d) the spur would require a major interchange station at Heathrow *and* at Old Oak Common; **SST** did not appear to dispute this;

(e) it was unclear whether the spur would provide access only to and from the north or to London/HS1 as well; the former would be very disadvantageous to airlines (in so far as the latter has now been announced by the SST with the junction locations, it showed that the DfT had provided insufficient information about it for an informed consultation response); **SST**: it was always "anticipated" that there would be two junctions, the locations of which have now been announced;

(f) the spur would require two dedicated trains per hour to be attractive, which would provide much more seating capacity than required, making the business case unsound; **SST**: Strategy Review 7.3.4: the spur was not based on the economic case alone but on wider strategic objectives, such as enhancing the "connectivity" of Heathrow and providing an attractive alternative to short haul aviation, and promoting economic activity in the Midlands and North;

(g) the impact on HS2 services of the reduced speed spur trains joining and leaving the main line could not be determined and had not been analysed by HS2L; **SST**: provided no direct answer to this save a general reference to the "detailed consideration of all Heathrow options" in the September 2010 supplementary report, which at 1.2.1-2 appears to confirm that the spur would have an effect on the operating capacity of HS2;

(h) there was no detail or route for the spur and junctions, so neither its costs or environmental impact could have been properly considered, (the effect on the Colne Valley was raised in particular); **SST**: there was a dispute about the costs which SST said had been properly considered, and the environmental impact could not be assessed in detail at this stage because the detail of the spur route and junctions had not been decided;

(i) the proposal was contrary to EC inter-modal transport policy since there was no consideration of a wider airport masterplan and connectivity with classic rail services; **SST**: the various decision documents demonstrate that the strategic connections to Heathrow for inter-modal purposes were an important part of the case for the link; modal shift to rail was considered throughout the DNS and in the Strategy Review;

(j) delaying consultation on the spur connection between HS2 and Heathrow could mean that the decision was made before the details had been considered, which could have led to a different decision; **SST**: there was no direct response;

(k) the possible further loop was an inefficient way of developing the spur, and European experience showed that a through line connection was better**; SST:** the loop was not proposed, but its potential provision was to be protected; there was no technical work to support the assertion about European experience and its relevance.

617. The points made in favour of HHL's proposals were:

(a) BAA and Heathrow airlines favoured an interchange at or near Heathrow on the HS2 through line albeit BAA did not want that to be at Iver; **SST:** this was known already;

(b) it would be available at Phase 1, co-located with a terminal, and would allow a "one-seat" ride from a large catchment, generating considerable demand and modal shift, improving the business case for HS2; **SST**: the DNS explained that the spur was not provided in Phase 1 because of the low level of use anticipated until the Y network was built; modal shift was a regular theme of the decision documents;

(c) there would be a single interchange between HS2, GWML/Crossrail and the motorway network, and would be early benefits to the West and Wales;

(d) the cost would be less on a greenfield site than at Old Oak Common, with fewer impacts on the local community;

(e) the cost of the direct route was likely to be no greater than the cost of the spur and the HS2 consultation route and could be much less;

(f) the environmental costs of the through route near Heathrow were likely to be lower than the spur and junction, and on the revised alignment it would require through the Chilterns;

(g) the 3 minute time penalty was likely to be offset by greater wider benefits**.** SST: the benefits to Heathrow passengers and disadvantages to the others had been weighed, and a decision reached.

618. Mr Warren made the point that the thrust of HHL's contentions in the consultation response should not be obscured by picking off some of the detail, and picked up this theme in reply. I have set out the points made in the consultation response, as did Mr Warren. Some of his points in submission seemed to me to go beyond HHL's consultation response, which is not relevant for this case and were grouped to create a thrust to the case which did not come over so clearly in the omitted part of the response.

619. However, Mr Warren said, for example, to illustrate the themes of the consultation response that HHL's case was not answered by the DfT's acceptance that a connection between HS2 and Heathrow was of strategic benefit, and so there were benefits from a spur. HHL's case was that there should have been a proper comparison between the costs and benefits of each. Provision of the connection at Phase 1 was important. The decision on the spur or through route would be made at Phase 1. The whole analysis by the SST had been of the benefits and costs to HS2, rather than to the aviation role of Heathrow as the national airport hub as well.

620. Points (f) and (g) above against the spur were not answered by the SST, since the weaknesses in the economic case, the broader benefits relied on and the apparently admitted capacity impact of the spur should have been part of a comparative assessment of the through route and hub, not driven by BCR.

621. Point (h) above against the spur and point (f) in favour of the hub related to the impact of the spur which could not be assessed, but which would be the only direct connection option left with Phase 1 as proposed; there was insufficient information about the spur and the potential link from HS2 to Terminal 5 for an informed response or for a proper environmental and cost comparison to be drawn between the hub and spur. There was no answer to this, yet consideration of HHL's response might have led the SST to consider the issue further. The timing of the development of material relevant to the spur and Phase 2 shows that there was no reason not to delay the consultation so as to include the relevant material.

622. Mr Miller's response in his Witness Statement was troubling since it referred to work in 2009 and 2010 on a spur, loop and through route. This had considered a spur from Iver. But this work did not consider the HHL proposal.

623. Mr Mould emphasised the essence of the proposals as an interchange at Iver on the GWML on a through route for HS2. The problems with that, as set out in a number of documents published in January 2012, including the "Review of Strategy" and the "Review of Route Selection and Speed" had led to the rejection of the very basis of the proposal. Mr Warren made a number of very detailed criticisms of these documents which did not bear on the issues before me, at least so far as I could tell, and I have not referred to them.

624. I also note the extensive argument proffered, over many pages, by Mr Costello in his first Witness Statement and which I was asked to consider. I have. They do not advance the case since they go somewhat beyond the consultation response, debating the response by Mr Graham, whereas it is not for me to resolve the merits nor to assume that HHL would have had a second bite at the consultation cherry if its first response had been fully considered. It would be wrong to suppose that conscientious consideration of consultation responses on what the proposal should be, required a fully reasoned decision letter as if one following a Public Inquiry into the substantive decision.

625. Mr Warren submitted that there was no sound evidence that representations and knowledge gained from meetings with HHL and material provided over time were fully conveyed to the SST when she made the DNS decisions, or that the substance of the matters in its consultation response to Question 3 would therefore

have been before her, even at some earlier stage. The SST was not the same person throughout. The summary of HHL's omitted consultation response by DbD in July 2012 could afford no basis for supposing that the substance of the points had been properly appreciated. There was no evidence that the substance of HHL's particular points had been made by other consultees whose response had been considered.

626. Mr Mould accepted that the full response of HHL had not been analysed and considered in the same manner as most other consultation responses. However, he submitted that that this did not render the process so unfair as to be unlawful. The SST did consider HHL's primary contention – a through-route via Heathrow – as the DNS showed, for the reasons it gave. Other documents also deal with her consideration of the essential issue. The proposals had been carefully considered over a number of years; the issues raised had already been canvassed with the Secretary of State through the Transport Select Committee at a similar time in the decision-making process. The substantive points made in support of a through route serving Heathrow were taken into account by the Secretary of State. So HHL's proposal had been the subject of proper consideration by her before, during and after the consultation process; it had had the opportunity in that way to make its case.

627. The first part of each answer within the response was analysed. The points not considered were rather points of fine detail on a case in which there was a substantial policy or judgment element behind the conclusion that the spur should be provided and at Phase 2. There was no substantial prejudice to HHL, and the consultation process as a whole was not unfair.

Conclusion on the omitted responses

628. I have given this detailed consideration but the nature of the submissions has required it. I start from the premise, set out at the start of this issue, that the SST failed to consider the important parts of the consultation response of a major consultee on an important aspect of the consultation. On the face of it that is not merely unfair, but sufficient to render at least part of the consultation unlawful. But if the points which were made in the response have in fact been considered,

there is no unfairness or unlawfulness. It is upon that issue that the SST defends and is entitled to defend the decision.

629. The statement by the SST to Parliament on 17 July 2012 was general, in that it applied without differentiation to all the omitted responses; it was quite bald of reasoning; it referred to the effect of the omission of the responses from the DbD analysis, which begs the question of how that form of analysis would have captured the points made in HHL's response. Given the significance of the omission, and the need for the SST to show that the consultation was fair notwithstanding that omission, the SST's statement would not have persuaded me by itself that the consultation was in reality fair. Hence an examination of what was considered is required.

630. However, I have come to the firm conclusion that there was no point of significance omitted from consideration, which might have led to a different decision on the spur/hub issue. I accept that the submission to the SST contains the advice given by officials, and that the reasoning of the SST on the hub issue is set out in the DNS and the documents issued with it. The essence of the points HHL wished to make were in fact known to officials and adequately considered by the SST.

631. Before, turning to the detail, I make three observations. First, the consultation response was not a document which the SST was invited to consider on its own. It was set in the context of the knowledge which officials had acquired of HHL's proposals, its advantages and disadvantages, over some long time of discussion and consideration. This was not a free-standing response, but assumed knowledge of the proposal and what the respondent was talking about. As I have said, it did not describe the proposal in any detail.

632. One cannot exclude either the post-consultation meetings which HHL had with officials, seeking to put across its point, before the DNS and other decision documents were produced. The same applies to the debates which were carried on through the medium of or in responses to the Transport Select Committee. These were just as much endeavours to persuade officials as was the consultation response, which it cannot have supposed the SST would read personally, along with all the other consultation responses, and in its entirety. The very process of

consultation and presentation in the formal and outside the formal consultation process was predicated on the ability of officials to convey the essence of the points to Ministers and advise on them. Accordingly, in seeing what was considered and not considered as a point in the consultation response, what officials knew from other sources is very relevant.

633. Mr Warren sought to emphasise that not all proponents of a through route and hub had put forward the terminal which particularly marked out HHL's proposal. But some of the most important arguments for and against it were common to all such proposals. Among drawbacks were the delays to HS2 passengers who were not bound for the airport caused by the stops at Iver, or the loss of capacity from a selectively stopping service, the low proportion of HS2 passengers who would benefit, and the need to travel 3 miles from Iver Station, terminal or not, to the airport. Among asserted advantages were the potentially greater modal shift to rail, greater interchange potential for Heathrow and support for Heathrow's role, and improving rail access from the west and Wales.

634. Second, although it is not determinative to characterise a consultation response as having or lacking particular qualities, the points made are not of themselves supported by technical arguments, or detailed evidence; many are quite general. Mr Warren did not identify any points which had not previously been placed before officials by HHL, and by their nature it would have been surprising if any were essentially new.

635. Third, the DNS and other documents made it clear that the reasons why a hub was not taken forward are quite general judgments, which the consultation response was able to dispute, but of their nature not to refute. These were the transit cost and time from the interchange whether at Iver or the Northern Perimeter Road to the airport, the journey time penalties to non-airport bound passengers and the capacity problem of selective stopping, the small percentage of passengers who would benefit, a problem relied on by those against a link at all, and the advantages of a closer link at Terminal 5.

636. In examining the detail of the HHL consultation response, I emphasise that this case is not concerned with whether the answer given by the SST is satisfactory to HHL, could have been further answered by HHL, or meets the standard of

reasoning for a Decision Letter after an Inquiry. The issue is whether the points made in the consultation response were in fact sufficiently considered, even if considered despite the failure to consider the response itself.

637. I now deal with the specific points made against the spur in the consultation response, using the numbering from the earlier references:

(a) (b) and(f) (pre-spur interchange penalties, risk of dependency on Crossrail and the absence of a business case in view of the low usage): these points were specifically considered in the January 2012 Strategy Review;

(c) (uncertainty of provision): this is a political point, in effect met in so far as it can be in the fact of the decision in the DNS;

(d) (the existence of two stations, spur and Old Oak Common interchange): this is not a new point but an accepted part of the scheme as the SST knew; what may be new is the SST's response that the Old Oak Common interchange would be needed with the hub, but that cannot show that the actual point made by HHL was not considered;

(e) (uncertainty of travel direction of spur): it may have been true that consultees did not know the answer; but the answer has now been given, and the point met;

(g) (impact of spur trains on HS2 capacity): this appears to have been considered in the past, though it is not expressly dealt with in some way or other in the decision documents so far as the submissions went;

(h) (absence of detail of cost and impact of the spur route): these were not specifically dealt with in the DNS but the former has been provided, and the reason given for the latter. The answer and reason may be debateable on their merits, but the point has now been answered;

(i) (EC inter-modal policy); this issue permeates the decision documents;

(j) (decision on spur could be made without the details): this was an obvious and known risk at least so far as the DNS stage is concerned;

(k) (loop v through route): no loop was proposed; but overall the whole decision was about what option achieved the best balance between many competing considerations; the European comparison was a very general point quite unsupported by material which could have called for further consideration.

638. The advantages of the hub: BAA's stance was well known to the SST, and did not support the hub. The rest are asserted advantages expressed in very general terms; they summarise what, I infer from the meetings and papers which HHL had provided, was already known as the case for the hub. Not all the asserted advantages were accepted as advantages, even if of no great import. That is apparent from the DNS: for example cost of through route with Old Oak Common interchange required anyway, and the environmental impact of the spurs compared to the realignment through the Chilterns.

639. I find it impossible to conclude that, if the points against the spur, as made in the consultation response, had been considered as part of the consultation responses, they could have led to any different a conclusion in the DNS. The most important points are in fact answered in the decision documents directly or indirectly or were obvious factors the SST knew well. On two others (the travel direction and cost of the spurs), the failure to consider that consultees might not have been aware of that, could not show the consultation to have been carried out on the basis of insufficient information, and the points have now been clarified.

640. The only point on which there is no direct answer is (g), the effect of possible delay caused by spur trains joining the main line, although officials were aware of it. It was put forward at a very general level. I cannot conclude that this state of affairs leads to the consultation being so unfair as to be unlawful, or that there is the remotest prospect that the balance of advantage and disadvantage reached by the SST could be changed if this point, put in the general way it was by HHL, had been expressly and conscientiously considered by officials and the SST.

641. There is nothing in the benefits of the hub which added to what must already have been well known to officials for distillation in their advice to the SST.

642. The points as summed up by Mr Warren put something of a different form and thrust to HHL's consultation response. I think that, thus reformulated, they go somewhat beyond, or are presented rather differently in emphasis, from what HHL had actually put forward. However, it is clear that a comparison was done between the hub and spur, that the relation to Heathrow's role as a hub was considered, but the SST was entitled to approach this on the basis she did. I have already dealt with this point in relation to the aviation strategy ground. The insufficiency of information about the link at Terminal 5 was not really a consultation response point. The SST was entitled to approach the decision on the basis of the information she had. The complaint that HHL did not have enough to make an informed response has to fail if the SST had enough on which to reach a decision on the merits of spur versus hub, which she did. There was also very little material from HHL to enable an environmental comparison of routes. The main points of the comparison, as the SST was entitled to judge them, were dealt with in the submission to the SST.

643. Accordingly, this ground is dismissed.

Consultation unfair because not at a formative stage

644. I deal with this on the basis that there was no unfairness in the HS2 consultation taking place before the consultation on aviation strategy.

645. Mr Warren relied on the *Medway (*Gatwick) and *Hillingdon* (Heathrow expansion) cases I have already cited. He drew a parallel with the unfairness found in *Medway*. The DNS and the promotion of Phase 1, on the alignment proposed, would permit connection to Heathrow only via interchange at Old Oak Common or a spur: a through-route would have been ruled out. In *Hillingdon* Carnwath LJ had drawn a distinction, in the fairness or unfairness of a consultation process, between those cases where there was a further, real opportunity for views to be expressed, so that the flaw in the process could be put right later, and those where the flaw was fatal, because irremediable.

646. Neither the authorities nor the facts support Mr Warren's contention. The option of a spur or through-route was consulted on, having been the subject matter of considerable prior analysis with HHL's input. This led to a decision being taken as to what option was to be pursued. It did not lead to the bypassing of an option, as in the *Medway* case. This is not a flaw which requires remedy in Court or later. There is also a real distinction between the decision-maker cutting off the scope of consultation, in a way which skews the policy which will then weigh in his own decision-making, and the promoter of a proposal (HS2L/DfT) deciding what to put forward to another body as the decision-maker.

647. Indeed, HHL can continue to promote its proposal to MPs and to Parliament, though I am assuming, perhaps wrongly, that the Select Committee stage would treat this as going to the principle of the Bill and would not hear a petition on it.

648. I reject this aspect of the consultation challenge.

The flawed information in the consultation

649. The consultation process was said to be unlawful because it was based on errors by HS2L. These errors fed through to the decision in the DNS where they were "not explained or reasoned". Mr Warren submitted that these errors vitiated the DNS. I am not sure whether that was a challenge to the rationality of the DNS, or an allegation that the reasons for the decision were inadequate or evidence that the consultation response was not effectively considered. It appears to be a further but related ground of challenge. The SST disputes that there were such errors; there were disagreements if not errors by HHL.

650. The basic errors by HS2L were said by Mr Warren to be:

a) HS2L's report to the DfT of December 2009 "High Speed Rail: London to the West Midlands and Beyond" wrongly assumed that the catchment for Heathrow would remain the same regardless of the improvement to surface access that HS2 is capable of bringing about.

b) HS2L's work was premised on a time penalty for routeing via Heathrow which was incorrect. Early route option analysis of this kind was flawed.

c) HS2L's work in 2009 did not assess what HHL submit is a key component of the benefit of a through-route via Heathrow, namely the modal shift in trips to the airport from those coming from the West, South West and South Wales.

d) The Mawhinney Report recommended not a hub but a station under the Central Terminal Area which HS2L itself called "unbuildable". Both the SST and the Mawhinney Report appear to have misunderstood the nature of an 'on-airport' rail interchange.

651. Mr Mould responded as follows:

(a) This is incorrect. The modelling approach used by HS2L included an assessment not only of existing trips to Heathrow (whether by surface access or domestic aviation) but also of new trips made by passengers who might otherwise have travelled to a different hub airport (such as Schiphol or Paris Charles de Gaulle) to make their journey.

(b) HS2L's analysis continues to show a time penalty for routeing via Heathrow; the earlier premise has therefore not been shown to be incorrect. The analysis continues to show a time penalty of at least four minutes for routeing the main HS2 line via a station at or near Heathrow, in comparison to the route confirmed following consultation.

(c) Whilst HS2L's work does not include potential benefits from GWML travellers who might use a Heathrow hub station to access the airport, benefits from improved western access to Heathrow could be derived in a number of ways, including a scheme providing such access through a new

conventional rail link between the GWML and the airport, which the Government supports.

(d) A later analysis of options for serving Heathrow was provided in HS2L's September 2010 report, *High Speed Rail: London to the West Midlands and Beyond – Supplementary Report*. The analysis of the option of a hub station at Iver does not assume a subterranean structure, with paragraph 1.2.10 stating that: "An Iver station would be at or near ground level." The treatment of the Mawhinney report's recommendations in respect of a Heathrow station cannot be properly criticised. It was only one of the elements supporting the Secretary of State's December 2010 decision on the package to be put forward for consultation. The decision was also informed by the analysis for serving Heathrow carried out by HS2L and the proposals made by Arup for a hub station. In the light of Lord Mawhinney's recommendation in favour of a Heathrow station at the Central Terminal Area, HS2L reconsidered the feasibility of such an option, but concluded that the difficulty of construction and its high costs ruled it out as a practicable option.

652. There is nothing in this aspect of the consultation ground. It reveals no more than the sort of debate about issues which are inevitable for a project of this sort. The points raised do not come close to establishing a legally deficient consultation process.

9 Aylesbury Golf Club, Mr Woodford and Mr Jarvis

653. This ground of challenge relates to consultation issues. The consultation route traverses the Golf Club's course, the farm land of Mr Woodford and the farm land of Mr Jarvis as it passes close to the west of Aylesbury. At the closest at the south western and north western edges of Aylesbury, its centre line is 300ms and 250ms or so away; it is generally no more than 500ms away from the outskirts of Aylesbury. In the December 2009 Report by HS2L, "High Speed Rail: London to the West Midlands and Beyond" published in February 2010, the route had been shown 75 to 100ms further west. On that alignment, the golf course could have survived with adjustments, but on the consultation route, it could function at best as scarcely a short 9 hole course; in effect the Club would not survive, according to the Claimants' evidence. The change to the route also would make farming Mr Jarvis' land very much more difficult. I received on 21 February 2013, brief further evidence on the impact which HS2 would have on the golf course and on

Mr Jarvis' farm: at a meeting with the HS2L forum, they had been shown plans which proved the impact to be yet worse than they had realised, and worse than I have set out.

654. The route had been changed as a result of a meeting in 2010 between the National Trust, HS2L, and the owners of Hartwell House, a Grade 1 listed building leased to the National Trust and operated as a hotel. The associated garden is registered on the Register of Gardens. The owners of land affected by that change were not aware of the meeting nor were they consulted about the effect which the change would have before the consultation route was published. The change was referred to in the "High Speed Rail: London to the West Midlands and Beyond: Line of Route Mitigation: Supplementary Report" by HS2L to DfT published on 3 December 2010, which explained the change and the meeting which had led up to it. The March 2010 Command Paper had said that between then and the formal consultation process, there would be a process of "engagement" with "key stakeholders" and which would enable local and other sensitivities to be factored in. The change was not picked up by the Claimants, however, until after the close of the subsequent consultation process in July 2011; the report referred to the route passing through the edge of the golf course. The change and its significance were in fact not appreciated by them until shortly before service of amended grounds on 31 October 2012.

655. The Claimants sought and I granted permission to them to amend their grounds to raise a challenge based on the fairness of the procedure adopted in 2010, and leading to that change. I had expected that it would not lead to further evidence, but the development of the argument, relating it to various ways in which they put their challenge to the fairness of the 2011 consultation process, led me to accept further evidence from both the SST and in reply from the Claimants.

656. The First and Second Claimants in this action, that is the Golf Club and Mr Woodford, responded to the consultation process, putting forward through their consultant engineer Dr Eaglen, an alternative route for a section of some 22 kms, which would take the line of the railway 3 to 5 kms further to the west of Aylesbury, linking back to the proposed route to the north and south of Aylesbury. It was submitted by email with images on 20-22 July 2011; the consultation process closed on 29 July 2011. Dr Eaglen commended what he described as a "possible alternative" route in his emails for the avoidance of some demolition of properties, and of extensive blight; it did not purport to be fully engineered or worked up. Mr Jarvis submitted a late response supporting that alternative, and referring to the effect of the consultation route on his farm holding. The Golf

Club, Mr Woodford and Dr Eaglen himself asked HS2L for a meeting between engineers to discuss the proposed alternative, which they accepted would require further work and consideration with other interested parties. There was no meeting, nor other form of discussion, nor response to the Claimants from HS2L about their proposed alternative.

657. In November 2011, the SST published the report entitled "High Speed Rail: Investing in Britain's Future: Consultation Summary Report" by DbD. This referred to the Claimants' alternative as one of 187 responses to the effect that the consultation route passed too close to the western edge of Aylesbury. There was also concern about tunnelling and the proposed viaduct. 769 changes were proposed to the consultation route along its length.

658. In January 2012, HS2L prepared a series of review documents, by way of advice to the SST. One was "The Review of possible refinements to the proposed HS2 London to West Midlands Route", which recommended some changes in the Aylesbury section, largely by way of mitigation of the consultation route but with one minor route change. It does not deal with the Claimants' proposed alternative nor with the other 768 route changes proposed and not accepted.

659. In the DNS, published with the Route Refinement Report in January 2012, the SST concluded that "the proposed route corridor and stations and the approach to mitigating its impact, remained the best option." A package of alterations to "the proposed route" would minimise impact on the local environment, communities and properties.

660. In response to the original challenge, Mr Graham gave evidence in his 3rd Witness Statement about how alternatives proposed during the consultation process were considered. It is in quite general terms. Some proposed alternatives were seen as coming from "key stakeholders" and were given special consideration. These did not include the alternative proposed by these Claimants. Ms Munro, said that alternatives were recorded on a spread sheet, but the exhibited spread sheet contained no information about how this particular alternative had been assessed or why the conclusion reached was in fact reached. Mr Castle, then Senior Route Engineer at HS2L, and his team had dealt with the alternative and told her that it was "not considered to merit further investigation. It would have resulted in

significant changes along a long section of the route, adversely affecting a number of other communities".

661. Mr Fletcher, for the Claimants, in trenchant oral submissions, contended that this degree of consideration showed that the alternative had not been considered conscientiously, and that it could not have been in view of the short period of 3 months in which all 769 were to be considered. The reasoning referred to by Ms Munro, and overall outcome of the consultation in relation to alternatives, showed that only quite minor changes were in fact seriously considered. All of this showed that the only real opportunity which the Claimants had to influence the route was before the consultation began, a process from which they were excluded by the decision of HS2L to consult the National Trust about Hartwell House and a change of route, but not to consult those affected by the change, notably the Claimants.

662. There might have been a factual answer to some of these charges, the need to provide which might not have been apparent from the original Grounds of Claim. These focused on the claim that the consultation response had been ignored. The change became more apparent from oral submission, which focused on whether the responses had been conscientiously considered. So I permitted the SST to adduce further evidence, from Mr Castle, directly this time, to avoid a possible conclusion on a false basis. In fact he produced two further witness statements, the second in response to criticism that parts of his first were unclear.

663. Mr Castle, a Chartered Civil Engineer, had had overall responsibility for route engineering for Phase 1. He was well aware of the area to the south and west of Aylesbury in 2011 as he had led the engineering development for HS2 since March 2010, in response to the revised remit given to HS2L by the SST. He had been involved in the work to reduce its impact on Hartwell House and Gardens and he had been present at the meeting to discuss it between HS2L and the National Trust.

664. One of the route changes he evaluated after the close of the consultation process was that proposed by Dr Eaglen on behalf of the Claimants. No written record was made of the evaluation; and it appears that there was, for example, no matrix within which impacts of the consultation route and alternatives could be compared

or weighted on a consistent basis, a not unusual tool for such comparisons. Mr Castle said that based on his detailed knowledge, his professional experience, expertise and understanding of the area through which the two routes would run, "I was able to conclude with my team that no further investigation or development of this proposal was merited". The changes would produce significant disadvantages without any net benefits. He identified four: population and other features affected by noise and landscape impacts such as Waddesdon Manor, a Grade 1 listed building, at least five named villages, open countryside and farmland; curves of relatively tight radii which would require trains to run much more slowly; two tunnelled sections; and earthworks to carry the track across the rather more undulating land of the proposed alternative. The implications were immediately apparent to him.

665. In response to the challenge as to how, in December 2012, he could remember the basis upon which this particular proposed alternative had been rejected between August and October 2011, Mr Castle said that Dr Eaglen had been in regular contact with him since 2009, they had met in 2010, he could recall discussing this with colleagues, and had become very familiar with the Aylesbury area, which had received a good deal of attention.

666. Dr Eaglen responded to the adverse comments of Mr Castle. His route would take the line further away from the major population centre of Aylesbury, and from the two pinch points, at the north west and south west edges. The impact on Waddesdon Manor would be reduced by a box cover, and other villages, if not avoided, would be protected by short tunnels; and it would obviate the need for a greater length of tunnel at Wendover; the tightness of the curves would be reduced by detailed engineering and there would be no significant reduction in speed; the two tunnels and box cover would address the undulation in the ground. Hartwell House had benefited little from the move eastward of the consultation route, to protect, he thought, but without evidence or explanation, the commercial interest of the hotel operated in it.

667. Dr Eaglen also referred to wider planning reasons for the proposed alternative, including removing a constraint on the westward expansion of Aylesbury, road safety, flooding and sewerage issues. Mr Mould submitted that these last three were new issues, not put forward in July 2011 as the basis for his choice of route, which focused on property demolition. This too was an area of partial dispute.

668. In the light of all of this, Mr Fletcher submitted, by way of context, that the Government had chosen to consult on issues of principle as well as on the detail of the Phase 1 route, which made for an unwieldy consultation, especially if it was to be dealt with fairly within the short time 3 month time frame allowed for the analysis of responses. I would accept that the Government cannot plead, nor did it do so, that the short time frame, of its own choosing, permitted or excused an unfair consultation. But I cannot deal with this challenge as a challenge to the fairness of the whole consideration of the consultation responses, on the basis of the Claimants' evidence which is simply not adequate for so large a purpose.

669. His first two main submissions were linked. The change which led to the consultation route was made in an unfair way, because the Claimants, adversely affected by the change, were not given any opportunity to comment on the change before it became part of the consultation route. They could have pointed out how serious its impact was on them and how limited the gain to Hartwell House; as it was they had not appreciated that the change had been made at all till too late. This linked to the second submission that the consultation was not genuine; and that the line was effectively determined before the consultation process, with only the most minor changes being thereafter allowed. Question 5 in the consultation document asked: "Do you agree that the government's proposed route, including the approach proposed for mitigating its impact, is the best option for a new high-speed rail line between London and the West Midlands?" Mr Fletcher submitted that this slanted answers towards a choice between the consultation route and one other alternative which had been considered at an earlier stage; radical change could not be proposed in response to that question; but it was also not immediately apparent that Question 5 was about the precise route rather than the route corridor.

670. Mr Fletcher's third submission was that there had been no genuine engagement by HS2L with the Claimants over their alternative, a point which he said was good for other alternatives proposed by other objectors as well. Fairness in this context, and in the light of the material Dr Eaglen had provided to HS2L, required a meeting between them so that Dr Eaglen had a fair chance to put his points across on behalf of the Claimants to HS2L. There should have been a Working Group and consultation with the local planning authorities and those adversely affected by the proposed alternative in order to reach a fair appraisal of it. These points also linked to the fourth submission: HS2L/DfT had given no conscientious consideration to the proposed alternative; there was no substantial evidence as to how Mr Castle had approached this alternative, nor was there evidence of any systematic and documented approach, drawing for example on numbers affected to varying bands of degrees. A meeting with Dr Eaglen would have enabled a greater understanding to be achieved.

9 Conclusions : Aylesbury Golf Club and Others

671. I do not accept Mr Fletcher's submissions. First, I accept the reasons given by Ms Munro as to why HS2L approached the National Trust about Hartwell House: it is a Grade I listed building and its gardens are on the Register of Gardens. There is a clear public interest in avoiding damage to the setting of that which is of its nature irreplaceable.

672. It might have been preferable for this change to been discussed with those adversely affected before the consultation route was published, since it would have taken little time and effort to have done so, and HS2L would have had a clearer idea of the impacts. But that does not make the process leading up to the initiation of the consultation process unlawful. If the process which follows is a lawful consultation process, I see no reason to impose a requirement of the nature for which Mr Fletcher contends before the consultation process even begins. I see no reason in law to impose the sort of constraints for which Mr Fletcher contends on how the consulting body formulates its proposals for consultation, if the subsequent process of consultation is itself fair.

673. The true question therefore is, as Mr Fletcher accepted, whether the subsequent consultation process was lawful. If a fair opportunity was given to the Claimants to respond to the impact which the consultation route would have, and if the SST considered conscientiously what they had to say about it, and any alternatives proposed, any unfairness in the process leading up to the change to what became the consultation route could not be unlawful.

674. I note that the fact of this prior meeting had been publicly referred to in the "Line of Route Mitigation: Supplementary Report" in December 2010. This made public

the change to the previously proposed route before the consultation process began. Some consultees commented on this report before the 2011 consultation process began. The change to the route in the vicinity of Hartwell House was then expressly referred to in the Consultation Document itself, paragraph 5.14, and in the Appraisal of Sustainability, paragraph 3.8.2; the justification for the change, to protect the setting of the Grade 1 listed building was also referred to. The Claimants' consultation response did not identify any adverse effects arising specifically from this change; they had not appreciated the change or its significance. I do not regard any failure in that respect as attributable to the SST. The process of consultation was perfectly fair in relation to that change. The consultation process would have considered any responses which the Claimants wished to make to the change from the once proposed route to the consultation route, such as reverting to the previously proposed route. Nothing in the changes actually made after consultation suggests otherwise.

675. I cannot possibly infer that the consultation process was unfair in relation to the change leading to the consultation route, because of an alleged failure conscientiously to consider other subsequent objections; that was never put to the test by the Claimants' consultation response which did not seek a reversion to the previously proposed route. I reject therefore the argument that the pre-consultation phase was the only real chance the Claimants had to address the change to the route made in the Consultation Document. They simply have not shown that the later process could not cure any deficiency in the earlier stage. I also accept that, expensive though it might be to appear with legal representation at the appropriate stage in the hybrid Bill process, the Claimants can petition in person.

676. I do not accept that the description of the consultation process in the Consultation Document could have sensibly led to any real doubt but that it covered any aspect of the route from London to the West Midlands which any consultee wished to raise, whether mitigation, minor or major route change, or even a wholly different corridor. It does not seem to me that the Claimants can have seen it as restricted in any way either: the alternative they proposed in response to the consultation exercise was quite significant; they did not propose minor changes alone, or even at all. I am not prepared to infer that the nature of the changes which the SST accepted can only be described as matters of minor detail, but even were that so, that could not warrant the inference that the process was far more limited than it appears to be from the Consultation Document, or that wider alternatives were not properly considered.

677. I turn to the fairness of the way in which the response which the Claimants did make was considered. The essential contention was that it was not conscientiously considered. I reject the argument that fairness in that respect required HS2L to meet with Dr Eaglen, or to set up a Working Group with others to develop it, or to optimise it, before rejecting it. The primary responsibility is on the respondent to a consultation exercise to put forward the case it wishes the consulting body to consider; and if it does not contain the detail necessary to show how drawbacks were to be overcome, and in its draft or incomplete state does not persuade the consulting body that it should be looked at further, their duty of conscientious consideration does not require the body to take it further. That would be to impose a very onerous duty on the consulting body, far beyond the scope of conscientious consideration, to pursue alternatives which as presented to it were not even persuasive that it should be considered further. There is no authority which would require that.

678. The fact that Dr Eaglen is a responsible railway engineer, known to HS2L, and had sought a meeting, holding out the prospect that his alternative could be improved in a way which might make it more attractive, does not alter that position. It was for Dr Eaglen to present the material in a way which persuaded HS2L to take it further; there was no duty on it to find the material. I recognise that this can put objectors to a scheme of this nature at something of a disadvantage, where so much of the technical information, knowledge and skills are in the hands of the consulting body. But that does not mean that the absence of reaction by HS2L to the request for a meeting makes its response so unfair as to be unlawful. Mr Castle was entitled to recognise that Dr Eaglen described the "possible benefits" of his proposal, and was sufficiently tentative to suggest a Working Group; he had not done the work which would show that his alternative was actually better. HS2L was not obliged, with that level of detail, to take the alternative further in discussion with Dr Eaglen in order for the alternative to receive conscientious consideration.

679. Mr Fletcher's various criticisms of the analysis of consultation responses by DbD on behalf of DfT, focussing on what he saw as a statistical analysis, without any analysis of the merits may have some force, but not for these Claimants in this context. The crucial question is: how did HS2L actually consider Dr Eaglen's alternative? The language of Ms Munro's witness statement, cited above, could lead readily to the conclusion that the degree of change proposed was itself a reason for not considering the alternative further. If so, that would have been a statement, in the light of the breadth of the consultation exercise in relation to route, that the alternative had not been conscientiously considered, but rejected for

a reason not foreshadowed in the Consultation Document as a criterion by which alternatives would be judged. It could have justified Mr Fletcher's claim that the real chance to deal with changes arose before the consultation process began, or, to put it another way, that the route had in effect been all but pre-determined save for matters of detail or mitigation.

680. But I am satisfied that hers is merely a poorly worded statement designed to deal with a claim that the alternative had been ignored, rather than not dealt with conscientiously. I am satisfied from Mr Castle's two statements that the alternative as presented was considered to a level which meets the standard required for a conscientious consideration. It may lack written record, and the application of a consistent framework for the comparative assessment of alternatives and the consultation route. But those imperfections do not amount to a want of legally sufficient conscientious consideration. I do not doubt that Mr Castle's experience and knowledge of the area and route permitted him to reach the judgment he did. As I have said, such consideration did not require a meeting or discussion with Dr Eaglen. I also accept that had Mr Castle and Dr Eaglen met, there would have been disagreement but it is not for me, nor would it be possible for me on the information I have, to resolve those issues. But that does not preclude my conclusion that Mr Castle reached a rational view after conscientious consideration. Accordingly, this challenge is dismissed.

10 HS2AA's challenge to the compensation decision

Introduction

681. This part of the judicial review claim brought by HS2AA concerns the Secretary of State's decision in the "Review of Property Issues", ROPI, published alongside the DNS in January 2012, relating to compensation for householders living on or near the proposed route of HS2. In summary, HS2AA argues that the compensation scheme decision was unlawful because it was based on a fundamentally flawed public consultation process. This process was to take place in two stages, one concerned with the principle of a non-statutory compensation

scheme and the other with the details of the one of the three options which would be taken forward after the first stage. It is the decision on the first stage which is under challenge.

682. The SST was concerned to address the impact of "generalised blight", blight described by Mr Wolfe QC, for HS2AA on this ground, as that experienced by persons or businesses whose properties were not required for the construction of HS2 but who were nonetheless adversely affected by it, and for whom the statutory compensation schemes for compulsory purchase and operational impacts would be too long delayed or unavailable. The SST used the phrase to cover the impact on the property market in certain areas as a result of fear of the perceived impacts of a proposed new development, coupled with uncertainty about future compensation.

683. For many properties initially affected by blight, the ultimate impact of a scheme when it happens may be nil or minor. But until the scheme is operational, or abandoned, blight can have a severely adverse impact on house values, even to the extent of making properties unsaleable, because of the fear that potential purchasers have of the scale and effect of a scheme. The straightness required for HS2 tracks involves, for example, a land take 75m wide.

684. Mr Wolfe submitted that the decision on how, if at all, people affected by generalised blight should be compensated is fundamental to who bears the burden of the project. If householders were not compensated for the generalised blight suffered in the period before HS2 was actually operational, they would bear a substantial but unacknowledged share of the true cost of the project. This should be taken into account on the cost side of the public scheme or by reduction in the calculation of public benefits. The costs actually allowed for were confined to statutory and some discretionary compensation.

685. Areas and communities near the proposed Phase 1 HS2 route have been affected by 'blight' since the proposals were announced. They are most obviously affected by an inability to sell their homes, to move or to re-mortgage their properties to

cover the many vicissitudes of life. The HS2AA evidence included many Witness Statements from people already actually affected by HS2 blight; a helpful summary note was provided. I do not need to set it out, but the impact of blight was in some instances severe, and for all a serious source of anxiety. On the assumption that the line is operational as intended from 2026, blight could paralyse the local property market for at least 15 years.

686. The Government has shown itself alive to and concerned by this issue on a number of occasions. An Exceptional Hardship Scheme, EHS, was introduced. In July 2011, the Government announced that it was considering various solutions, involving compensation going beyond the requirements of statute, and beyond the EHS already announced. It consulted on these proposals in the February 2011 HS2 consultation. 172000 people were contacted by the DfT in the consultation process for HS2 Phase 1: that is those within 1km of the line or within 250m of a tunnelled section. Those parameters were chosen, said Mr Graham, because of the significant interest among communities along the route; they were not chosen, as Mr Wolfe implied, to indicate what might be a lower limit on the numbers potentially affected by the construction or operation of HS2 Phase 1.

687. The consultation process proceeded on this issue in two stages. First, the Secretary of State consulted on a range of three options for addressing the issue of generalised blight. The 10 January 2012 decision was the decision to adopt one of those options, the "refreshed hardship based property purchase scheme", along with other proposals tailored to meet specific problems. Second, in the light of that consultation and decision, the Secretary of State embarked on a second stage of consultation, beginning on 25 October 2012 and concluding on 31 January 2013, on the operational details of that suite of compensation measures centring on this "refreshed hardship" scheme. It excluded the other two options which had been part of the February 2011 consultation.

688. Mr Wolfe argued the following grounds as I have amalgamated them: (1) the first stage of the consultation process was unlawful as it was carried out with insufficient information being provided on the options in play for consultees properly to evaluate and thus respond to the consultation question on the options; the two stage process was therefore also unlawful as the second stage would only consider one of the options in detail; (2) the decision to proceed with the "hardship scheme option" was unlawful as it was not based on the issues upon which comment was sought in the consultation process, and which were seen as the basis on which the decision would be made but instead was based on issues which were not notified to them; (3) the SST created a legitimate expectation

about what the chosen scheme would achieve which was breached by the decision made; (4) HS2AA's consultation response (among many others) was not in fact considered, by the SST, let alone conscientiously, when reaching her decision.

689. Mr Mould submitted that at the heart of HS2AA's compensation challenge lay a disagreement with the SST's policy choice, which was not a proper basis for judicial review. It should pursue its argument for the introduction of a bond based property purchase scheme in a political forum. It was illogical to seek to compel the SST by litigation to adopt a different form of voluntary code. The decision as to what, if any, discretionary compensation measures to introduce beyond the statutory scheme was for the Government, which had a wide margin of discretion in deciding what measures were appropriate, being best placed to assess how society's needs and resources should be balanced. The consultation on compensation obviously related to the allocation of public resources, and involved a judgment about what should be done for those affected by blight but not covered by statutory provisions, balancing the various interests of those affected and the rest of the population.

690. In short, HS2AA had put forward its case for the introduction of a bond based property purchase scheme; that case was considered by the SST who had formed the overall view that such a scheme should not form part of her discretionary compensation package; she explained why she had reached that view in ROPI. She had made no error of law. HS2AA had fundamentally misunderstood the purpose and nature of the consultation. Blight and compensation was one issue raised within a large and wide-ranging public consultation. The two stages were set out and pursued, as expected.

The facts

691. In March 2010, shortly after the publication of the Command Paper, the Government published a consultation paper "High Speed Two-Exceptional Hardship Scheme".

692. It explained that the statutory blight provisions in the Town and Country Planning Act 1990, ss149 and following, enabled the owner-occupier of a qualifying interest in certain property to require the land to be purchased if it was blighted within the scope of the specific statutory provisions. These would not be triggered before any land was defined and safeguarded for purchase. The Command Paper did not trigger those provisions. But it had triggered general blight.

693. This consultation paper sought views on a non-statutory "exceptional hardship scheme", EHS, to cover residential owner-occupiers who had an urgent need to sell before those statutory provisions were triggered, and whose property was seriously affected in value by the preferred route option. It listed five proposed criteria, such as a change in employment location, medical needs, extreme financial pressure and the need to move to special accommodation. Efforts to sell were required and the loss of value had to be directly related to the HS2 proposals.

694. The EHS was introduced in August 2010 as a voluntary Government scheme. Its terms reflected the criteria and restrictions which I have outlined. It did not purport to be an answer to most cases of generalised blight. Some 405 applications had been made under it by November 2012; 78 had been accepted. Mr Wolfe emphasised the detail in the scheme and its later revision.

695. The SST's Written Statement to the House of Commons on 26 July 2010 acknowledged that, even after the statutory provisions were triggered, there would be property which was not to be acquired, but which was blighted by the serious affect which construction or operation of HS2 might have, and to which neither the statutory blight provisions nor EHS would apply. The SST agreed that further non-statutory provision was required: the issues raised in respect of the different models for assisting those most seriously affected were complex and required detailed consideration, and so officials were to be asked for further advice on the terms and conditions of such additional provision and how it should operate. He would report to Parliament with proposals in the light of the Spending Review. Ms Wharf, a director of HS2AA, drew attention to the language of that Statement.

696. On 20 December 2010 the same SST, when making a statement to the House of Commons on the plans for HS2 and the topics for consultation in 2011, said this about compensation for blight:

> "Where a project that is in the national interest imposes significant financial loss on individuals, I believe it is right and proper that they should be compensated fairly for that loss, so I have asked my officials to prepare a range of options for a scheme to assist those whose properties will not be required for the construction of the railway but who will nonetheless see a significant diminution of value as a result of the construction of the line.
>
> The forthcoming consultation will include proposals for such a scheme, which will sit alongside the statutory blight regime, which covers those whose properties would need to be taken to build the line.
>
> …
>
> I have indicated that we will seek to go further than has happened with such previous infrastructure schemes in the UK, because it is right and proper that individuals who suffer serious financial loss in the national interest should be compensated.

He was also asked whether this would be setting a precedent in that regard. He replied that European jurisprudence and the need for Governments to compensate pointed towards "more generous compensation becoming the norm."

697. I do not find it difficult to accept that this was encouraging and reassuring to the members of HS2AA and the many others affected. This is the Statement relied on as giving rise to the legitimate expectation. Mr Wolfe pointed out that the reference to the Spending Review in the earlier Statement had not been repeated.

698. Annex A to the main February 2011 Consultation Document summarised the statutory blight provisions, and the compensation provisions for those whose property was affected by physical factors such as noise and vibration once the line had been open for a year. The Annex recognised that generalised blight had inevitably been caused by the proposal for HS2 in some areas along the proposed London to West Midlands route. Blight was worst when uncertainty was greatest.

Although the position could be expected to improve as plans became more certain, the Annex recognised that, if the decision was made to go ahead with HS2, the blight could well continue in areas along the route.

699. Hence the Government was considering whether "additional support arrangements" for property owners might be appropriate, which would be available for those whose properties were unlikely to be compulsory purchased in order to build the new line, "but who may still experience a significant loss in the value of their property as a result of its proximity".

700. The purpose of the consultation was "to inform the development of a preferred approach to be consulted on in early 2012". The issues on which views were sought included the general approach to this form of discretionary support: how to assist those whose properties lost significant value, how to enable the property market to continue functioning normally, how to provide reassurance that proper compensation would be paid, how to enable people to stay in their homes and communities, and how to avoid the Government ending up owning large numbers of properties. These were the five issues for the public to address, on which its views were sought and, on Mr Wolfe's submissions, which were to form the basis of the decision.

701. As to the mechanisms, the options had been developed based on those issues and past experience; they were offered for general comment, and would be further analysed before a decision was taken on which option would be taken forward for further consideration. Although the Government was not obliged to add to the statutory provisions, it had made clear its intention to introduce discretionary arrangements "to support affected property owners". Three options were set out, and "whichever option for a new scheme is chosen", it was anticipated that the EHS would then close, as it had been a temporary scheme awaiting the final decisions on routes.

702. The first option was a hardship-based property purchase scheme akin to the EHS, enabling those whose property fell outside the safeguarded zones, but who were affected by generalised blight and suffered hardship as a result to have their property purchased. There would be criteria and valuation procedures. The Government was concerned that this "would inevitably lead" to it owning

properties which were not required for the scheme, with a concerning effect on the local property market and community.

703. The second option was a bond-based scheme. The qualifying property owner would seek a Government guarantee that it would purchase the property at a later date in the evolution of the project at its unaffected value. The guarantee would be transferable, and the confidence which that would give to purchasers would enable the local property market to keep functioning. Since that "may still lead" to the Government owning significant numbers of properties, it explored a third option of a promise to pay compensation. Mr Wolfe noted the contrast between "would "and "may" in the light of the way in which the decision was later reasoned.

704. Thus the third option was the compensation bond scheme. The Government would promise a qualifying property owner to pay fair compensation for the loss of significant value due to the new line, and would embody that promise in a certificate which would be transferable. The guarantee could only be called on after the railway had been in operation for a year.

705. The Annex then set out what would happen next: the responses on the approaches and options would inform the detailed development of the scheme. People would then have another opportunity, if the Government decided to go ahead with HS2 Phase 1, to have their say in a further consultation on a detailed scheme. This was likely to be in early 2012, alongside the consultation on safeguarding land, focused on those close to the line of route, with the scheme to be launched in the summer of 2012.

706. The February 2011 consultation documentation included a separate Consultation Summary Document. This Summary referred briefly to property impacts, among the many HS2 issues it covered. It asserted: "Minimising uncertainty and protecting the legitimate interests of private property owners would be of paramount importance". It informed consultees that the statutory blight provisions were set out in an Annex to the main Consultation Document. But the Summary, reflecting what the SST had said in Parliament, stated that the Government was also considering:

> "…what additional measures may be appropriate to help those whose properties would be unlikely to need to be compulsorily purchased in order to build a new line, but who may still experience a significant loss in the value of their property as a result of its proximity. For the purposes of this consultation, the Government has identified a range of approaches that it is considering applying to any additional discretionary arrangements and these are also set out in the annex to the main consultation document, along with some options for how such arrangements might operate."

707. Question 7, as in the main Consultation Document, asked whether consultees agreed "with the options set out to assist those whose properties lose a significant amount of value as a result of any new high speed line?" Answers could be provided online or in writing.

708. No information about the issues, options or range of approaches was given in the Summary, either as a matter of broad description or detail. No mention was made of a two stage process.

709. The consultation process was notified to the occupiers of property, who were told that the consultation material could be viewed online or in hard version at libraries, and electronic or paper versions could be ordered via the consultation website or by telephone. Annex A could be ordered separately. The process included a number of road shows with an opportunity to ask questions and find out more about the proposals.

710. The main Consultation Document, into which Annex A was bound, was available as a reference copy at the road shows but only the Summary was handed out. If Mr Graham implied that copies of the main Consultation Document and separate copies of Annex A were available to be taken away, (paragraph 470 of his third Witness Statement), that implication is not correct in my judgment on all the evidence I have read.

711. HS2L staff, property consultants and lawyers were available to answer individual questions; they were experienced and knowledgeable. The staff could explain the broad differences between the options and give information about the potential impacts on specific properties. However, where the question related to the subject matter of future consultation, staff would answer that they were outside the scope of this consultation. Questions about the practical detail of the compensation options were dealt with in that way; Mr Graham's fourth Witness Statement paragraph 31.

712. Ms Wharf said that these staff were not always present, and there were often long queues to speak to them. The evidence of individuals showed that what Mr Graham said was correct: many had had questions to ask about how the various schemes would work in greater detail but were told that the questions could not be answered at this stage. Some were given only the Summary Consultation Document to satisfy their enquiry as to details. Some were told that there would be another consultation, but not that it would only be on the details of one option.

713. If an answer could not be provided to a question, it could be written on a postcard for subsequent written answer. The same restriction on the scope of consultation obviously applied to these as well. Those who asked for more detail, having read Annex A, were still directed to Annex A. This reflects, in my view, the fact that the consultation process, as Mr Graham said, was not about the second stage, which is where the details, but only of the preferred option, would be discussed. No more detail was being provided at this stage.

714. A blight and compensation fact sheet was handed out to the public at these road shows dealing with compensation and blight. It referred to a range of possible "approaches" being considered. These included a hardship purchase scheme such as the EHS, (and no more than that was said about it), the property purchase bond scheme and the compensation bond scheme. It described them briefly, said that their intention was to help the property market to function as normally as possible, but contained no caveats about the choice, for example Government owning too much property. It made no mention of a two stage process. Annex A was referred to and recipients were directed to the DfT's website for the consultation documentation, which on this issue could only be Annex A.

715. Mr Graham said that during the consultation period, HS2AA had continued to campaign for the property purchase bond scheme, and produced material for consultees to append to their responses in support of it.

716. Ms Wharf, in her first Witness Statement, said that in practice the documents, which contained such limited details on the options as were provided, were not readily available as claimed by the DfT.

717. Those respondents who telephoned the hotline publicised by the DfT and HS2L to request a form to respond to the consultation were only sent the Consultation Summary Document (unless they specifically asked for more). This document contained a paper response form in the middle for consultees to use, but as I have said, it did not describe, name or anywhere refer to the three options that Question 7 related to. It simply referred the reader to the Annex for more.

718. Orders by telephone for more than one copy of the full Consultation Document which contained Annex A were strongly resisted: only one copy could be provided in response to each request. It was often out of stock.

719. Fewer than half of the 55,000 responses to the February 2011 Consultation were prepared and submitted online where Annex A was more readily obtainable and signposted; those who responded by some other means may have had none of the information contained in Annex A.

720. Ms Wharf knew that DfT/HS2L had a good deal of further analysis and material derived from, for example, the Central Railway scheme, which could have been made available to consultees but was not. She knew that because she had provided it to the DfT on earlier occasions. Mr Wolfe pointed out that one reason why consultees would have wanted more detail was because they were aware of the detail available on the EHS scheme criteria.

721. HS2AA submitted its consultation response on 29 July 2011. It was emailed to a DfT email address, and to Mr Graham, by Ms Wharf. There were two documents: one covering Questions 1-6 with a one page summary on Question 7, the other the full response to Question 7 on compensation. The latter was a substantial 34 page response, which could properly be described as detailed, well-informed and fully reasoned. It recommended revision to the five criteria, and the adoption of the property bond option subject to revisions. The response also referred back to HS2AA's earlier "Property Blight Report" submitted in 2010 as part of its response to the consultation on the EHS. It dealt with the causes and extent of blight, market confidence, and the role of lenders and valuers. The response sought further discussion.

722. DbD analysed the consultation responses and its "Consultation Summary Report" was published with the DNS. 35790 direct responses were received to Question 7. Only 4592 mentioned any of the three options directly; the property bond was the most popular by a considerable margin (4042). There was some uncertainty as to whether this was the DfT proposal or a more detailed and so possibly different version put forward by HS2AA. Only 72 disagreed with it. It was the preferred option for many organisations including the Council of Mortgage Lenders. It was the preferred option of many local authorities, although unable to express any concluded view because of the paucity of information.

723. Out of 472 responses mentioning it, only 21 preferred the hardship purchase option; most comments about it were negative. 81 out of 556 responses mentioning it supported the compensation bond approach.

724. 16027 disagreed with the Question. Of those who gave reasons, some felt that the proposals lacked sufficient detail to be acceptable at this stage; others rejected the limit on compensation to those who would be "significantly" affected. A further 3738 said that the proposals lacked sufficient detail for an assessment of the options. This was the most commonly voiced opinion among both supporters and opponents of the proposals. Some respondents were quite critical of the consultation process, on the grounds of insufficient information for those potentially affected. Local Authority responses noted that residents were highly confused about what they were being consulted on.

725. The responses on the five issues or criteria were analysed. Some responses which did not necessarily relate to the proposals in the Consultation Document were also analysed.

726. The decision on Question 7 is set out in the "Review of Property Issues", ROPI, published with the DNS which has but a very brief summary of the decision in ROPI.

727. The Introduction to ROPI set out in short form the background to the consultation, saying that Annex A had "stated an ambition to work towards a property deal that would" meet the five objectives, or issues. It summarised the consultation responses. One topic ROPI dealt with was the response that the consultation did not provide enough detail for useful answer: it acknowledged that those potentially affected would naturally want as much detail and reassurance as possible, adding, at paragraph 21, "At the same time, we believe that comments like these reflect a genuine difficulty in striking a balance between providing enough detail to make the consultation meaningful and reaching policy conclusions before having consulted properly." Mr Wolfe thought that somewhat obscure.

728. ROPI also referred to the support which respondents mentioning the three options gave to the bond-based purchase scheme, and the supporting views of the Council of Mortgage Lenders and the British Bankers' Association.

729. The existing statutory compensation regime was thought, as a result of the consultation responses, to be widely misunderstood; it was then explained. Then the ROPI announced that the exceptional nature of HS2 made a strong case for "adjustments" to that system. There would be a "streamlined advance purchase scheme" to simplify the statutory blight purchase process, enabling people to sell their house but to stay on in it, renting it back until it was required. For those affected by the impact of construction works, there would be an additional "streamlined small claims scheme". There would be a package of measures for those concerned about the effect of tunnelling on their properties, with

compensation for subsidence and settlement caused by HS2 tunnelling, and for the purchase of subsoil rights.

730. For those who had a strong need to sell urgently, there was a strong case for a "refreshed hardship-based property purchase scheme". 453 out of 472 comments on this had been critical but this policy could be of crucial help to a minority although of limited relevance to most. It would be like the EHS, itself summarised, and which could be reviewed, but it might have different criteria since the EHS dealt with the situation before the statutory scheme came into effect. This was the proposal for dealing with generalised blight, which of the three which it identified, the Government had decided to proceed with "for the reasons set out above". I have set out the supposed reasons, and at scarcely any shorter length. They are not reasons which compare the three options. The reasons for choosing the hardships purchase scheme over the other two options are not "set out above", but follow by way, not of comparison, but of comments on their perceived drawbacks.

731. ROPI then dealt with why the other options were rejected. The reasoning was the subject of critical submissions by Mr Wolfe, and defended uncomfortably by Mr Mould. As HS2AA's full consultation response, rather more cogent than the SST's reasoning in ROPI, was overlooked by DbD at least initially**,** the weaknesses in the ROPI reasoning and what are said to be its internal contradictions mean that it was referred to at some length. So, for what it is worth, I set it out:

> "59. We believe that there is only a very weak case to be made for introducing a **compensation bond** and have therefore decided not to proceed with it.
>
> 60. Of the 551 respondents who mention it, only 81 believed it was an appropriate option. Many were concerned that the compensation would only start to be paid out once the line had been running for a year. Others did not believe it would help the local property market. And in contrast with the hardship property purchase scheme there is no particularly affected minority that would be helped.
>
> We have also made the decision not to introduce a **bond-based property purchase scheme.**

61. Under such a scheme, as stated in the February 2010 consultation document, a qualifying property owner would apply to the Government for a 'bond' or guarantee to purchase the property at a future date. Rather than leading to an immediate sale, the bond would guarantee the holder that once a certain stage in the project has been reached, they would be able to sell their property to the Government at its unaffected market value if they were not able to do so on the open market.

62. We learnt, through the consultation process, that many respondents felt the bond-based property purchase scheme might have the potential to make a positive difference.

63. But it also became increasingly clear that we cannot discount the associated risks and costs.

64. The bond-based property purchase scheme would impose an additional burden on the taxpayer.

65. It also might have run the risk of exacerbating blight (the very problem it seeks to address) if it led to the Government owning so many properties along the line of route that it unsettled the balance of communities and significantly lowered home-ownership.

66. It is also important to stress that this proposal did not receive unambiguous support in the responses to the February 2011 consultation.

67. As stated above, 4402 consultation responses stated outright or qualified support for a bond-based purchase scheme.

68. It is, however, important to set this in context.

69. The vast majority of those who responded to the consultation (and even the vast majority of those who responded specifically on property issues and expressed serious concern as to the impact that HS2 might have on property values and communities) did not comment either way on the merits of the bond-based purchase scheme.

70. We have therefore decided not to take forward the bond-based property purchase scheme."

732. The "next steps" were set out: "We recognise that to develop an effective set of policies on blight and compensation we have to understand the market impacts and local issues thoroughly. That is why we will consult further on blight and property proposals". Mr Wolfe commented that the first stage of consultation might have been thought to be the point at which this reason given for the second stage would have been understood.

733. I now turn to the sorry saga of the consideration given to HS2AA'S consultation response. It took until November 2012 for HS2AA to track down what had happened. Ms Wharf examined the consultation responses on the website on 30 May 2012: no response to Questions 1-6 was listed, and only a short response to Question 7, but not the whole of the document to which the entry referred. DfT then found out that 413 consultation responses had not been considered by DbD, which then carried out a further analysis of them.

734. The Addendum report by DbD said, in a footnote, that it was HS2AA's answers to Questions 1-6 which had been omitted, but not its answer to Question 7. This Addendum report concluded that the omitted responses provided nothing which would have altered the substance or balance of their original report, nor would they have affected the considerations which informed her in taking her decisions following the consultation. On 17 July 2012, the SST made the Written Statement in Parliament, to which I have already referred in the HHL case.

735. Various other problems came to light, so HS2AA sought to identify exactly what document had been considered by DbD in relation to Question 7. What eventually emerged from the Treasury Solicitor on 7 November 2012 was a 6 page document which was not HS2AA's response at all, but was a draft of a briefing document prepared for its affiliate groups to consider when preparing their own responses. It was not a summary of the Question 7 response, though it contained many of the conclusions of its full response. This was the document, the Treasury Solicitor said, which was on the consultation website as the response, and was referred to in the Addendum report in the footnote as the response which DbD had already analysed from HS2AA. There is nothing in the Addendum Report to suggest that any further Question 7 response was considered in it; rather the response had already been considered. But as it turned out that was the wrong one.

736. Ms Wharf was understandably critical of what must have been DbD's original conclusion that the 6 page document was HS2AA's response in the light of what that 6 page document said.

737. Like HHL, HS2AA tried to obtain the materials used to brief the SST, which could have been important in the light of what was actually sent to and received by Mr Graham. However, this request was rejected since it was for "preparatory works in a process that led to the decision documentation in January 2012. These internal documents add nothing substantial to the published documents and their reasoning. The published documents provide a detailed public record of the matters taken into account and the process which led to those decisions." This was further explained in the evidence. Of course, that no doubt entirely accurate reply opened up a further avenue of attack, given the SST's problematic reasoning in the decision.

738. This answer is also consistent with the letter dated 26 September 2012 from the Treasury Solicitor to the solicitors for HHL on the same issue as to what was before the SST; I have quoted from it in the HHL consultation case. Mr Graham's third Witness Statement, paragraph 481, said that the SST "had given careful consideration to the property purchase bond scheme", but her conclusion was against it. The reasons for her decision were in ROPI paragraphs 61-71. That is important, as I shall come to.

739. Mr Graham then elaborated in a way which Mr Mould accepted could not be extracted from ROPI. She was concerned, at paragraph 482, that the effectiveness of the scheme was uncertain, the consequent risk of significant cost escalation, made it unjustifiable to place such a significant liability on the taxpayer, with the risk of creating a precedent for other projects. She considered, at paragraph 484, that her decisions struck the right balance between helping to ease blight and avoiding placing an unreasonable burden on the taxpayer "or on the promoters of similar projects in the future". I cannot see in ROPI any reference to doubt over the effectiveness of the scheme or to the risk of setting a precedent for promoters of other projects.

740. Mr Graham's third Witness Statement, of 3 August 2012, described the role of DbD and how it dealt with the omitted responses; it appears to have assumed that

DbD had considered originally the full response to Question 7, when the 7 November letter from the Treasury Solicitor was later to show that it had only considered the 6 page draft for affiliates. Mr Graham and his team had read and considered the HS2AA responses separately from DbD, as they had done with a number of "key stakeholders'" responses. Mr Graham said that he had received the long response to Questions 1-6, and the long response to Question 7.

741. Mr Graham's fourth Witness Statement of 11 September 2012 said that the full response on property issues from HS2AA had been considered by the officials who advised the SST and had drafted ROPI. He also said that the full response on Question 7 had been considered in the Addendum report.

742. My findings on this are that the officials did receive and consider the full Question 7 response, since it was emailed to them, and HS2AA was regarded as a key stakeholder, so its responses would have been singled out for attention. I accept that Mr Graham would have direct knowledge of this. I reject the suggestion that DbD ever considered the full response: its own documents and the 7 November 2012 letter from the Treasury Solicitor are inconsistent with it. Mr Graham cannot know what happened there; he assumed, reasonably enough, that DbD had the full response originally, and then assumed that having omitted it, it was what was considered in the Addendum. But the Addendum Document, and Ms Wharf's evidence as to the website contradicts that, as does the 7 November letter. There was no response from Mr Graham to that letter.

743. I do not regard the error in that respect in his fourth Witness Statement, at paragraph 29, as undermining his evidence about what DfT officials read because he would have a clearer and more direct picture of what officials were doing. But it means that the Written Statement of 17 July, to the effect that the response had been considered and added nothing of substance was founded on a misunderstanding that DbD had actually read the whole omitted response. The evidence shows that it did not.

Legal principles

744. It is unnecessary to add at this point to those which I have set out in dealing with the Bucks CC Group's consultation ground.

Ground 10 (a): Insufficiency of information for consultees particularly in the light of the two stage process

745. Ms Wharf said in her first Witness Statement, and I quote it as HS2AA's introduction to this issue:

> "As a director of the national campaigning group against HS2, the issues around compensation were perhaps the most emotive of all for people directly impacted by the proposed route. Both before during and after the February 2011 Consultation period I was contacted frequently by people asking for advice and information on this issue. I was personally involved with many deserving and tragic cases with people who had a pressing need to move for family or personal reasons (eg the need to move due to illness, bereavement, divorce, to be nearer to family) yet could not do so and were trapped by the blight of HS2. The publication of materials on compensation as part of the February 2011 Consultation was therefore extremely important to many people. It was asking the people who would be suffering personal financial loss through absolutely no fault of their own (totalling in many cases to tens of thousands of pounds) due to HS2, about their views on compensation options. It is inescapable that they would need enough information so they could assess how they personally would be affected, before they could intelligently respond even at a principles level. The bare outlines provided even in Annex A failed to do this, and many individuals asked our organisation if we could provide basic information as to how the schemes would work. I believe it was unacceptable that the Claimant

> should have been the mediator on how such schemes might work."

746. Mr Wolfe accepted that in principle a consultation process could proceed in stages, an option stage first with consultation on the details of the chosen option to follow. However, for that to be lawful, sufficient information about the options had to be available at the first stage for consultees to understand what the proposals were, so that intelligent consideration could be given to them and an informed response made. Where that did not occur, the split process was unlawful.

747. First, the Consultation Document which underpinned the decision unlawfully failed to provide consultees with sufficient information to enable them to understand what the proposed options were, how the different options might impact on them, what their advantages and disadvantages were in the eyes of Government, and then properly to respond to the consultation, expressing an informed view for or against such options, directed to the issues which were to weigh in the decision. This was particularly important given what was at stake for residents.

748. A great many consultees specifically complained about lack of information and detail in the consultation materials: they lacked sufficient information to be able to tell how each option would affect them individually, including for example how close to the line the various options would operate, who would be regarded as qualifying property owners for each scheme, or what would happen to those whose houses had been specially adapted for disability or age, nor could they tell what was meant by "significant loss of value".

749. The paucity of information and confusion surrounded the two-stage process was an important finding by DbD.

750. The ROPI stated that the SST had reached her decision on the first stage without understanding market impacts and local issues thoroughly. If that were right, there

could not have been sufficient information provided to the consultees to make an informed response, and the two stage process was doomed from the start.

751. Second, when the Secretary of State came to evaluate consultation responses, she placed weight on the scale of support for options among consultees, as ROPI demonstrated. So this was not a consultation the fairness of which can be judged only by reference to the understanding of expert consultees, or consultees with access to additional information. The benchmark here was the information needed to give a sufficient understanding to each ordinary householder, whose view for or against an option would be numerically counted (and a decision based partly in reliance on the numbers of supporters or opponents for any particular purpose would be made) when it came to deciding between options.

752. Third, the fact that HS2AA's response, running to some 34 pages, demonstrated, as the SST said, a good understanding of the options and offered views on matters such as relative costs, is no answer to this ground of challenge. HS2AA complained that it had not had sufficient information to make a properly informed response, even with its private discussions with DfT and HS2L officials. And the mere fact that some consultees responded did not show that the information provided to them was legally sufficient, particularly when many of their responses complained of lack of information.

753. This was a consultation directed at the public in large numbers, not with HS2AA as an organisation alone, nor one acting or able to act as the representative of residents. It was not sufficient for information for them to be available through others, or from research conducted by consultees.

754. Fourth, Annex A talked about the options "hav[ing] been developed", but none of the documentation or information arising from that development process was provided to consultees including those who asked for more information. Where the decision-maker, as here, had access to important documents material to the decision and whose contents the public would have a legitimate interest in knowing, then those documents should be disclosed in the consultation process. Mr Graham referred to a number of factors which were said to underpin the choice of compensation option' but none of these were mentioned in the Consultation

Document. He explained the reasons for rejecting the property bond option on the basis of new material not previously relied on.

755. Mr Mould submitted that the SST did not act unlawfully in her approach to consultation. It was fair and reasonable to consult first on high level considerations and on three broad options for discretionary compensation in the February 2011 consultation to inform the selection of which discretionary compensation scheme or schemes to take forward for further development and public consultation, followed by a second public consultation focusing on the details of such schemes targeted primarily at those property owners likely to be affected.

756. The information provided in Annex A of the Consultation Document was sufficient to enable consultees to make an informed response at the first stage of the overall consultation process, which focused on the principles of a discretionary compensation scheme. This broad outline of the different options for different types of scheme which could, potentially, be taken forward was appropriate and proportionate for the purpose of that stage of the consultation.

757. The consultation responses made by HS2AA (and others) showed that sufficient information was given in Annex A of the Consultation Document to enable consultees to respond intelligently and on an informed basis. A fair and proper consultation did not require the SST to put into the public domain her background workings or information provided to her prior to the February 2011 consultation. The information provided in Annex A formed an appropriate and proper basis for the consultation process being undertaken at that time.

758. There was no basis in law for the assertion that the requirements of proper and fair consultation, and thus any decision following the same to be lawfully made, required the Secretary of State to make public her cost/budget sheet, inviting consultees to "comment on the appropriateness of any figures". HS2AA was a consultee, not a decision-maker.

759. HS2AA's misunderstanding of the purpose of the 2011 consultation was apparent from the information which it asserted ought to have been provided, namely the meaning of 'significant amount of value', how the Secretary of State would design a revised hardship based scheme, for example, as regards threshold, the maximum distances (or other determining factors) from the proposed route which would be used for each scheme; and how "qualifying property owners" would be defined.

760. Further, Annex A made clear that the detailed arrangements for discretionary compensation were to be developed as part of the second stage of consultation

> "[31]…The response from this consultation will help to inform the detailed development of a scheme. This will include exactly what any scheme might look like, how it might operate, who would be eligible and how it would be administered."

Ground 10(a) Conclusion on the sufficiency of information

761. I am satisfied that the SST did not make sufficient information available to consultees at the first stage for the consultation process to be fair; it was so unfair as to be unlawful. Part of my views on this are coloured by the second issue, as will become apparent.

762. It is incontestable but that the Consultation Summary Document on this topic could not have enabled anyone to answer Question 7, whatever else it may have permitted in relation to the other 6 Questions. Its general availability is of no consequence but it was the document containing the response form. The blight and compensation fact sheet handed out at road shows was a little better, but contained nothing about the hardship scheme and little more than the briefest of description of the mechanics of the other two options. It contained nothing to convey the basis upon which the decision would be made or of the two stage process. So I have concluded that that could not have provided sufficient information.

763. Annex A itself was the only source of information upon which the SST can really rely. One copy, perhaps more, of the main Consultation Document was available for reading at the road shows, but would have been in considerable demand on all topics. Copies of Annex A were not separately available for reading or for removal by potential consultees. I accept that information up to but not exceeding the level in Annex A would have been provided by staff at the road shows, or in response to questions on cards, to the extent that staff were available to be questioned, or cards were answered. There were problems on a number of occasions with both.

764. However, individuals who read the Summary or the fact sheet, each of which they could take away from road shows, were told that Annex A contained the relevant material. The main Consultation Document was available in libraries. It was available to read on line for those adequately equipped to do so. It or Annex A could have been ordered over the telephone, although that required at times more persistence than the words imply. I have come to the conclusion that that manner of making the information in Annex A available was not so unfair as of itself to be unlawful.

765. The question therefore is whether the information in Annex A itself is insufficient for a fair and lawful consultation. I accept that the Government was entitled to hold a two stage consultation process, and that it could decide that the boundaries between the two would be crudely described as approach or principle and then detail. But Mr Wolfe is right that that process makes it important that the information at the first stage is sufficient for consultees to make an informed response as to the option to be taken forward in detail.

766. Question 7 asked whether the options were agreed, rather than making a distinction in approach between the options. It offered no direct scope for the expression of a preference. The options, according to Annex A, would be measured against the five issues on which the views of consultees were expressly sought: effectiveness in assisting those affected, supporting the proper functioning of the housing market, ensuring that the house holder would be paid compensation, the length of time it enabled the house holder to stay in the house, and the relative risk of the social effects of the Government owning large numbers of properties in an neighbourhood. The information provided in Annex A was about the mechanics of the three options. The differences were explained in terms

of the mechanics: purchase when qualified, guarantee of purchase later, guarantee of compensation later. There was no suggestion that they would operate differently as between applicants so that those who qualified for the one in any given situation, might not qualify for the other. There was no information in Annex A about how, if they were to operate differently between one individual and another or one situation and another, they would in practice do so. No detail was available in answer to questions about whether and how the options might differ in practical value to those suffering from blight. Detail was for the next stage.

767. If the consultation was about answering Question 7, the absence of details, about how the various schemes might operate, might not have mattered since the Question only required very general consideration, devoid of any element of choice between schemes. It is impossible to tell how many of those who expressed no preference were answering that Question in the very way it was asked, although the absence of expressed preferences came to play a significant part in the Government's decision. But, for those who had it, Annex A showed that, although the consultation Question could not be answered by reference to them, the Government was seeking views on which one of the three options should be taken forward for the second stage consultation on details.

768. The consultee therefore needed sufficient information about the factors which would influence the first stage decision. It is here that what was said and not said matters. The five issues to my mind explained the basis upon which the decision would be made. The absence of further detail about how the three mechanisms might be differentiated in practical operation and degree of benefit to those suffering "significant loss", would suggest to many that the decision would be made on the basis of the effectiveness of the three different mechanisms in meeting the five factors, each of which might tell in favour of different schemes and the decision on which would require an overall judgment. The consultees' preferences and reasons would inform that choice. The schemes were not differentiated on some other basis, for example that more might gain or lose under one or the other, or that qualifying persons or situations might be very different as between mechanisms, or that those who suffered significant loss would be more protected under one than under another, or that one might cost so much more that a scheme which achieved less could be chosen. On the basis, however, that the choice would be made by assessing the three options against the five factors, there might have been enough information for a reasonably informed response. That might also have been a defensible line to draw between the stages.

769. However, the information provided was inadequate as became more apparent with the decision. Some consultees who said that there was insufficient information clearly realised, rightly as it turned out, that there would or could be differences between the schemes which the Government would consider in the first stage decision, which would go beyond which was the most effective in meeting the five factors.

770. It is not possible to read the decision in ROPI without concluding that there were differences in the ways in which Government saw the three options operating as between individuals suffering significant financial loss. There is otherwise a large and unexplained gap in the reasoning between the consultation material with its five factors, and the conclusion that one scheme would be much less costly, and involve rather less property acquisition than another. Indeed the options are not assessed against their effectiveness in relation to the five factors.

771. The decision and supporting reasoning show that the costs and risks to the public purse are different as between the three mechanisms, or at least as between the one preferred by consultees, the property purchase bond scheme, and the chosen hardship scheme. There is a difference in performance which might lead to more houses being owned by the Government under the property purchase bond scheme than under the hardship scheme. These points relate to differences in the way the Government must have envisaged the schemes would be operated by it in alleviating generalised blight. The implication of the reasons for the decision in ROPI is that the hardship scheme was to be operated on tighter qualifying criteria than the bond based property purchase or compensation scheme, or would do less for those who suffered serious financial loss as a result of generalised blight, otherwise the different costs and level of property purchase would not have been the issue. There would be differences between them in who would benefit, and in what circumstances, going well beyond any differences inherent in the three mechanisms.

772. The possible causes of these differences in the way in which the schemes would operate in practice to relieve financial suffering were not outlined in the consultation material, yet they must have existed before the decision in ROPI, for the cost and level of property purchases to differentiate between schemes. The unspoken qualifying criteria for each scheme affected costs and risk to the public purse. There was nothing in the consultation material to indicate what it was about the three, in the Government's eyes, which could mean that more, and decisively more, would be owned in the property purchase bond scheme. The differences in the nature of the three mechanisms cannot explain that, or if they

can, that ought to have been set out in the consultation material, in order for the response to be sufficiently informed. Consultees should have been told what it was about each scheme which could affect, and how, which one was chosen by Government. The reasonable consultee was not to be supposed to know what the Government had failed to tell them, to the effect that one scheme might be more costly or open-ended than another, or the one so much more restricted in beneficiary than another, let alone how, but that that would be crucial to its decision. It was not obviously inherent in the language describing the approaches, or in the issues set out for comment.

773. That is the sort of detail which should have been provided, since it goes to the first stage principle. Government had drawn the line in the wrong place, plainly taking into account unspoken detail relevant to the first stage choice, which it had not merely not revealed but which it had not set out in response to justified requests, and which it positively refused on the ground that it was not yet relevant. When Government took that into account, it failed to observe the consequence for the decision it was to make of where it had drawn the line between principle and detail.

774. This information must have been known to the Government before the consultation began, and if not, reliance on it was so unfair as also to make the consultation unlawful, since it changed the whole basis upon which the consultation was carried out.

775. This is not a question of the definition of "significant loss" as such, nor the provision of all the internal information which Government had about the operation of similar schemes elsewhere. But Government did have information about that, and could have used it to illustrate the sort of factors which evidently by the time of decision were crucial. If that experience is what weighed with Government, that experience should have been referred to in order to provide sufficient information. If that material played no real part, and I do not accept the argument that that is material which Government should have made available simply because it had it, then other information was required about the sort of factor in the practical operation of the three mechanisms which could affect the choice of the one to proceed with. The five factors identified did not play that part, nor, if they were to do so, was sufficient information given about how or why that might be so as a means of differentiating between the schemes.

776. An alternative way of putting the same point is that the ROPI decision was made on a different basis from that on which consultation took place.

777. I accept that HS2AA itself as a corporate body may have had enough information from its own resources, and enough experience of dealing with Government to realise that the practical operation of the schemes might affect the decision in principle. But that is not an answer to the need to provide HS2AA with the information as Government saw it. HS2AA's response might or might not hit the target. Still less can it be said that, even if HS2AA itself corporately were adequately informed, that that meant that all its various members and affiliates should be taken to have been adequately informed, or to have been the recipients of HS2AA's fund of knowledge. HS2AA is also entitled to point out that those consultees who were not its members were disadvantaged, and though not Claimants, their inadequately informed responses or absence of response, would have affected the way in which the numbers of responses were assessed in the decision. They came to play a very large part in the decision. The Government discounted the strong support given for the bond based property purchase in part on the grounds that the large majority of respondents concerned about the impact on property values expressed no view one way or the other. If they had been adequately informed as to the basis of the consultation, they might well have expressed views on the point one way or the other.

778. The comment in paragraph 21 of ROPI, set out above, shows a misapprehension of the information required. There was no balance to be struck; the information had to be sufficient for informed consultation, the balance could not be struck so as to leave the consultee with insufficient information for an informed response. Read strictly, this is an admission that insufficient information was provided but for a reason. Moreover, as ought to have been obvious, the difficulty in reaching policy conclusions, before having consulted properly, required more detail, rather than a balance in which less detail was provided. It also emphasises the need for the SST to consider carefully HS2AA's response which could have helped the understanding of the property market at that stage.

Ground 10 (b) : Changing the basis of the decision from the basis of the consultation

779. Mr Wolfe submitted that the decision was unfair as it was not based on the five issues which had been identified to consultees as the intended basis for evaluating the options and on which comments were invited. They were reasonably read as the criteria against or basis upon which the decision would be reached. The Consultation Document had specifically said that the Government was "considering the following issues in determining the most appropriate discretionary support arrangements for affected property owners" and that "the Government would welcome views and comments on these issues to inform the development of a preferred approach to be consulted on in early 2012."

780. Ms Wharf said in her first Witness Statement that HS2AA and many others regarded the five issues on which the then SST sought comments in that way and referred to them as such in its responses to the consultation. HS2AA's response had addressed each of what it described as "criteria" and suggested that they should be revised to guide the choice of scheme and its details.

781. Mr Wolfe contended that the decision was, instead, unlawfully based on considerations which had not been identified to consultees. Consultees were thus unlawfully denied a proper opportunity to respond to the factors which, in the end, were determinative, let alone were they able to do so on a properly informed basis.

782. On his analysis, the reasons for the SST's decision to reject the bond-based property purchase scheme were the risks and costs of the bond based purchase scheme, the additional burden on the taxpayer, the risk of exacerbating blight, and the lack of unambiguous support for it. None of these were among the five issues identified to consultees as the issue upon which their views were sought. Precedent and effectiveness were raised by Mr Graham as additional reasons.

783. Mr Graham took those reasons in turn. I take costs and burden to the taxpayer together, and they are the main point on which Mr Wolfe relies. There was no evidence that new information on costs came to light during or after the consultation process. No information was given to consultees about relative costs or financial limits. It was always clear that the additional discretionary scheme would cost additional money, and that that might be offset by rental income, depending on the scheme. It was unfair now to claim, as the SST did, that "assessment of cost and risk and effectiveness and practicability of delivery are

plainly relevant". It was not for consultees to guess that factors other than those the SST identified would be critical to the decision.

784. A single reference to "cost" in the Consultation Document was insufficiently clear that cost would be a factor in deciding between the proposals. Annex A contains this sentence which I have italicised, in the discussion of the fifth of Mr Wolfe's issues:

> "Avoiding Government owning large numbers of properties": "While a certain number of properties would inevitably need to be purchased in order build a new line, the Government considers that it is unlikely to be in the local or national interest for the state to buy up large numbers of properties in the areas near the proposed route which would then need to be managed, tenanted and eventually sold on. This could disrupt the property market and contribute to its stagnation, and the presence of many tenanted rather than owner-occupied properties may have an effect on community life and property values. *Purchasing, maintaining and managing properties would also require significant outlay of public funds.* The Government is also considering whether purchasing properties along the proposed route can be avoided except where absolutely necessary."

785. In correspondence dated 26 September 2012 the Treasury Solicitor confirmed that the SST relied on this passage to justify his position that cost was adequately explained to consultees to be a relevant factor. But, submitted Mr Wolfe, there was no clear explanation of the issues relevant to cost, and whether any amounts were earmarked for that purpose; and why one scheme would be more costly. Consultees would have needed sufficient information about the relative cost implications of the proposals to make meaningful responses on the point.

786. Exacerbating blight: this should have been explained, and could have been dealt with. Lack of unambiguous support: 98% of those supporting a particular scheme supported the bond based property purchase scheme; the numbers obscured the fact that many bodies including local authorities and organisations of lenders and

landowners supported it. Bizarrely, given this reason, only 21 supported the chosen scheme.

787. If consultees were expected to comment on other but unidentified issues, they needed sufficient information about those other issues in order properly to formulate responses. Had those issues been identified along with sufficient supporting information, consultees could and would have commented on them. This applied to precedent, for example.

788. Nor is it an answer that the consultation document promised "further analysis of the proposed options". That suggested that the decision was based on analysis and information never provided to consultees, for their comments on it to be taken into account in the decision-making.

789. None of the statements made by the SST in the February 2011 consultation materials or during the consultation period indicated the compensation scheme would be qualified by concerns about setting a more expensive precedent, if that were part of the SST's thinking at the decision stage.

790. Mr Mould submitted that the SST did not act unlawfully in her approach to determining the preferred option to take forward for further consultation later in 2012. HS2AA referred to 'Five Issues' in its Statement of Facts and Grounds. Paragraphs 18-19 of Annex A of the Consultation Document made clear that those were matters on which the Government sought views and comments to inform development of a preferred approach to take for future consultation. These "issues" were not, and were not presented as, criteria against which the options would be assessed. This is evident from the express invitation for views and comments on the topics "to inform the development of a preferred option to be consulted on in early 2012" (paragraph 18 of Annex A). Those topics informed the consideration of potential options and were matters on which views and comments were sought to inform the development of a preferred approach for future consultation. They were not, and were not presented as, criteria against which the options would be assessed. Nor were they the only matters which the SST would be considering in assessing the appropriate package of discretionary measures to take forward.

791. Matters such as risks and costs were clearly matters to which the SST would, and would be required to, have regard to in deciding upon a discretionary compensation scheme. HS2AA was wrong to assert that cost was not a matter identified to the consultees as one of the factors which the SST was considering in assessing the appropriate scheme to take forward. Its relevance was apparent from paragraph 18 of Annex A. Issues such as cost, risk and deliverability were evidently matters to which the SST would have regard in considering the options to take forward. The contention that the absence of a more detailed reference to costs and funding implications implied that the SST would not consider the potential costs of different options to the public purse was unsustainable.

792. Part of the HS2AA response to the question of how the Government was to avoid owning too many houses, recognised that there would be a cost to the Government, but said that Government was better placed to bear it than individuals. It recognised that its preferred property purchase bond scheme was the most costly option for the promoter, and that was a disadvantage. It dealt with how, on this option, the Government could reduce the number of houses it would have to own or alternatively manage them effectively. So those two related issues were recognised to be in play and were addressed. A comparison was drawn with other property purchase bond schemes. It also included a comment from the SST reported in the press in December 2010, to the effect that while Government was obliged to treat those affected fairly, the taxpayers' interests had to be taken into account as well.

793. Mr Mould submitted that the concern that a property bond scheme would lead to Government owning properties so as to exacerbate blight was an issue raised in the Consultation Document (see paragraphs 25 and 18 of Annex A). The property bond based option was thought to risk exacerbating the problems of blight because of the extent of properties which Government would own. That was a relevant matter in deciding not to take a proposal forward for further development and consultation.

794. Paragraph 19 of Annex A expressly identified that further analysis was being undertaken alongside the consultation process to inform the SST's decision on the option(s) to be taken forward for further public consultation. Fairness did not require her to place that analysis in the public domain during the February 2011 consultation process, nor did she act unreasonably in not doing so. Consultees

were not thereby denied a proper opportunity to respond to the February 2011 consultation.

Ground 10(b): conclusion on change of basis of decision

795. I do not accept that there was a change in the basis of decision by reference to the numbers expressing a preference for one scheme or another. It must have been obvious to any consultee that the numbers supporting any particular option could be a factor swaying the Government. The distinctly curious language of the decision whereby the "absence of unambiguous support" for the option which was the overwhelming preference of those expressing a preference did not tell in its favour, yet the absence of any real support for the hardship scheme did not tell against it, is not to the point here. Nor is the reference to the exacerbation of blight a new point: it is simply a reflection of the concern about the effect of the Government owning too much property, which was one of the five issues.

796. It may not matter precisely how the five issues or points are characterised. What matters is that it was on them that views were sought, and no other factors were mentioned as relevant, even if views were not to be sought on them. I have accepted that the views expressed by consultees were relevant, but that is obvious. In particular, the cost and risk of cost increases were not mentioned. Now, I acknowledge that the cost to the public purse of discretionary compensation is a highly relevant matter for Government to consider, as is the impact which a scheme here could have on the cost of other projects. This is to be seen however against the background of the clear expression of concern by the SST to Parliament that the cost of public infrastructure would be unfairly borne by the happenstance of property ownership along its line, if there were not fair compensation for those who suffered significant loss: "It is right and proper that individuals who suffer serious financial loss in the national interest should be compensated".

797. This was followed by a response to anxiety over the setting of a precedent by the comment that this was the direction which compensation was taking. The precedent was therefore good or one acceptably being set.

798. So there was a legitimate reason why at least some consultees would not have regarded total cost or precedent as the basis of the choice to be made, unless one option was more expensive than another in achieving the same end. But that is not the point made by Government in its decision at all. As I understand its reasoning, the cost difference arises because one achieves less than the other for those suffering the same degree of significant loss.

799. But taking Mr Mould's submission at its strongest, the question still remains to be answered: were consultees sufficiently informed of whether or on what basis the cost to the taxpayer could affect the decision? There was nothing in the consultation information from the Government to suggest that it would operate so as to affect the choice between the options or in what way. The description of the mechanisms does not draw such a distinction. There is nothing in the consultation information to show what effect cost could have on the answer to Question 7, or on the choice of options, or on the practical operation of the scheme or rather what features of the practical operation of the schemes would affect their relative costs. The reference to the cost to the public of owning properties goes nowhere as a point of distinction between the three options, unless there is something about the schemes which means that more would become Government owned in one than in another. There was no information as to why that should be so, rather than it being a point which went to how the qualifying criteria were set in all schemes. This is precisely where the drawing of the line between the stages broke down.

800. The references to occasions in the past where schemes of the type being considered here had been used could not answer that point. The fact that some consultees, HS2AA included, were aware that some schemes would cost more than others does not answer the point. Once consultees were aware, with some of the detail, as to how the schemes would work in practice so that one might cost more to achieve the same or greater protection, responses might answer those features. They could comment on the different degrees of loss or different qualifications for different schemes, or compare the degree of help which one offered for the money compared to another. To answer this, the sort of detail was required which many consultees, including HS2AA, sought.

801. There was also no suggestion that consultees should try to deal with a concern about precedent and the increase in public or promoter's cost on other unnamed projects, or to put it another way, should try to respond to a Government now

accepting the continued absence of fair compensation in other cases for those who suffered serious financial loss in the national interest. Preventing the latter had been more an objective than a matter of concern. The precedents of other schemes of the same type were mentioned, not to discourage but to offer some point of reference. There must have been more than some vague notion which underlay what the Government decided; but the fact and nature of this concern, highly relevant to the ROPI decision as it turned out, was not mentioned, and could not have been anticipated. The Government's line had appeared to be the opposite. Caution, however, is required over this point. It only appears in Mr Graham's evidence as a concern. It also appears from the responses of others that there was a concern about precedent, noted in ROPI, which it would have been legitimate for the SST to take on board. If that had been the only point, it might have been insufficient to show the consultation to be so unfair as to be unlawful, although it involved an apparent shift in Government's public stance.

802. However, I have come to the conclusion that Ground (b) is made out along with Ground (a). They overlap significantly. Inadequate information was provided for consultees on what was to become the unheralded basis for the decision. It was unfair to change the basis of the decision given the nature of the information which the Government had provided, in particular against the backdrop of its stated aims and concerns.

10 Ground (c) : Breach of legitimate expectation

803. Mr Wolfe submitted that the SST's statement to Parliament on 20 December 2010 created a legitimate expectation that the scheme would ensure that individuals who suffered serious financial loss in the national interest would be fairly compensated. The scheme chosen and the schemes proposed in detail in October 2012 would, by their very nature, provide support, by contrast, to only a minority of the people suffering from generalised blight. What was promised was clear enough. (I have already set it out.)

804. The issue was not the "nature, terms and purpose" of the December 2010 statement, as the SST submitted, but how on a fair reading of the promise it would have been reasonably understood by those to whom it was made. It was not a promise of a process of consultation but of the application of principles to

mechanisms which were being consulted on. The maker of a statement could not change its effect by later claiming to have made it for some different and unstated purpose.

805. When the Written Statement of December 2010 was compared with the decision in ROPI, it was clear that there had been a shift from a principle of compensation to a cost-driven scheme. Although HS2AA's response to consultation did contain a reference to cost, it cannot have been that which led the SST to reach her decision on the basis of cost. It was also unfair for it to be turned into the driver of the decision.

806. I start with the summary of the principles in *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32 [2012] 1AC 1 at paragraph 38 where Sir John Dyson SCJ said:

> "28. In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, at para 60:
>
> It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990]1WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

807. Mr Wolfe also relied on the concept of conspicuous unfairness as part of this ground. The relationship between that concept, as discussed and applied in *R v IRC ex p Unilever* [1996] STC 681, by Simon Brown LJ, and the concept of rationality was considered by Elias LJ and Sharp J in *R (Lewisham London Borough Council and Others) v Assessment and Qualifications Alliance and Others* [2013] EHWC 211(Admin). In particular, the Court considered whether it was truly a separate ground of challenge.

808. Elias LJ pointed out that Sir Thomas Bingham, having concluded that the actions of the IRC in changing a well established practice without warning was an unfairness amounting to an abuse of power, had treated that as a form of irrationality, rather than as the conceptually new point of abuse of power which had been advanced. Simon Brown LJ expressed the same view. Elias LJ said at paragraph 111:

> "But I do not believe that *Unilever* has formulated a fresh head of review conferring on the court a wide discretion to substitute its view of the substantive merits for the decision-maker. In order to constitute *conspicuous* unfairness, the decision must be immoral or illogical or attract similar opprobrium, and it necessarily follows that it will be irrational. I would treat this concept of conspicuous unfairness as a particularly and distinct form of irrationality, which in essence is how it was viewed by Sir Thomas Bingham in *Unilever*. There are no doubt cases, of which *Unilever* is one, where the concept of fairness, and an allegation of conspicuous unfairness, better captures the particular nuance of the complaint being advanced than the concept of irrationality. Indeed, I think that is typically so in any case where the alleged unreasonable behaviour involves a sudden change of policy or inconsistent treatment. It is more natural and appropriate to describe such conduct as unfair rather than unreasonable. But in my view it is only if a reasonable body could not fairly have acted as the defendants have that their conduct trespasses into the area of conspicuous unfairness amounting to abuse of power. The court's role remains supervisory."

809. Mr Mould submitted that the representations relied upon had to be "clear, unambiguous and devoid of relevant qualifications". The SST's statement to the House of Commons on 20 December 2010 gave rise to no legitimate expectation

as contended for by HS2AA, or otherwise. The nature, terms and purpose of the statement were incapable of raising any legitimate expectation as to the nature or scope of any discretionary scheme or any sort of promise which could properly be relied on by HS2AA as a matter of law. The SST's statement had to be read as a whole. It merely announced the preparation of proposals for a discretionary package of measures to supplement existing statutory compensation arrangements. It was a statement of political aspiration and intent directed at a substantial body of people, ultimately at the nation as a while; it anticipated the formal consultation process. The only legitimate expectation was that there would be a consultation process, which there was.

810. It did not promise full compensation, nor compensation for any loss of property value on a short or long term basis. The aim but not a commitment was to provide fair compensation which necessarily involved a balance. It also would endeavour to reduce losses so that they were not significant, ie not so great that it was unreasonable for the persons affected to bear them. Discretionary expenditure was always changeable. There could be no legitimate expectation of a particular outcome by scheme or effect, particularly as public money was involved.

811. HS2AA had to persuade the Court that the SST not only gave that assurance in a manner that bound her legally, but also committed her to a particular component of such a package (i.e. the components favoured by HS2AA).

812. If change there was, he put this into the same sort of category as the pre-election statements considered in *R v Education Secretary ex p Begbie* [2000] 1 WLR 1115. Laws LJ commented pp1130-1:

> "The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

813. In any event, the package of discretionary compensation measures to assist property-owners adversely affected by HS2 set out in the Review (including, but not limited to, the refreshed hardship-based property purchase scheme) met the aspiration presented in the Ministerial statement.

10 (c) Conclusion on legitimate expectations

814. I reject this ground of challenge. The statement by the SST to the House of Commons is not so clear, unambiguous and devoid of relevant qualification that it could found a legitimate expectation. The scope of what is "fair" and whether or not that includes a balance between the private householder and the taxpayer, the scope of "significant" loss, and its application over time, prevent its language giving rise to a substantive expectation as to a particular outcome from the consultation process, measurable with some certainty against the Statement. The broad intent behind the crucial words is clear enough, but the main point was, as Mr Mould submitted, to state the aspiration and values, but not firmly to commit the Government to more than the consultation process.

815. The Government was entitled to introduce factors which might tell against that in the consultation as it did, including the effect of the Government owning large numbers of properties. It was not said that the consultation process started from a premise which itself breached the legitimate expectation. The use of the words as a backdrop to the understanding of the consultee is one thing, but to turn it into a substantive legitimate expectation is quite another.

816. I also accept that the issue of public finance would always have been understood to be relevant, unless specifically discounted, by Parliament to whom the Statement was in the first place addressed. The absence in this Statement of reference to the Spending Review is of no consequence in my view. This is a case which falls within the scope of the "macro-political" field as in *Begbie*; it concerns high level policy decisions about how a major piece of national infrastructure is to be provided and who bears the cost.

817. Even if there had been a legitimate expectation, Mr Mould submitted that it had not been breached. I would simply be unable to conclude that it has been met or breached. The position is arguable either way. That reflects the breadth of the words used, and the difference between creating a general impression and closer textual analysis. That reinforces my view that no legitimate expectation was created. I do not know how the Government viewed it, Mr Mould's submissions apart, ROPI is silent on whether the broader aspirations of Government have been met. There is no conspicuous unfairness, or abuse of power.

10 Ground (d) : Unlawful failure conscientiously to take consultation responses into account

818. Mr Wolfe contended that the decision was unlawful because not all consultation responses including, in particular, most of HS2AA's response on compensation were conscientiously taken into account by the SST.

819. The fatal flaw in the SST's case is that, at best, it asserts what officials or "the Department" knew or were aware of: HS2AA had met officials, its response was considered in detail by officials advising the SST, similar proposals by HS2AA had been considered before by officials, its proposals for a property purchase bond scheme was well known to officials; see Mr Graham's fourth Witness Statement paragraphs 23-9. The reference to the SST is in these terms:

> "The proposed property purchase bond formed the basis for HS2AA's response to the 2010 consultation on the Exceptional Hardship Scheme (details of which are provided in paragraphs 449-452 of my Third Witness Statement). They were considered in detail by officials in advising the Secretary of State in deciding his response to that consultation, as well as in preparing for the 2011 consultation and agreeing consultation materials. In each case, the Secretary of State gave close consideration to options of the kind proposed by HS2AA, and a property

> purchase bond was one of the options put forward in the 2011 Consultation Document."

820. The SST's case also included part of Mr Graham's third Witness Statement where he stated that HS2AA's consultation responses, as they came from a "key stakeholder", were read by officials and informed the preparation of advice for the SST:

> "279. The list of responses reviewed in this way was not intended to be exhaustive. Neither was it intended to replace the full analysis undertaken by [Dialogue by Design]. The aim of the exercise was to ensure that the substantive content of the consultation responses submitted by these organizations and individuals, given their particular areas of interest or expertise, was captured and considered, in order to inform the advice underpinning the Secretary of State's decision-making…
>
> 282. The information captured throughout this process was used in two ways: firstly to identify whether further work needed to be undertaken or commissioned from consultants; and secondly to inform preparation of advice to the Secretary of State to inform her decisions following consultation…
>
> 284. These analyses, including DbyD's response analysis, DfT and HS2 Ltd's parallel analysis of consultation responses from "key stakeholders", and HS2 Ltd's review of location-specific issues fed into the overall programme of work which informed the Department and HS2 Ltd's advice to the Secretary of State in support of her decisions following consultation…"

821. As a matter of law, what matters is what the SST took into account. She is not to be taken to know what her officials knew simply because they were her officials. Mr Wolfe relied on *R* (*National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154. Sedley LJ said:

> "26… It would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it.
>
> 27. In contrast to *Carltona*, where this court gave legal authority to the practical reality of modern government in relation to the devotion of departmental functions, the doctrine for which Mr Cavanagh contends does not, certainly to my knowledge, reflect the reality of modern departmental government. The reality, subject no doubt to occasional lapses, is that ministers (or authorised civil servants) are properly briefed about the decisions they have to take; that in the briefings evidence is distinguished from advice; and that ministers take some trouble to understand the evidence before deciding whether to accept the advice.
>
> 37. The serious practical implication of the argument is that, contrary to what the decided English cases take for granted, ministers need know nothing before reaching a decision, so long as those advising them know the facts. This is the law according to Sir Humphrey Appleby. It would covertly transmute the adviser into the decision-maker. And by doing so it would incidentally deprive the adviser of an important shield against criticism where the decision turns out to have been a mistake.
>
> 38… For the reasons I have given, it would be incumbent on such an official to ensure that either the advice or a suitable précis of it was included in the submission to the minister whose decision it was to be."

822. The Court then considered the extent of the material which the decision-taking Minister should have; the test was the familiar public law test: was something relevant left out of account by him? The Court cited extensively with approval from Brennan J in the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] 162 CLR 39.

> "A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such

> importance that, if they are not considered, it could not be said that the matter has been properly considered.
>
> The department does not have to draw the minister's attention to every communication it receives and to every fact its officers know. Part of a department's function is to undertake an evaluation, analysis and précis of material which the minister is bound to have regard to or to which the minister may wish to have regard in making decisions. The consequence is, of course, that the minister's appreciation of a case depends to a great extent upon the appreciation made by his department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of the ministerial function. A minister may retain his power to make a decision while relying on his department to draw his attention to the salient facts ....”

823. As Sedley LJ then said, paragraph 62, the Minister had to know that which was necessary but not necessarily everything that was relevant, since that could be sifted, and distilled by officials advising the Minister. What was relevant was enough to enable him to make an informed judgment. The fact that it might have been better for a Minister to have been told something would not of itself vitiate a decision.

824. Mr Mould submitted that the evidence before the Court established that responses, including that of HS2AA, were considered and informed officials’ advice to the Secretary of State. HS2AA’s preferred property bond option is expressly referred to in the Consultation Summary Report. The Review demonstrates that the SST had HS2AA’s case well in mind. The evidence before the Court establishes that responses, including that of HS2AA, were considered and informed officials’ advice to the Secretary of State. HS2AA’s preferred property bond option is expressly referred to in the Consultation Summary Report.

825. All material points raised by HS2AA in its consultation response were taken into account:

i. A summary of HS2AA's response to Question 7 was considered by DbD in its initial analysis. This is reflected in paragraph 7.3.8 of the Consultation Summary Report.

ii. HS2AA's full consultation response on compensation and blight was read and fully considered by officials in the DfT and HS2L for the purposes of informing and advising the SST in reaching her decisions following and in light of the 2011 public consultation.

iii. HS2AA's response to Question 7 of the 2011 consultation was essentially consistent with and based upon its response to the 2010 public consultation on the Exceptional Hardship Scheme. HS2AA's response to the 2010 public consultation was considered by the SST in preparing the 2011 consultation documents.

iv. On 27 May 2010 HS2AA had met with the Department and HS2L to discuss HS2AA's proposals in respect of property and compensation matters. HS2AA also met with HS2L officials on 11 October 2010 at which again property and compensation matters were discussed."

826. The SST also contended that there was nothing new of substance in the response which DbD had not considered, and officials were well aware of HS2AA's proposals. Mr Graham's fourth Witness Statement says "the property purchase bond was not a new proposal…it was first described in a paper prepared by HS2AA in April 2010"; paragraph 23, and "the proposals for a property compensation scheme…were substantively the same…well known to the Department for Transport and HS2 Ltd"; paragraph 25. (Mr Mould expressly did not rely on the detailed comparison carried out by Mr Graham of the EHS consultation response from HS2AA and its main 2011 response.)

827. Mr Wolfe countered this point: HS2AA's consultation response on this was materially different to what it had submitted in 2010, and the new materials included critically an analysis of the strengths and weaknesses of the three proposed schemes by reference to the 'five issues' set out by the SST on which consultee comments had been specifically invited.

828. The key issues considered in depth by HS2AA in its consultation response but not considered by the DbD Report or the Review were: the real examples of how the types of scheme under each option have worked in practice and why HS2AA said they could be distinguished or improved on; the role and importance of re-mortgaging (as well as selling) and financial and property institutions' support for the HS2AA solution, including the BBA and National Association of Estate Agents, and the opposition of the Council of Mortgage Lenders and BBA to the hardship scheme, HS2AA's discussion of the five issues/criteria, the need for all those affected to be compensated and not just those with 'significant' losses; private sector precedents; the way compensation can assist progress on the project as well as householders, and the HS2AA analysis of fear of uncompensated losses as driving blight. These points, if conscientiously considered might have made a difference.

Ground 10(d) Conclusion on conscientious consideration of the HS2AA consultation response

829. The evidence demonstrates that DbD did not consider the full consultation response submitted by HS2AA. However, it is clear those DfT officials, and Mr Graham in particular, were not dependent on DbD's analysis for their understanding of its response. They had access to it via a different route. I accept Mr Graham's evidence that they were well aware of it, and were familiar with at least some of the thinking from earlier meetings and discussions with members of HS2AA.

830. Mr Wolfe is right, and the point was not really at issue, that it is the Minister's conscientious consideration of the response which matters; see the *National Association of Health Stores* case. The extent of the consideration given by officials is only relevant to the extent to which they were sufficiently informed to present the relevant material to the Minister for decision, in a way which satisfied the tests in *Peko-Wallsend*.

831. I also accept that Mr Graham did consider the full response conscientiously, and was in a position to advise the SST sufficiently of the substance of the consultation response, applying *Peko-Wallsend,* for her to be able to make her own mind up.

832. Thereafter, something went wrong. I have not been shown the briefing; disclosure of it was refused, though I was shown it in HHLs' case. In the end I do not need to decide whether the briefing failed to convey the substance of the response adequately, although that seems to be unlikely in view of Mr Graham's grasp of the issues generally, in which he has been steeped over the years, or whether it did but the SST did not consider it conscientiously.

833. Mr Graham's evidence was that SST gave close consideration to options of the kind proposed by HS2AA. I am not prepared to accept that very general statement as evidence that the HS2AA consultation response was considered conscientiously by the SST, and certainly not in the light of the language of the decision. Indeed Mr Graham's language does not actually refer to consideration of the response in question.

834. The failures of DbD are germane at this point, since an examination of the DbD analysis would not have remedied any failings. But, their reports, if their substance was conveyed to the SST as appears from the Ministerial Statement in July 2012, could have reinforced a misunderstanding about the extent and detail of HS2AA's response. The SST told Parliament that reading the further DbD analysis of omitted responses would not have altered the decision; but that report too was defective. It is impossible also to tell from Mr Graham's evidence in paragraph 284 of his third Witness Statement what effect that omission had.

835. Whichever way it happened, I am satisfied that HS2AA's response was not conscientiously considered by the SST for the purpose of reaching the decision on the issue on which consultation had taken place.

836. First, the HS2AA consultation response was couched in terms of the five issues or objectives, and measured the three options against them. This was the structure of response dictated by the SST's form of consultation. The decision simply does not grapple with that response or the structure of the thinking in Annex A to which it related. There is no coherent comparative analysis of the three options against the five objectives or against the more broadly expressed ambitions which underlay the Consultation Document, the Summary and Annex A. There is no evidence that the structured response to the question was considered from the form of the decision, or its reasons. They point the other way.

837. Second, the introduction of further issues, notably cost and risk, and the part they played, reinforces my conclusion that the judgment was made on other issues, rather than following upon a conscientious consideration of the responses. The reasons given by the SST in ROPI, which are said by the Treasury Solicitor to be the reasons for the decision, do not include all the reasons given by Mr Graham for her decision, which suggests that there was no clear process of considering the consultation responses. ROPI does say that it became increasingly clear that the costs and risks of the bond based property purchase scheme could not be discounted, but that became a or the crucial issue. Had the response been properly considered, the SST would have realised that she was making a decision based on a large new point of differentiation between the schemes. She ought then at least to have recognised the cost points made in the response.

838. Third, the HS2AA consultation response made many specific points, including points about the way in which the anticipated drawbacks of its preferred scheme could be met, on past experience, and how significant were the views on the approaches of all respondents involved in the property and property finance market. ROPI makes but a brief mention of the views of some who worked in those areas on the bond based property purchase scheme.

839. Finally, the reasons actually given are in part very odd. The refreshed hardship scheme was the one of which it was said by Government that it would "inevitably" lead to it owning large numbers of properties, and that that "may" happen with the property bond scheme. In ROPI, with no reference to any material or consultation response, that had become ignored on the one and a point against the other. Evidence about how the latter risk could be countered was in HS2AA's response. (It does also support my view that either the Government had information about how it intended to operate the schemes in detail which it did not share with consultees, or it changed the basis upon which it would compare the schemes, so that it was an advantage to one that it affected only a particular

minority, and a drawback of the other that it applied more generally to those experiencing serious financial loss).

840. The absence of support for the hardship purchase scheme was acknowledged but explained on the basis that it would only help a minority; the much greater support for the bond based purchase scheme was discounted on the basis that most people expressed no view. The ROPI does not deal with the problem of the lack of detail in this context, although that was a point made by HS2AA. Paragraph 21, ignoring its muddled thinking, cannot answer the problem of the effect of the lack of detail on the absence of responses expressing preferences, and the implications for the assessment of support. Nor does it recognise that the language of its own Question 7 did not actually invite the expression of a preference between options, and the absence of such expression of preferences had to be judged against the question.

841. HS2AA's full response was careful and substantial; HS2AA was a "key stakeholder" on this topic. I have read this response; if the response was considered at all, it was not considered conscientiously. It was in reality just brushed aside. The evidence from ROPI itself shows that to be so. The SST took a decision based on unheralded factors which seemed more important, and which, if Mr Graham is right and the Treasury Solicitor wrong, were not even fully expressed in ROPI.

842. I appreciate that the decision in ROPI is not to be read as a decision letter, and there is no reasons challenge available. The ultimate decision cannot be regarded as irrational. However, the quality or paucity of the reasoning has its part to play in the judgment as to whether or not the views being rejected were conscientiously considered. In my judgment they were not.

843. The consultation process in respect of blight and compensation was all in all so unfair as to be unlawful.

844. I will hear Counsel on the form of remedy.