Neutral Citation Number: [2020] EWHC 226 (Admin)

Case No: CO/3131/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2020

Before :

MR JUSTICE DOVE

- -

Between :

MR BRIAN ROSS AND MR PETER SANDERS (ACTING ON BEHALF OF STOP STANSTED EXPANSION)	**Claimants**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
-and-	
(1) UTTLESFORD DISTRICT COUNCIL (2) STANSTED AIRPORT LIMITED	**Interested Parties**

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- -

Paul Stinchcombe QC and Richard Wald (instructed by **Birketts LLP**) for the **Claimant**
Charles Banner QC (instructed by **Government Legal Department**) for the **Defendant**
Thomas Hill QC and Philippa Jackson (instructed by **Town Legal LLP**) for the **2nd Interested Party**
Hearing dates: 12th-13th November 2019

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Approved Judgment

Mr Justice Dove :

1. This is a claim for judicial review of the decision of the Defendant, the Secretary of State for Transport, proposed development a planning application made by the Second Interested Party to the First Interested Party as being a nationally significant infrastructure project ("an NSIP") in terms of sections 23 and 35 of the Planning Act 2008, and therefore subject to the approval processes required by the 2008 Act, including determination at the national level. The Claimants are Mr Brian Ross and Mr Peter Sanders, both of whom are acting on behalf of the group Stop Stansted Expansion ("SSE"). SSE campaign to ensure that any development of Stansted Airport is sustainable and takes due regard of the natural environment, heritage assets and the quality of life of local residents. As the Defendant did not consider the proposed development to be an NSIP, the Second Interested Party's planning application has fallen to be considered under the terms of the Town and Country Planning Act 1990 by the First Interested Party, in whose administrative area Stansted Airport lies. The First Interested Party had resolved to grant planning permission, but a final decision had not been made at the time of the hearing; as this judgment was in the very final stages of preparation the court was advised that the First Interested Party has decided to refuse planning permission, but since this new turn of events could only impact upon relief it seems sensible to continue to produce a judgment dealing with the substantive issues. The First Interested Party and the Second Interested Party are both joined to this litigation, but only the Second Interested Party participated in the hearing.

2. The planning application made by the Second Interested Party with which these proceedings are concerned involves building two new taxiway links, being a rapid entry taxiway and a rapid exit taxiway, and nine additional aircraft stands. These new developments are planned to take place in four separate locations within the existing footprint of Stansted Airport. It is uncontentious that these developments would increase the use of Stansted Airport's single runway and its potential to handle aircraft movements. The planning application also includes a request for the planning cap of 35 million passengers per annum ("mppa") to be increased to 43 mppa.

3. The Claimants challenge the decision of the Defendant of 28th June 2018 not to treat the planning application as development requiring development consent under the 2008 Act on two grounds. First, it is argued that the proposed developments should have been considered to be an "alteration of an airport" falling within the scope of section 23(4)-(6) of the Planning Act 2008. The effect of these provisions, it is contended, was that it was mandatory for the Defendant to consider that the proposed developments comprise an NSIP within the meaning of the 2008 Act. This is because, on the Claimants' calculations, the proposed developments would increase the "number of passengers for whom the airport is capable of providing air passenger transport services" by at least 10 mppa. Section 23 in effect provides that once this threshold of 10 mppa is passed, the Defendant has no choice but to treat the planning application as an NSIP and decide the planning application at a ministerial level under the framework of the Planning Act 2008.

4. At the hearing, in relation to Ground 1 various arguments were made which are more fully considered below. However, in short, argument centred upon the meaning of "capable" in the phrase "the number of passengers for whom the airport is capable of providing air passenger transport services" in section 23 of the Planning Act 2008.

The Claimants argued that the word "capable" indicated that one must calculate the number of passengers that could be transported through Stansted Airport exploiting the new infrastructure and the aircraft it serves, not limited to what would be likely but examining arithmetically what could be technically possible as a result of the proposed developments. The Defendant and the Second Interested Party argued that the number of passengers capable of being transported should be a judgment calculated by reference to what is a realistic and likely usage of the new runway infrastructure, rather than the most that might be hypothetically feasible. The Second Interested Party also disputed that the proposed structural developments constituted a relevant "alteration" under section 23, as there were no proposed changes to the runway itself.

5. The Claimants' Ground 2 is that, even if the proposed developments at Stansted Airport do not satisfy the NSIP criteria set out in section 23 of the Planning Act 2008, the Defendant should nonetheless have exercised his discretionary power under section 35 of the 2008 Act to treat the developments as nationally significant and therefore subject to the 2008 decision-taking process and a decision at a national level. In support of this ground, the Claimants pointed to, amongst other things, their suggestion that the application was in truth part of a wider project for expansion of passenger throughput in excess of the NSIP definition, and the ramifications of increased carbon emissions as a result of increased air travel which ought to have led to the conclusion that the development should be treated as an NSIP. Again, the Claimants' submissions in respect of this Ground are set out more fully below.

6. This judicial review application came before the court as a rolled-up hearing. Accordingly, it is necessary to consider in this judgment whether the Claimants should be given permission to bring these proceedings on their pleaded grounds, and, if any of those grounds are arguable, whether they should succeed in substance.

The Facts

7. In 1991, Stansted Airport was opened as London's third airport, there having existed a smaller airport on the site since 1942. Stansted Airport is presently the subject of a £600 million capital investment programme to transform passenger facilities. The development programme is being rolled out in three phases. The first phase focuses on improvements to existing terminal facilities: it commenced in January 2018 and is now largely complete. The second phase is the development of a new arrivals terminal, which obtained planning consent from the First Interested Party in 2017. The third phase is the current planning application to increase the passenger movements cap to 43 mppa and for the infrastructure works described above to make best use of the existing runway.

8. Stansted Airport's initial planning approval was for passenger throughput of 8 mppa. However, over time, this planning cap has been incrementally increased. In 1999, it was raised to 15 mppa. In 2003, it was raised to 25 mppa. In 2008, it was raised again to its current cap of 35 mppa. In 2017, Stansted Airport had a passenger throughput of 25.9 mppa. As at December 2018, the total passenger throughput for the year had increased by 8.1% from the 2017 figure to just over 28 mppa.

9. In addition to the passenger throughput cap, Stansted Airport is subject to caps on the total number of flight movements in and out of the airport per year, sometimes

referred to as ATMs. Since 2008, it has had a flight movement limit of 274,000 ATMs per annum. Of that number, up to 243,500 flights may be passenger flights. The remainder are cargo flights and other miscellaneous flights. Currently, 80% of the passenger flights that operate from Stansted Airport are budget airline flights, which generally operate short-haul routes using narrow-bodied aircraft.

10. Stansted Airport is subject to restrictions on the number of night-time flights that may operate to and from it. Accordingly, between the hours of 11:30 pm and 6:00 am the Second Interested Party cannot operate its runway at or near full capacity. The restrictions on night-time flights are not governed by planning regime caps, but rather by a separate regime set out in section 78 of the Civil Aviation Act 1982, which is overseen by the Secretary of State. The current night-time flight restrictions will expire in October 2022, when the restrictions will be subject to review and re-implementation will be considered. The Second Interested Party's planning application does not seek to alter night-time flight restrictions. Instead, the Second Interested Party has said that its forecast increase in passengers and passenger aircraft movements is contained within the daytime period of 6:00 am to 11:30 pm.

11. In March 2015, following consultation, the Second Interested Party published its masterplan for the airport, known as the Sustainable Development Plan ("SDP"). In the "Land Use" section of the SDP, it is provided that:

> "This Land Use Plan identifies the land, the uses and the facilities required to support the maximum capacity of the airport's single runway, up to annual throughput of between 40-45 million passengers and over 400,000 tonnes of cargo.
>
> …
>
> The ultimate capacity of the airport's single runway is likely to be between 40-45 million passengers a year. The exact capacity will be a product of our route network, aircraft size, the spread of traffic through the day and year and the capacity drivers described earlier. However, for the assessment of certain environmental and surface access effects we have used a figure of 43mppa as the maximum throughput the airport could achieve with a single runway; owing to capability limits of the runway and the associated infrastructure.
>
> …
>
> We expect Stansted to be able to reach 35mppa within the current cap of 243,500 PATMs [passenger air transport movements]. Operating at full capacity, we expect the single runway to be capable of handling some 285,000 PATMs, based on current market knowledge and our view of how the market will develop in the future."

12. In the "Economy and Surface Access" portion of the SDP, the current and future economic impact of Stansted Airport is modelled using three sets of alternative figures. The first set of figures uses the 2013 figure of a passenger throughput of 17

mppa. The second set of figures models the economic impact using the figure of 35 mppa. The final set of figures start from the basis of 45 mppa. The use of 45 mppa is subject to the caveat that "the exact maximum passenger throughput figure is likely to be between 40 and 45 million passengers a year and will be a product of our route network, aircraft size, the spread of traffic through the day and year and the capacity drivers described earlier".

13. On 2nd February 2017, the Defendant met with the Second Interested Party in a meeting described as a "quarterly catch-up". In a note of the meeting, it is recorded that the Second Interested Party is "planning for additional growth to 50 mppa in the future". Further the meeting notes record that its "next planning application, expected to be submitted in May, would be to increase its existing planning cap of 35 mppa to 43 mppa". On 10th May 2017, the Defendant and the Second Interested Party met again, but it appears from meeting notes that no mention was made of the 50 mppa figure. The implications of these noted observations are disputed, and the nature of the disputes and the parties' submissions in relation to them are set out fully below. It suffices for the present narrative to observe that the Claimants contend that they demonstrate the clear ambition of the Second Interested Party to develop the capacity of their airport to a level well in excess of that contemplated by the planning application, an ambition which was clearly known to the Defendant. By contrast, in relation to the 50 mppa figure in the notes from 2nd February 2017, the Second Interested Party submits that the reference to future growth to 50 mppa is a reference to projected growth in unconstrained passenger demand.

14. In May 2017 there were two meetings between the Second Interested Party and the First Interested Party, the minutes of which were obtained by SSE by way of an FOI request. On 3rd May 2017, handwritten notes taken at the first meeting by an unknown attendee record "2029 forecast 44 million airport growth". It was also noted that the airport needed to have a policy for growth and that, without constraints, the airport would have a runway capacity of "50-55m". Between the parties it is disputed whether the "m" in this last note refers to "million" passengers per year or, as the Defendant and the Second Interested Party assert, hourly "movements". On 17th May 2017, a handwritten note of a meeting by an unidentified author contains the note "applying for 44½ million as NSIP cap is 45 million". The Claimants submit again that this note demonstrates that the Second Interested Party was deliberately seeking to expand in a way that would avoid the NSIP process, and that this is a relevant consideration when it comes to Ground 2 of their application.

15. On 28th June 2017, the Second Interested Party wrote to the Director-General for International, Security and Environment at the Defendant, notifying her of the intention to apply for planning permission for further works at the airport and, as part and parcel of that, to seek to raise the cap from 35 mppa to 44.5 mppa and allow an extra 11,000 flights. In the letter it was written that:

> "With capacity for almost 45 mppa, Stansted can contribute a further 20 mppa of valuable capacity to the London system at a time when other airports face severe constraints, and benefit consumers by boosting competition and keeping fares low. Stansted's growth will strongly support the achievement of the Government's wider policy objectives, including the principle of making best use of available capacity in the period to 2030."

16. On 4th July 2017, the Stansted Airport Consultative Committee Corporate Affairs Group held a meeting at Stansted Airport to discuss future development at the airport and the annual work programme, including the planning application and the increase proposed to the passenger cap. At that meeting members noted that the increase in the proposed planning cap of approximately 9.5 mppa meant that the application could be determined locally rather than be treated as a NSIP, although there was the option of asking the Secretary of State for Communities and Local Government to call in the application.

17. On 28th July 2017, SSE met with the First Interested Party to discuss the proposed development at Stansted Airport and to make the argument that the development was nationally significant. In particular, the representatives of SSE made points ventilated in the present proceedings in relation to the likely throughput of passengers being understated and the status of the airport as a piece of nationally significant infrastructure.

18. Meanwhile in June 2017, and alongside some of the discussions set out above, the Second Interested Party submitted a request for a Scoping Opinion to the First Interested Party in relation to the proposed planning application, and a response was received on 21st December 2017.

19. In the Scoping Request report submitted for the proposed planning application, the Second Interested Party introduced its planning application in the following manner:

> "Stansted Airport Limited (STAL) intends to submit a planning application to Uttlesford District Council (UDC), to facilitate making the best use of the existing single runway. This will include amending the existing cap on the number of passengers from 35 million passengers per annum (mppa) to 44.5mppa, as well as an associated increase in aircraft movements (passenger and cargo air traffic movements (ATMs), plus General Aviation) from the existing permitted total of 274,000 to 285,000 per annum – representing a net increase of 11,000 movements or 3.9%.
>
> The planning application will seek permission for additional airfield infrastructure. This will comprise two new links to the runway, six additional stands on the mid airfield … and three additional stands at the north eastern end of the Airport…"

20. The Scoping Request report contained forecast annual passenger numbers, calculated both on the basis of the existing 35 mppa passenger cap and an increase of the cap to 44.5 mppa. It was estimated that if the cap was maintained at 35 mppa, then annual passenger throughput would reach that cap by 2024 based upon the Second Interested Party's forecasting data. The existing cap of 274,000 annual aircraft movements would not be exceeded, with there being 247,000 projected aircraft movements in 2029. However, if the passenger cap was lifted to 44.5 mppa then it was forecast that in 2028 there would be 43 mppa, and that the cap of 44.5 mppa would be reached in 2029. The contention based upon these figures was that by lifting the cap on passenger numbers best use could be made of the runway capacity at the airport. It was also projected that if the passenger cap was increased and the aircraft movement

cap was increased, then the total number of annual aircraft movements in 2029 would be 285,000, again reflecting best use of runway capacity.

21. SSE were concerned by the Second Interested Party's stated intention to seek an increase in the annual passenger cap to approximately 44.5 mppa, in particular as they perceived that it was an attempt to game the system by being just below the 10 mppa NSIP threshold provided by s23(8) of the Planning Act 2008. The Scoping Report, and their concerns in relation to it, formed part of the discussions that SSE had with the First Interested Party at the meeting on 28th July 2017.

22. In October 2017, the Defendant published a document entitled "UK Aviation forecasts: Moving Britain Ahead". In this document, the difference between constrained and unconstrained national air passenger capacity forecasts was explained:

> "Forecasts are made for both unconstrained demand and demand constrained by airport capacity limitations. Unconstrained forecasts give a picture of underlying demand while capacity constrained forecasts form the primary basis of the department's appraisal and decision making processes.
>
> …
>
> Without constraints to airport growth, demand is forecast to rise to 355 million by 2030 (central scenario) and 495 million passengers in 2050 within a range of 480 to 535 million. When capacity constraints are taken into consideration, and no new runways are added, national demand is forecast to rise to 315 million by 2030 (central scenario) and 410 million passengers in 2050 within a range of 395 to 435 million passengers."

23. On 18th October 2017, the Second Interested Party wrote a letter to the First Interested Party to alter the request for an EIA Scoping Opinion under regulation 15 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. In the letter, it was stated that in the light of community consultation and the 800 consultation responses received, the Second Interested Party would adapt its proposals so that airport growth could be met with the current total aircraft movement limit of 274,000, without the increase in the cap on the number of aircraft movements which had been previously proposed to 285,000. Further alterations as a result of this change were that instead of modelling the forecast number of movements and passengers to 2029 they were now modelled to 2028, and the increase in the cap of the number of passengers per annum was reduced from 44.5 mppa to 43 mppa. The letter explained the implications of these changes as follows:

> "The difference in the forecasting is limited such that we do not consider this change alters the original proposed content of the Scoping Report submitted in June 2017. We believe growth to 43mppa could be reached in 2028 with some 253,000 PATMs. By comparison to our previous forecast tables … in the Scoping Report, the passenger numbers, associated Passenger ATMs as well as Cargo ATMs remain the same in that year. In

> order to maintain a total movement limit of 274,000 it is the Other / General Aviation traffic that becomes constrained as the runway slot availability becomes limited.
>
> For clarity, there is no alteration to the physical development works proposed."

24. In relation to the revised figure of 43 mppa, Mr John Twigg of the Second Interested Party explained in his second witness statement that:

> "The clear message from that consultation was significant public concern at the suggested increase in "aircraft movements per annum" ("atms") from 274,000 to 285,000 a year. The decision to maintain the current limit of 274,000 atms places an inevitable constraint on Stansted's growth, and the forecast effect of this constraint is to achieve a throughput of 43 mppa. This was forecast to occur in 2028. As Stansted's movements would then be capped,… a figure of 45 mppa at 2029 would simply not be achievable."

25. On 9th February 2018, the Defendant met with the Second Interested Party. Minutes of the meeting record that "Future phases of the investment programme, particularly the arrivals terminal, are dependent on successfully raising the planning cap."

26. On 22nd February 2018, the Second Interested Party submitted their planning application to the First Interested Party in relation to the two new taxiway links and nine new aircraft stands. The application also sought to raise the planning cap on passenger throughput from 35 mppa to 43 mppa. The Claimants have emphasised the fact that this application for an increase to 43 mppa is less than the airport's original proposal in the Scoping Report to lift the cap to 44.5 mppa. The Second Interested Party has emphasised that the application did not include a proposal to increase either the aggregate annual limit on flight movements from 274,000, nor the size of the existing noise contour around the airport.

27. The application was accompanied by documents including a Planning Statement, Statement of Community Involvement, Environmental Statement and Transport Assessment. In the Planning Statement, the Second Interested Party wrote that:

> "Stansted has a modern and fully capable runway with a full-length parallel taxiway, but it is currently under-utilised both throughout the day and also its potential hourly capacity. To enable best use of runway capacity, some minor taxiway improvements form part of this application and include a new rapid access taxiway and rapid exit taxiway from the runway. These improvements will reduce runway occupancy times and reduce congestion by improving the sequencing of aircraft to and from the runway. These works will enable us to make best use of the runway's capacity by enabling a greater number of aircraft movements per hour and increasing the runway throughput from 50 to 55 movements per hour."

28. The Planning Statement also stated that the increase of passenger throughput to 43 mppa was in line with the objectives set out in the 2015 SDP. Further, the airfield development works would accommodate the forecast number of 253,000 passenger aircraft movements for the period to 2028. It was noted that the figure of 253,000 passenger aircraft movements took into account expected increases in aircraft size and load factors, which result in a higher number of passengers per aircraft movement and the ability to handle 43 mppa over the next decade.

29. In the Environmental Statement accompanying the application, Stansted Airport's forecast growth to 43 mppa by 2028 was modelled and compared with the forecast if the passenger cap were not lifted. The model was based on constrained, rather than unconstrained, demand. It was predicted that the average passengers per air transport movement (PATM) would grow from the current figure of 160 to 170 by 2028. The prediction that PATM would increase reflected the assumptions that airlines would increase the number of seats per aircraft, more long-haul services would be introduced at the airport, and there would be a small "improvement in load factors". Because of the increases in average passenger loading, ATMs were forecast to grow at a slower rate than passengers, reaching just over 243,000 movements by 2028 if the passenger cap were lifted to 43 mppa. By contrast, without the proposed development and with the passenger cap remaining at 35 mppa, it was predicted that ATMs would reach 212,500 by 2028.

30. The Environmental Statement contained a chapter on socio-economic impacts. In this chapter, it was noted that the proposed expansion would bring national economic benefits:

> "If the figure derived from [Oxford Economic Forecasting] work referred to above is adopted, the wider impacts on the business efficiency and productivity from the proposed expansion at Stansted would produce an increase in annual UK GVA of £1.2 billion. As around 79% of the passengers will be from the East of England and London the impact at that level is estimated to be £0.95 billion.
>
> Were the figures implied by the Oxera work to be adopted, the wider impact would be even greater at around £5.6 billion at the UK level and £4.4 billion at the London and East of England level."

31. On the same day, 22nd February 2018, the Second Interested Party published a press release entitled "London Stansted Airport commits to long-term growth within approved flight and noise limits". The press release contained the following passage:

> "The application seeks permission to make best use of the airport's existing single runway over the next decade, a move which will deliver significant economic benefits to the UK and the vibrant East of England region, create 5,000 new on-site jobs, improve passenger choice and convenience and boost international long-haul routes to fast-growing markets like China, India and the US. The application will also ease pressure

> on the London airport system by unlocking additional capacity at a time when other airports are full."

32. On 13th September 2018, the Second Interested Party published a press release entitled "London Stansted sets sights on long-haul growth". The press release provided that:

> "In the next five years London Stansted is aiming to secure direct services to at least 25 new long-haul destinations around the world, with a strong focus on the Far East, India, North America and the Middle east.
>
> …
>
> As the London area's fastest growing airport and with ambitious plans to maximise the potential of existing runway capacity, Stansted is well placed to meet rising demand from airlines across the world eager to gain access or grow within the London aviation market.
>
> In addition, Stansted already provides the most direct connections to Europe of any UK airport, and this network is set to grow further as the airport works with existing and new carriers to provide even more choice."

33. On 14th November 2018, the First Interested Party resolved to grant planning permission.

34. Earlier in that year, on 19th March 2018, SSE wrote a detailed letter to the Secretary of State for Housing, Communities and Local Government, asking him to intervene in the Second Interested Party's planning application. On 14th June 2018, that request was repeated as a new Secretary of State had been appointed since the previous letter was sent. Many of the points made in the letter of 19th March 2018 reflect the submissions made in the Claimants' application for judicial review, albeit the letter ranged wider in terms of the powers that the Claimants invited the Secretary of State to exercise, and did not contain all of the matters referred to in their submissions in support of this judicial review. On 16th April 2018, the Second Interested Party wrote to the Secretary of State setting out reasons why SSE's request should be rejected.

35. On 21st June 2018, the Secretary of State for Housing, Communities and Local Government wrote to SSE to advise that the issues relating to sections 23 and 35 of the Planning Act 2008 were matters for the Defendant, and only if the Defendant did not exercise his powers under section 23 and 35 of the 2008 Act would the Secretary of State for Housing, Communities and Local Government consider the requests to call in the application under the 1990 Act. On 28th June 2018, the Defendant rejected SSE's request to consider the proposed developments as being an NSIP. This is the decision being challenged in these proceedings, and is explained more fully below.

36. Shortly prior to the decision under challenge in this case, on 5th June 2018, the Defendant published "Airports National Policy Statement: new runway capacity and infrastructure at airports in south-east of England" (NPS) together with the policy

"Beyond the horizon: The future of UK aviation-Making best use of existing runways" ("MBU"). The NPS provides the basis for decision-taking in relation to future development consent applications relating to what the NPS describes as the North West Runway Scheme at Heathrow Airport ("LHR NWR"), while the MBU policy paper confirms the Government's support for airports beyond Heathrow making "best use" of their existing runways.

37. The MBU policy paper notes that the Government is supportive of airports making best use of their existing runways, including those in the South East other than Heathrow which has its own policy, subject to environmental issues being addressed. In relation to the role of national policy, the MBU policy paper provides:

> "There are, however, some important environmental elements which should be considered at a national level. The government recognises that airports making best use of their existing runways could lead to increased air traffic which could increase carbon emissions.
>
> We shall be using the Aviation Strategy to progress our wider policy towards tackling aviation carbon. However, to ensure that our policy is compatible with the UK's climate change commitments we have used the DfT aviation model to look at the impact of allowing all airports to make best use of their existing runway capacity. We have tested this scenario against our published no expansion scenario and the Heathrow Airport North West Runway scheme (LHR NWR) option, under the central demand case."

38. Under the heading "Role of national policy", the MBU policy included a table from the Defendant's aviation model showing the carbon dioxide emissions from flights departing UK airports, in million tonnes. The table shows that in 2050, it is predicted that under the MBU policy model (including the LHR NWR) there will be 40.8 million tonnes of carbon dioxide emissions.

39. As to the local environmental impacts, the MBU policy paper provides:

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

> communities as part of the planning consultation process. This ensures that local stakeholders are given appropriate opportunity to input into potential changes which affect their environment and have their say on airport applications."

40. The MBU policy paper also contains the following policy statements:

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

41. When developing the MBU policy, modelling was conducted to ascertain the national carbon emission impacts of airports growing in line with MBU. The modelling extended from 2016 to 2050. The 2016 figures were the only figures based on recorded data; the figures for the subsequent years were projections based on the model. The Defendant has filed evidence from Ms Sarah Bishop who was, at the times material to this application, a senior civil servant in the Defendant's department. She explains in her first witness statement that in the MBU modelling it was assumed that the permitted use cap at Stansted Airport would increase to 44.5 mppa, as this was the proposal of the Second Interested Party in the public domain at the time that document was being prepared. Thus the subsequent proposal for it to grow only to 43 mppa fell within the national modelling undertaken.

42. The MBU modelling projected that in 2018 there would be 23,220,944 passengers passing through Stansted Airport. The Claimants emphasise that the actual throughput for 2018 was just under 28 mppa. The MBU modelling predicted that on current trends the airport would have a throughput of 35,491,040 in 2050, or a throughput of 36,074,640 in 2050 if the MBU policy was implemented.

43. In her second witness statement, in relation to national aviation demand forecasts and the impact on associated carbon emissions, Ms Bishop emphasises the interaction

between national demand forecasts, assumed airport planning caps and assumed demand at airports:

> "The Department's aviation model forecast predicts the underlying, total passenger demand for all UK airports in any given year. The distribution of this predicted national demand – where demand arises – is itself subsequently predicted and, in statistical terms 'distributed' geographically and 'allocated' at airport level, taking account of a variety of factors as highlighted in the Department's 2017 Aviation Forecast documentation… The Department's model does not assume that demand at every airport increases to the level of the airport's permitted usage cap… Instead, where demand is statistically distributed depends on a variety of factors including journey purpose, where the passenger would start or end the journey, the level of congestion, and the availability of a suitable service – it is only when an airport's capacity is filled that the model allocates passengers to the next most suitable airport.
>
> … there is inherent uncertainty in any forecast, especially at airport level where there are strong overlapping passenger catchments that may make forecasting demand less predictable (the overlap of Stansted Airport and Luton Airport catchments is a good example of this). However, regardless of whether or not the predicted statistical distribution of passenger demand at a given airport is fully accurate, at national level the predicted overall or total passenger demand is unchanged and will be met by other airports and produce aggregate CO^2 emissions which can be identified with a higher degree of certainty."

44. On 28th June 2018, the Defendant wrote to SSE to inform them of his decision (as set out above) that he did not consider the Second Interested Party's development application to be an NSIP within the terms of section 23 of the 2008 Act and that he would not exercise his power under section 35 of the Planning Act 2008. He wrote in relation to section 23 that:

> "The expected effect of the airport alteration is neither to increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services nor to increase by at least 10,000 per year the number of air transport movements of cargo aircraft for which the airport is capable of providing air cargo transport services.
>
> I am assured by my officials' evaluation of the evidence, including evidence provided by you and by STAL [the Second Interested Party] that the expected effect of the alteration is to increase by 8 million per year the number of passengers for whom the airport is capable of providing air passenger transport services."

45. In relation to section 35 he wrote that:

> "With respect to considerations under s35, I have concluded that the development is not of national significance, either by itself or when considered with other projects or proposed projects in the same field.
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> …
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> With respect to national significance, although the development of the airport would play some role in supporting the international connectivity of London and the South East of England, the passenger capacity would still be less than other large single runway airports such as Gatwick. The impacts, mitigations and benefits of STALs application appear to be local in nature, and therefore I believe that adequate mitigation can be agreed between the airport and the council."

46. On 17th July 2018, the Claimants' solicitors wrote to the Secretary of State for Transport to notify him of the Claimants' potential application for judicial review of the decision contained in the letter dated 28th June 2018. As a result of that correspondence the Defendant disclosed the detailed submission (the "Ministerial Submission") which was made to the Defendant by his advisors which contained the recommendation from them which he adopted in taking his decision to decline to deal with the application under the powers in the 2008 Act. The document is dated 14th June 2018. It contains the recommendation that, in effect, the Defendant should refuse SSE's requests.

47. In relation to section 23 of the Planning Act 2008, the Ministerial Submission first sets out the two relevant limbs of the section, namely the "permitted use" threshold in section 23(1)(c) and the "capability" threshold in section 23(1)(b). Any argument based upon the permitted use threshold was shortly dismissed, as the application was for an increase in the cap of 35 mppa to 43 mppa, which is below the 10 mppa threshold required to meet the NSIP criteria. Greater focus was placed on the capability threshold, and whether it could be argued that this threshold had been exceeded. In this regard, the Ministerial Submission contained the following passages:

> "13. To consider capability we need to assess the difference between what the airport would be technically capable of handling pre and post development. This, we believe … [redacted text] … should be assessed as if no planning caps are used.
>
> 14. In terms of passenger numbers, in a response to SSE's letter, MAG [the Second Interested Party] provided evidence that the infrastructure being built as part of the planning application will allow an extra five ATMs per hour to operate off the runway. Using the theoretical operating timeframes presented by SSE, and today's average passengers per plane (which we believe is a reasonable proxy for when the development would complete given the current high load

> factors of STN's [Stansted's] current traffic), the scheme would therefore allow for an additional 5.4 mppa – significantly below the NSIP threshold of 10 mppa.
>
> 15. We have assessed the assumptions used in the calculations. With one exception (55 hourly movements) we have high confidence in MAG's approach to calculating these estimates. Whilst we have not been able to independently validate the increase in maximum runway capacity to 55 hourly movements, the figure is consistent with comparable pieces of infrastructure such as Gatwick Airport runway and therefore we have a reasonable degree of confidence in it."

48. In relation to section 35 of the Planning Act 2008, the Ministerial Submission advised that SSE's request constituted a "qualifying request" under the terms of the Act and so the question for the Defendant was whether to grant the request. The Ministerial Submission then provided responses to particular allegations set out in SSE's request. In answer to SSE's argument that the Second Interested Party was seeking to circumvent the NSIP criteria by applying for an increase in the annual passenger cap slightly below the section 23 threshold of 10 mppa, the following points were made:

> "23. If the works STN present in their planning application form part of a larger scheme with a higher throughput, then they could be directed for development consent under the presumption that they "form part of" a wider NSIP under section 31 PA 2008.
>
> 24. STN's application for planning permission is accompanied by an Environmental Statement (ES) which states "the proposed development …, comprises "Phase 3" of the wider capital investment programme for Stansted. Phase 1 involved internal terminal works, whilst Phase 2 involves the development of the new arrivals terminal both of which we consented to during the 2008 application for planning permission.
>
> 25. Phase 3 is therefore a separate project to increase runway throughput. Given this, and the fact that the previous stages have already received local planning permission and will be implemented before the runway works are undertaken, we do not believe that this application "forms part of" a wider NSIP application when Phases 1 and 2 are also taken into account."

49. The Ministerial Submission went on to note that the development application was in line with Government policy on airports making best use of their existing capacity in the South East. The Ministerial Submission observed:

> "26. STN's planning application proposes the increase of the airport's cap by 8 mppa. Modelling undertaken to consider the policy of making best use of existing runways (which 'allowed'

> STN to increase its planning cap) did not affect the forecasts associated with proposed Heathrow expansion.
>
> 27. STN's application is focused on making the best use of the existing airport capacity and the proposed development is not of the scale or significance of projects considered for the long term by the Independent Airports Commission. Further, Government recently announced its support of airports beyond Heathrow making best use of their existing runways, including this policy in the Airports NPS, referencing the Airports Commission's findings on more intensive use of existing airports.
>
> 28. [S]TN's application therefore is in line with Government policy on airports making best use of their existing capacity in the South East."

50. It was further added, in relation to the contention that the development should be considered to be a piece of strategic economic infrastructure of national importance, that the development "is expected to deliver important, but largely local economic benefits". The fact that the airport had an employment and customer base which extends beyond the local authority was not considered to make the development nationally significant, as this is not a situation specific to Stansted and if the contrary view were taken then "the development of most if not all airports would be nationally significant, including very small schemes".

51. In relation to the environmental impacts of the development, the Ministerial Submission advised that:

> "35. As with any airport development the project is expected to have environmental impacts. Taking into account the likely scale of these impacts judging by STN's description of the development, the continuation of the current ATM cap, and the mitigating measures they have proposed, we believe there is nothing preventing these issues from being tackled satisfactorily at a local level. …
>
> 36. Furthermore, as part of the making best use policy development, modelling was conducted to ascertain the national carbon impacts of airports growing. The modelling showed that an increase in the planning cap at STN, any additional carbon could be adequately mitigated to meet the [Climate Change Committee's] 2050 planning assumption."

52. Finally, in response to SSE's arguments in relation to the size and complexity of the development project, the Ministerial Submission advised that these factors were insufficient to require that the project be deemed nationally significant:

> "37…There is no increase in the number of total aircraft movements already permitted, and no changes to the airport infrastructure in relation to freight.

> …
>
> 39. …The only significant cumulative effect identified is the potential for increased delay and congestion on Junction 8 of the M11 motorway, as a result of additional traffic arising from growth to 43 mppa, along with other development in the area and background traffic growth. This has already been considered in detail by Highways England and to mitigate this STN suggest a direct contribution, committed via a section 106 agreement, if the need to improve the junction is required."

53. Annex E to the Ministerial Submission was provided to address in greater detail the analysis of the extent of increased capacity which could be created by the proposed development, and substantiate the material in paragraphs 13 to 15 of the Ministerial Submission. It set out a table that was provided on behalf of the Second Interested Party in a letter to the First Interested Party regarding the theoretical runway capacity of the airport. The table was designed to illustrate the runway capacity of the airport as a result of the proposed improvements to its physical infrastructure. The table was predicated on the operating hours for the airport remaining as at present, namely 17.5 hours per day, with no additional passenger flights at night. The figure for PATM was also constant at 170 PATM. The differences were the number of hourly movements during the 17.5 hour day, which increased from 50 to 55. This change led to an increase in the number of daily daytime movements of 87.5, an increase in annual daytime movements of 31,937.5 and (taking account of the PATM assumption of 170) an annual increase in passengers of 5,429,375.

54. In relation to this material, it was commented that:

> "Under the calculations, the theoretical maximum number of ATMs will increase by 32,000 and the number of passengers by approximately 5.4 million. We have assessed the assumptions used in the calculations. With one exception (55 hourly movements) we have high confidence in MAG's approach to calculating these estimates. Whilst we have not been able to independently validate the increase in maximum runway capacity to 55 hourly movements, the figure is consistent with comparable pieces of infrastructure such as the Gatwick Airport runway and therefore we have a reasonable degree of confidence in it.
>
> Our analysis shows that, in order for the theoretical capacity of the airport to increase by over 10 mppa, the number of passengers per ATM would need to almost double from 170 now to 313 passengers per ATM. Given the related (typical) figures for Gatwick and Heathrow are between 160 and 170 passengers per ATM we believe that it is unrealistic to expect the theoretical 10 mppa will be breached at Stansted, especially considering their predominately short haul business model which typically makes use [of] narrow body aircraft (80% of Stansted air movements are Ryanair)."

The legal framework

55. When determining an application for planning permission the decision-taker is required by section 70(2) of the 1990 Act to have regard to the provisions of the development plan so far as material to that application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that a determination "must be in accordance with the plan unless material considerations indicate otherwise".

56. Section 77 of the Town and Country Planning Act 1990 allows the Secretary of State for Housing, Communities and Local Government to direct that certain applications, including for planning permission or permission in principle, be referred to him or her instead of being dealt with by local planning authorities. This section 77 procedure is generally referred to as "calling-in" by the Secretary of State.

57. Projects which are deemed to be NSIPs are not to be determined under the Town and Country Planning Act 1990. Instead, they are to be determined by the Secretary of State under the Planning Act 2008. Section 14(1)(i) of the Planning Act 2008, which provides a sequence of types of projects which are to be regarded as within the definition of an NSIP, provides that an "airport-related development" is an NSIP. However, section 23(1) of the Planning Act 2008 provides further definition of which "airport-related development" falls within the definition of an NSIP within the terms of section 14(1)(i). "Airport-related development" is only to be considered within the terms of an NSIP pursuant to section 14(1)(i) if the development is:

> "(a) the construction of an airport in a case within subsection (2),
>
> (b) the alteration of an airport in a case within subsection (4), or
>
> (c) an increase in the permitted use of an airport in a case within subsection (7)."

58. In relation to section 23(1)(b), the term "alteration", in relation to an airport, is defined in subsection (6). This provides:

"(6) *"Alteration"*, in relation to an airport, includes the construction, extension or alteration of:

> (a) a runway at the airport,
>
> (b) a building at the airport, or
>
> (c) a radar or radio mast, antenna or other apparatus at the airport."

59. Subsection (4) provides:

> "(4) Alteration of an airport is within this subsection only if—

(a) the airport is in England or in English waters, and

(b) the alteration is expected to have the effect specified in subsection (5)."

60. Subsection (5) of the Planning Act 2008 provides:

"(5) The effect is—

(a) to increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services, or

(b) to increase by at least 10,000 per year the number of air transport movements of cargo aircraft for which the airport is capable of providing air cargo transport services."

61. It is also relevant to note that section 23(7) and (8) give content to the case provided in section 23(1)(c) as follows:

"(7) An increase in the permitted use of an airport is within this subsection only if—

(a) the airport is in England or in English waters, and

(b) the increase is within subsection (8).

(8) An increase is within this subsection if—

(a) it is an increase of at least 10 million per year in the number of passengers for whom the airport is permitted to provide air passenger transport services, or

(b) it is an increase of at least 10,000 per year in the number of air transport movements of cargo aircraft for which the airport is permitted to provide air cargo transport services."

62. It can be seen from the content and structure of section 23 that section 23(1)(b), together with section 23(4) and (5), create a case or category of airport NSIP derived from alteration of its infrastructure, whilst section 23(1)(c) together with section 23(7) and (8), create a category of airport NSIP derived from increase in permitted use.

63. Provided that the terms of section 23 are satisfied by way of any of the three available pathways set out in section 23(1), then the airport development will be an NSIP and must be considered as such by the Secretary of State. As set out in section 31 of the 2008 Act, development consent is required for a development to the extent that it is, or forms part of, an NSIP. However, even if the terms of section 23 are not satisfied and the project is not an NSIP as therein defined, the Secretary of State may, subject to certain limitations, give a direction under section 35 of the 2008 Act for development to be treated as development for which development consent is required.

64. Section 35(2) of the Planning Act 2008 provides that the Secretary of State may only give such a direction if the development is or forms part of certain types of projects. Relevantly to this case, the list in section 35(2)(a)(i) includes transport projects. Further, the development, when completed, must be wholly within one or more of the areas listed in section 35(3). Section 35(3)(a) provides that one of those areas is England. Section 35(2)(c)(i) also sets out the key requirement that, in relation to transport projects, the Secretary of State must think the project (or proposed project) is of national significance, either by itself or when considered with one or more other projects (or proposed projects) in the same field.

65. The Second Interested Party contends that the proposed works do not amount to an "alteration" within the terms of s23(6). They submit that the works are not to the "runway", and that the term "runway" is to be understood as being distinct from "taxiway". This construction is said to be supported by the provisions of section 9(6) of the Land Compensation Act 1973 which provide as follows:

> "9(6) In this section "runway or apron alterations" means
>
> (a) The construction of a new runway, the major realignment of an existing runway or the extension or strengthening of an existing runway; or
>
> (b) A substantial addition to, or alteration of, a taxiway or apron, being an addition or alteration whose purpose or main purpose is the provision of facilities for a greater number of aircraft."

66. Issues have been raised in the arguments in the case in relation to the correct approach to the standard of review to be applied to the Defendant's decision. As a starting point to this consideration the parties agreed the following as part of a suite of agreed propositions of law prior to the hearing:

> "The parties are agreed that, provided that the Defendant did not misinterpret the relevant legal provisions, took into account relevant considerations and did not take into account irrelevant considerations, his decision was not unlawful unless it was outside the range of reasonable responses to the information and material before him at the time.
>
> In *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin), the Divisional Court (Hickinbottom LJ and Holgate J) held that the principle set out by Sullivan J in *R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions* [2001] EWHC 74 (Admin) at paras 6-8, namely that a challenge to an evaluative planning judgment on the grounds of irrationality is a "particularly daunting task" and must not be used as a cloak for challenging the merits of a decision or policy, was not confined to challenges to Planning Inspectors' appeal decisions under s 288 of the 1990 Act but was of general application: see paras 171-172. The parties are agreed that this principle applies to the

> consideration of whether the Defendant's conclusion that the proposed development in the present case was not "airport-related development" under s 23 of the 2008 Act was lawful."

67. The parties also agreed that these propositions of law also applied in the context of section 35 of the Planning Act 2008. I endorse the accuracy of these agreed legal propositions.

68. The issues which are raised in relation to both of the Claimants' grounds range beyond questions of statutory construction and into challenges based upon the legality of the judgments reached by the Defendant in taking his decision. It is therefore apposite to provide some observations based upon a review of the relevant authorities in relation to the approach that the court should take to this aspect of the case, and in particular the standard of review which should be adopted in examining the Defendant's conclusions to establish whether or not they contained any error of law.

69. The case of *R (Mott) v Environment Agency* [2016] 1 WLR 4338 is a convenient starting point, in which several of the earlier authorities dealing with the question of the correct approach to resolving contentions that a decision was *Wednesbury* unreasonable when the decision involved the evaluation of technical or scientific evidence, were considered. In *Mott*, an important aspect of the challenge concerned whether the scientific estimates as to the percentage of salmon from the River Severn estuary which were destined to be River Wye salmon and would return to the River Wye were robust enough to provide a rational basis for the Agency's decisions to limit fishing. The decision-taker had to predict what might happen in the future, based on the scientific material available. In his judgment Beatson LJ reviewed the previous cases of *R(British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417 and *R(Downs) v Secretary of State for the Environment, Food and Rural Affairs* [2010] Env LR 7, which were both cases that, whilst differing in detail on their facts, involved decisions which engaged with technical or scientific evidence. In that case, it was common ground between the parties that in principle the court should afford a decision-taker an enhanced margin of appreciation in cases involving scientific, technical and predictive assessments. The difference between them was the applicability of that approach to the given facts.

70. In *Mott*, Beatson LJ made the following determination regarding the error of law committed by the first instance judge:

> "The judge was very conscious of the fact that Mr Mott's critique of the [scientific report underlying the Agency's decision] was that of a layperson… and that it was likely that a decision-maker could rely on the views of experts who maintained their view despite lay criticism. But he then entered into an analysis of the reliability of the scientific evidence and the models used and undertook calculations of his own. He did so because … he considered the identification of the contradiction between low stocks in the Wye and his assessment that on the material relied on by the agency there would be 55,000 salmon returning to it to spawn, does not require any knowledge of the technical issues relating to the genetic or statistical analysis. That was, in my judgment,

> inappropriate. In the *Downs* case [*R (Downs) v Secretary of State for the Environment, Food and Rural Affairs* [2010] Env LR 7] Sullivan LJ, at para 46, stated that the Royal Commission's critique of the model used by the Secretary of State was the high-water mark of Ms Downs's case. Although he recognised Ms Downs was an experienced campaigner with expertise and knowledge of pesticides, she had no scientific or medical qualifications and he stated that there was no possible basis for accepting criticisms by her that went further than those of the Royal Commission."

71. Beatson LJ went on to add that the first instance judge, after wrongly taking on the task of analysing the reliability of the scientific evidence and models, had erred in his calculations:

> "The judge's detailed critique of the models also proceeded on the basis of some errors… It is also an example of why a judge considering a judicial review of a scientific topic to that effect should not engage in a detailed examination of the merits of an approach and the accuracy of calculations based on models. The second of these [erroneously calculated] figures became a major factor in the judge's conclusion that the decisions were *Wednesbury* unreasonable and irrational."

72. The case of *Downs* was introduced by Beatson LJ in *Mott* in the following way:

> "Ms Downs, an experienced campaigner with expertise and knowledge of pesticides, challenged the United Kingdom's regulatory regime for pesticides on the ground that it did not comply with the provisions of Council Directive 91/414/EEC because it did not properly protect residents in rural areas who were exposed to the effects of crop-spraying. The evidence included criticism by the Royal Commission on Environment Pollution in its 2005 report of a model used by the Advisory Committee on Pesticides on which the Secretary of State had relied. The judgment was given by Sullivan LJ, with whom Keene and Arden LJJ agreed. Sullivan LJ stated, at para 76, that:
>
> "while the [Secretary of State's] decisions in this respect are not immune from judicial review, the hurdle of 'manifest error' in such a highly technical field is a formidable one … [Ms Downs] is not able to surmount that hurdle."

73. In *Downs*, Sullivan LJ said that whether there was evidence that reasonably raised doubts about the safety of pesticides, or whether the risks are purely hypothetical, was pre-eminently a matter for the Department to decide, with the benefit of expert scientific advice. Sullivan LJ further found that:

> "The Report, the Commentary and the RCEP's Response all make it clear that there is no consensus in the scientific

> community that there is "solid evidence" as found by Collins J. In [the Department's] response the Appellant did not accept that there was such evidence… Collins J. was not entitled to substitute his own view for that of the Appellant, and in the absence of such a scientific consensus, had Collins J. applied the "manifest error" test, he would have been bound to conclude that there was no manifest error in the Appellant's approach to the issue of causality."

74. The case of *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417, 105(18) LSG 24 was, as set out above, also reviewed by the court in *Mott*. That case introduced the issues with the following passage:

> "Some decisions of a public body taken under statutory authority are intrinsically less amenable to a successful judicial review application than others. These proceedings are an illustration of this. …. the nature of the claimants' case is to challenge a composite scientific judgment based more upon an expert analysis of scientific material than upon the application of hard-edged terms of a document amenable to lawyers' construction."

75. The *Vivisection* case concerned a challenge to a decision of the Chief Inspector of Animals that the adverse effects experienced by marmosets as a result of university research tests were "moderate" and not "substantial". The view of the decision-taker that the adverse effects were "moderate" was supported by other experts. The first instance judge had exercised his own judgment that the adverse effects were "substantial", without finding that the original decision-taker's decision that the effects were "moderate" was perverse. Accordingly, the judge erred. It was also observed that:

> "The judge correctly stated that in practice there has to be an exercise of judgment; and that the views of scientists and veterinary surgeons who make the judgment must be given proper respect up to the point at which their judgment can be shown to be vitiated by legal error or clearly wrong."

76. In *Spurrier* the court was concerned with a number of challenges to the designation of an "Airports National Policy Statement" (see above), dealing in particular with the provision of LHR NWR. When considering the standard of review which it was appropriate for the court to adopt, the court noted that the degree of scrutiny involved would depend in particular upon the nature of any right or interest which the decision sought to protect, the process whereby the decision had been reached and the nature of the ground of challenge advanced. Further, the court noted the importance to the standard of review to be deployed in that case of the fact that the decision under challenge related to a policy, and that the making of policy would involve political judgments and would have "a spectrum of finality" in its operation, both of which influencing the standard of review to be applied. Some of the challenges in that case

involved challenges to decisions informed by technical or scientific material and, having reviewed the decision in *Mott,* the court observed at paragraph 179 that:

> "For our part, we consider *Mott* is a helpful reminder of well-established good law: the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise. The degree of that margin will of course depend on the circumstances: but, where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial."

77. In the light of these authorities, in my view the position in relation to *Wednesbury* based challenges to the legality of decisions which have been informed or influenced by scientific or technical material is well settled. The approach is based upon the fundamental principle that the court is not re-taking the decision: it is not equipped procedurally or substantively to do so. Whilst the court will not abandon all curiosity as to how the decision has been reached, and can (as was emphasised in *Mott*) expect that the decision-taker will provide a full and accurate explanation of the facts and scientific analysis relevant to the decision, nevertheless it is not the role of the court to embark on its own technical appraisal of the issues. The court must recognise and respect the expertise which has been brought to bear in reaching the decision, and appreciate that there may be more than one scientific view of an issue, as well as more than one way of modelling or forecasting an impact or effect. A decision-taker is entitled to give particular weight to a suitably scientifically qualified consultee and rely upon their advice in reaching a conclusion. All of these factors, and no doubt others, comprise the margin of appreciation to which the authorities refer. As Sullivan LJ observed in the case of *Downs,* this does not mean that the decisions are immune from judicial review, but that the hurdle for a claimant to surmount is one which is formidable.

Grounds of the application for judicial review and the submissions

78. As noted above, the Claimants based their application for judicial review upon two grounds. The grounds are sequential, in so far that if they succeed on the first ground there is no need to proceed to the second ground, and the second ground does not arise for consideration unless their first ground fails. Ground 1 is that the Defendant erred in law when deciding that the Second Interested Party's proposed development was not an airport alteration NSIP under section 23 of the Planning Act 2008. Ground 2 is that the Defendant erred in law when determining that the same proposed development was not to be treated as being of national significance under section 35 of the Planning Act 2008. The Claimants' submissions in relation to Ground 2 are made without prejudice to the submissions made in relation to Ground 1, as Ground 2 proceeds on the assumption that the planning application is not an NSIP within the definition of section 23.

79. Starting with Ground 1, the Claimants' first submission is that the developments proposed in the planning application constitute an "alteration" of a "runway" so as to be brought within the definition provided in section 23(6). This is because the two

proposed taxiways serve and conjoin an existing runway and cannot be delivered without alterations to the runway itself. The terms “runway” and “taxiway” are not defined in the Planning Act 2008, but it is submitted that the Defendant was correct to accept that the development involved an alteration on the basis that the new taxiways could only be useful as part of an augmentation of the runway. The Claimants also argued that the definition in section 23(6) had to be approached on the basis that it used the language of “includes” rather than any more definitive language such as “means” and therefore the section was framed to capture proposals designed to increase airport capacity of the kind concerned in the present case.

80. Turning then to the three alternate pathways to satisfying the requirements of section 23(1), it is the second case, being the expected increase in capacity set out in section 23(4) and (5), which the Claimants say is satisfied on the given facts. The Claimants’ core argument is that the Defendant misinterpreted section 23(4)(b) and (5)(a) by looking at how the proposed development might affect what was realistically or likely to be achievable by way of passenger throughput at the airport, rather than examining what these provisions in fact required, which was the total passenger capacity which it was theoretically possible might be created by the works. The statute did not call for an analysis of what was the actual or likely new capacity but rather the capacity which the airport could possibly achieve technically and arithmetically with the improvements.

81. In effect, the word “capability” in section 23(5)(a) is interpreted by the Claimants to mean possible technical or arithmetical capability. Mathematically, even deploying the data and forecasts provided by the Second Interested Party to the Defendant, it was easy to demonstrate an increase as a result of the development of in excess of 10 mppa. For instance, assuming an additional 32,000 aircraft movements and a PATM of 313, would lead to an increase in excess of 10 mppa.

82. The Claimants went on to submit that in the event they were wrong in relation to their point of statutory interpretation, and the effect of the language in sections 23(4)(b) and (5)(a) were such as to require a judgment in relation to the likely or foreseeable practical increase, then that was a judgment which had to be reached lawfully, taking account of all material considerations and not leaving material considerations out of account. In that connection the Claimants drew attention to a number of factors that they submitted had been left out of account. Firstly, the Defendant had overlooked the Second Interested Party’s clear intention to cultivate long-haul flights (with larger aircraft and higher ATM rates) and maximise the use of its runway evidenced in a press release from the Second Interested Party on 13th September 2018. Long-term trends showed a steady increase in ATMs which was not reflected in the Defendant’s assessment. Secondly, the Defendant had placed reliance on figures for Gatwick as a comparator in the Ministerial Submission, but had failed to appreciate that Gatwick has capacity for a significantly higher number of passengers per annum (albeit a number consistent with what the Claimants contend were the Second Interested Party’s aspirations in 2017) and had left out of account that sources such as the Gatwick Masterplan 2019 were stating that 60 ATMs per hour were expected by the early 2030s, well in excess of the 55 ATMs per hour accepted by the Defendant. This forecast growth at Gatwick ought to have been included in the analysis. Thirdly, the Defendant left out of account planning caps in undertaking the assessment but ought, in order to have performed the calculation correctly, to have

ignored the night-time flying restriction as well, which would have led to an increase in the calculated number of additional flights over the 24 hour period of 43,800 and the need for a rate of 228 PATM to lead to the exceedance of an additional 10mppa.

83. Ground 2 is that the Defendant erred in law when determining that the same proposed development was not to be treated as being of national significance under section 35 of the Planning Act 2008. The Claimants identified four factors which they say wrongfully underpinned the Defendant's decision not to exercise his powers under section 35. Firstly, the development did not involve additional runways, new terminal or cargo facilities and would take place within the existing footprint of the airport. Secondly, that the environmental impacts of the project could be tackled under the 1990 Act regime – the impacts and mitigations appeared local in nature and could be agreed between the Second Interested Party and the First Interested Party. Thirdly, that the proposals appeared focussed on making "best use" of the existing airport's capacity. Finally, that the proposals were not of the scale or significance of schemes for increasing capacity for the long term.

84. The Claimants submitted that these four factors were wrongly decided for the following reasons. First, so far as the first and fourth are concerned, the Defendant failed to take into account that the proposals were an intrinsic part of a long-term project to expand aviation at Stansted Airport by considerably above the NSIP threshold in the light of the evidence set out above, including the minutes of 2nd February 2017 which revealed a plan to grow to 50 mppa. It is further suggested that the evidence shows the Second Interested Party is purposely trying to grow the passenger throughput in increments that fall under the NSIP threshold.

85. Second, it is submitted that so far as the second reason is concerned, the Defendant wrongly relied on the modelling with regard to carbon emissions which had been prepared alongside the MBU policy in order to inform that policy. The Claimants' attack on the modelling commences with the observation that Ms Bishop's evidence suggests that the MBU modelling was predicated on an assumption that the permitted use of the airport at Stansted would increase to 44.5 mppa. However, notwithstanding this suggestion it is noted that the modelled figure for passenger throughput at Stansted is well below that figure even in the model's predictions for passenger use in 2050. Moreover, the modelled figure for passenger throughput predicted for 2018 is 23,220,944, whereas the actual surveyed figure for passenger numbers for 2018 was 28,001,793. This disparity (and others relating to 2016 and 2017) between the model and reality casts doubt, the Claimants contend, over the predictions of the model in relation to carbon emissions, bearing in mind that there is a linkage in the model between the two. The Claimants also draw attention to the fact that the model appears to predict that there will be a contraction in passenger numbers at times in the future, which is contradicted by the growth in passenger numbers predicted by the Second Interested Party. The Claimants note that the MBU modelling predicts around 1.6mt of carbon being generated by the flights at Stansted airport by 2050, on the basis of a forecast of 204,800 flights arising from the model. This, they submit, clearly contrasts with the 274,000 ATMs on which the planning application is based. It is contended that, for example, the model is forecasting ATMs and passenger throughputs at Luton Airport well below the figures for which that airport has said it is planning. Thus the Claimants contend that the modelling was not a sound basis for decision-taking and in particular concluding that the proposals would not have national significance in

relation to climate change and that the environmental issues involved could be tackled at the local level.

86. Third, in relation to the third reason, it is submitted that the Defendant wrongly decided that the proposals complied with the Government's MBU policy. It is said that the Defendant was wrong to say that the project made best use of the existing runway because he was not informed that the original development proposal had been "trimmed" from 44.5 mppa to 43 mppa and from 285,000 to 274,000 annual aircraft movements. In reality, the proposal had been deliberately designed to avoid scrutiny by artificially supressing the cap for usage.

87. Finally, it is submitted that, more generally, the Defendant failed to take into account the numerous material considerations related to the economic significance of the proposal, when had he done so the only reasonable decision open to him was to exercise the power afforded to him by section 35. The Second Interested Party had emphasised the national significance of the project in its press release of 22nd February 2018 and in its socio-economic assessment submitted with the application. The national significance of London's airports was also highlighted in the Airports National Policy Statement of 5th June 2018.

88. The Defendant submitted in relation to Ground 1 that the correct interpretation of the requirements of section 23 had been applied in arriving at the conclusion that the planning application was not an NSIP. First and foremost, the language of the section called for a judgment by the Defendant. Secondly, that judgment in respect of what passenger throughput the airport would, after the alteration, be expected to be capable of was a judgment about what was realistically achievable disregarding the planning caps, not what its hypothetical arithmetical capacity might be: it did not require all the inputs to any calculation of capacity to be maxima, which was the approach effectively advanced by the Claimants. On behalf of the Defendant it was submitted that to interpret the section as requiring an analysis of a technical or arithmetical possibility would be absurd and divorced from the real world. What the section requires is an examination of what is realistically achievable, not what is arithmetically or technically possible. The exercise in Annex E of the Ministerial Submission faithfully reflects that approach.

89. In relation to the capability threshold, the Defendant submitted that the proper approach is to disregard the current and proposed planning caps, and that the analysis in the Ministerial Submission was made on that basis. The Claimants' four arguments as to why the reasoning Ministerial Submission is said to be incorrect are refuted in turn.

90. Turning to the Claimants' fall-back argument (that even if the Defendant's interpretation of section 23 is correct then, nonetheless, the exercise was flawed by illegality), the Defendant submits that each of the factors relied upon by the Claimants are without merit. Dealing, firstly, with the argument that the application of the average load factor of 170 passengers per plane is said to overlook the ambitions of the Second Interested Party and trends in relation to long-haul aircraft, the Defendant draws attention to references in the Planning Statement and the Environmental Statement accompanying the planning application to the growth of long-haul flights and larger aircraft and their associated trends as underpinning the assumption of 170 passengers per aircraft movement. Secondly, responding to the Claimants' points in

respect of reliance on Gatwick in the Ministerial Submission's calculations, the Defendant contends that Gatwick Airport was simply used as a "sense check" when considering the likelihood that Stansted Airport could reach a runway capacity of 55 air traffic movements per hour.

91. Thirdly, in relation to the Claimants' contention that the Defendant overlooked the potential increases in long-haul flights to and from Stansted, the Defendant submitted that this was essentially the same as the first point in respect of load factors. It is submitted that given that Heathrow Airport and Gatwick Airport both have more long-haul flights than Stansted Airport, but have average load factors of 170 and 160 respectively, the judgment as to load factors that the Defendant reached was entirely rational and lawful.

92. Finally, in relation to the restrictions on night-time flights, the Defendant emphasised that these restrictions are set under section 78 of the Civil Aviation Act 1982 and operate independently of, and cannot be altered by, the planning regime. Whilst it was true to say that they will be reconsidered, following consultation, in 2022, there was no evidence at all to suggest that they would be relaxed. Therefore, it was reasonable in the *Wednesbury* sense to proceed on the basis that the night-time flight restrictions would continue to constrain the capacity at Stansted Airport. This was the approach taken by the Defendant.

93. The Defendant began his submissions on Ground 2 with the observation that section 35 of the Planning Act 2008 confers a power, not a duty, upon the Secretary of State. It is therefore incorrect for the Claimants to assert that the Defendant was "compelled" to make a section 35 direction. The Defendant's consideration of whether a project should be treated as an NSIP involved evaluative and policy judgments, in relation to which he had a broad discretion. The weight that the Defendant gave to the material before him when taking his decision that the proposed development was not of "national significance" cannot be challenged and his judgment was not irrational.

94. In answer to the Claimants' contention that the proposed development formed part of a larger project for Stansted Airport to expand considerably above the NSIP threshold, the Defendant submitted that simply an aspiration to grow the airport in the future is not a "project" or "proposed project" within the meaning of section 35. The Defendant was right to consider that the proposed development was the final phase of a three-phase investment programme, the first two of which had already been constructed and involved separate projects. Accordingly, his judgment that this part of a wider project extending beyond the application was not *Wednesbury* unreasonable.

95. In answer to the Claimants' point relating to carbon emissions, the Defendant submitted that as set out in the Ministerial Submission, carbon emissions had already been taken into account in the MBU policy. The MBU policy incorporated growth at Stansted Airport at levels within which the proposed development falls. Therefore, the proposed development was correctly regarded as within the parameters of what had already been assessed and endorsed by the Defendant in national policy, and therefore, in turn, fell within the planning assumptions of the Committee on Climate Change. Therefore, it was reasonable for the Defendant to consider that resulting carbon emissions did not require him to make a section 35 direction.

96. Insofar as the Claimants are critical of the MBU policy and the carbon emissions modelling underpinning the MBU policy, they misunderstand the MBU policy and modelling. Firstly, in relation to the modelling the Defendant submits that it is important to appreciate that the purpose of the model for which it was designed was to provide evidence for the MBU policy, not the evaluation of this proposal. In that connection the MBU policy is unchallenged, and lawful. What follows from this is that the analysis of the MBU policy based on the model which the Defendant describes as "extensively quality assured and peer reviewed" and "fit for purpose", together with its outputs in relation to passenger numbers and carbon generation forecasts, must be approached as sound and lawful. Further, the substantive policy contained in the MBU is also robust and lawful. At paragraph 1.26 of the MBU policy it notes "We expect that applications to increase existing passenger caps by fewer than 10 million passengers per annum (mppa) can be taken forward through local planning authorities under the Town and Country Planning Act 1990." It goes on to observe that applications to increase caps by more than 10 mppa will be considered as NSIPs on a case by case basis by the Defendant. Thus, the Defendant submits that this aspect of the Claimants' case is in truth an impermissible attack on the MBU policy itself.

97. The Defendant relies upon the evidence of Ms Bishop, who explains in her witness statement that the model is one which, having forecast aviation demand at a national level based on underlying economic drivers, then allocates passengers to individual airports. It is unnecessary to rehearse all the detail contained in Ms Bishop's evidence as to the way in which the model operates: for the purposes of the Defendant's submissions it suffices to say that the model is not designed for detailed short-term forecasts for specific airports but rather for long-term policy making. Thus the modelling is designed to be accurate at a national level and over the period of the model taken as a whole.

98. Turning to the further points taken by the Claimants, the Defendant submits that it was perfectly rational for the Defendant to observe that the proposal was in accordance with the MBU policy. So far as the contention that the Defendant failed to properly take account of the economic significance of the proposal the Defendant submits that it was perfectly legitimate for the Ministerial Submission to conclude that the economic effects of the proposal would be "largely local", in particular bearing in mind that the Defendant had to consider the effects of the proposal itself, and not the airport as a whole.

99. Turning to the Second Interested Party, as set out above they disagree with the view that the two proposed taxiway developments constituted an "alteration of a runway" within the meaning of section 23. In the absence of a definition of "runway" in the Planning Act 2008, it is submitted that the ordinary meaning and usage of the word "runway" should be adopted, so that it is understood as distinct from "taxiway". This approach is said to be consistent with section 9(6) of the 1973 Act set out above, and the Aviation Authority Licensing Manual. In addition, the Second Interested Party submits that the use of the word "includes" applies solely to "construction, extension or alteration" and not "runway", and thus does not enable the works proposed to be brought within the definition. Accordingly, it is said that the first ground fails at the first hurdle as the planning application does not propose any alterations to the runway.

In all other respects the Second Interested Party supported the submissions made by the Defendant to resist Grounds 1 and 2.

Conclusions

100. In relation to Ground 1 it is sensible to start with the Second Interested Party's contention that the proposed works in the planning application do not amount to an alteration within the meaning of section 23(6) of the 2008 Act, since the works proposed do not directly affect the runway, and for the reasons set out above do not fall with the definition in the statute. This is not a submission that I am able to accept. In my view the Defendant was correct, as the Claimants contend, to identify that the works comprised in the planning application were an alteration within the terms contained in section 23(6). Whilst the works do not directly augment the runway, it is important to observe (as DfT officials did within the Ministerial Submission) that the definition is framed in terms of "includes" and as such in my view is clearly capable of capturing improvements to the runway's linkages of the kind proposed which are designed to increase runway capacity. As the Claimants pointed out in the course of argument, the statute uses the word "includes" and not "means", and thus the Defendant was entitled to conclude that the works proposed were included within those which could constitute an alteration for the purposes of section 23, bearing in mind their purpose in enhancing the capacity of the airport and its runway. I do not consider that any material assistance is to be derived in construing the statutory language from the provisions of the 1973 Act or the Aviation Authority Licensing Manual, which arise in a different context and do not serve the same specific purpose as the definition within section 23(6). I am satisfied that the Defendant was correct to go on to consider whether or not the proposal fell within section 23(4) and (5).

101. The first point to resolve is the correct construction of section 23(5)(a). I am satisfied that the submissions of the Defendant in this respect are undoubtedly correct. The language of the statute in relation to whether the alteration will "increase by at least 10 million per year the number of passengers for whom the airport is capable of providing air passenger transport services" requires the Defendant to form a judgment in relation to that question. In my view that judgment is to be formed by asking what increase in capacity could realistically be achieved, not what might technically or arithmetically be possible. It requires an analysis based on how the infrastructure is likely to perform, not a hypothetical approach assuming speculative figures in relation to each aspect of the calculation of capacity to show what might be possible rather than what is likely to occur in practice. I do not consider that the use of the wording "is capable" endorses the Claimants' contentions: it is important that these words are to be read in the context of the language of section 23(4) which speaks of the alteration being "expected to have the effect specified in subsection (5)". The use of the word "expected" is an important qualification which imports the requirement for an assessment which is grounded in the reality of the capacity which might be achieved, rather than one which takes a speculative arithmetical approach to all of the inputs to the calculation. It is clear on this basis that the Defendant's interpretation of the statutory test was one which was sound and a reliable basis for taking the decision as to whether or not the proposal was an NSIP.

102. As set out above, the Claimants make further submissions on the basis that even if the Defendant's interpretation of section 23 was accurate, his decision was nonetheless unlawful on the basis that immaterial considerations were taken into account, material

considerations left out of account and the decision was irrational. The matters relied upon by the Claimants are set out above, and my conclusions are as follows. Firstly, it is clear that the figure of 170 PATM was one which was arrived at bearing in mind long-term trends and increased potential for long-haul flights. As set out above, these factors were included in the assessments of the Planning Statement and the Environmental Statement supporting the application (see paragraphs 28 and 29 above). In terms of the Ministerial Submission, the figure of 170 was supported by a cross reference to the comparative average from Heathrow and Gatwick of 160 to 170: it is beyond argument that these are airports which attract long-haul flights and this comparison provided legitimate support for the Defendant's judgment.

103. The second point relates to the comparison to Gatwick which is made in paragraph 15 of the Ministerial Submission. It is important to note that the comparison in this instance was narrowly related to a sense-check in respect of the number of potential hourly movements on the runway, and as such there is nothing to suggest that this comparison was inappropriate. It related to one component of the calculation, and was not a comparison for the purposes of assessing overall passenger capacity in mppa. Whilst the Claimants have made reference to increases in hourly movements set out in the Gatwick Masterplan that material had not been published at the time and, therefore, as Ms Bishop explains, could not have been taken into account. I do not consider that there is any real substance in this criticism of the Defendant's decision.

104. I am unimpressed by the Claimants' submission that the night-time flying restrictions should have been disregarded in the undertaking of the calculations. Those restrictions were clearly a material consideration to be taken into account in undertaking the realistic analysis which was required by section 23(4) and (5) of the 2008 Act. Whilst those restrictions are reviewed from time to time, there was nothing to suggest that there was evidence to support them being lifted or relaxed.

105. For all of the reasons set out above I am satisfied that whilst the Claimants' case under Ground 1 is arguable, I do not consider that it can succeed and it must be dismissed.

106. Turning to Ground 2 it is necessary to point out that it is clear from the statutory language of section 35 of the 2008 Act that the Defendant is granted a broad discretion as to whether or not to treat an application for development which does not otherwise meet the definitions for an NSIP as a project which requires development consent on the basis of national significance. Bearing in mind the prescriptive nature of the definitions for various types of NSIP contained in the 2008 Act, the discretion under section 35 is a broad one. Given the nature of the Defendant's decision, as one which was exercised using a relatively broad discretion, the task of the Claimants to show that the judgment which the Defendant reached was unlawful is daunting.

107. For the purposes of the Claimants' first contention as to why the Defendant's decision was legally flawed, namely that he failed to appreciate or take account of the fact that the proposal was part of a larger project, it is necessary to examine the disputed documents in relation to the suggested ambitions of the Second Interested Party which support the Claimants' contention that the planning application is in truth a stepping stone to a far greater increase in capacity, and ought to have been considered part of a wider and more extensive project which should have been determined to be an NSIP under section 35 of the 2008 Act. The first of these documents is the note of the

meeting of 2nd February 2017 in which it is stated that the Second Interested Party "are planning for additional growth to 50 mppa in the future." This is relied upon by the Claimants as demonstrating the suggested wider ambitions of the Second Interested Party. Ms Bishop on behalf of the Defendant and Mr Graeme Elliott on behalf of the Second Interested Party, who were present at the meeting, both contend that the reference to 50 mppa was a reference to unconstrained passenger demand at the airport (i.e. the potential pool of passengers within the catchment of the airport who would be likely to fly from the airport, if it had uncontrolled capacity to accommodate them). They draw attention to a graph which accompanies the note in the bundle before the court which illustrates the growth in unconstrained passenger demand at the airport. The observation was not therefore, they contend, an indication of the ambitions for future growth in the airport's passenger cap.

108. The second piece of evidence in time is the meeting between the First Interested Party and the Second Interested Party on the 3rd May 2017 at which it was noted that, as at 2029, forecast airport growth would be "44 million" in one note, or "44m" in another, and further noted "without constraints-runway capacity 50-55m". Again, the Claimants contend that this illustrates the wider ambitions of the Second Interested Party. On behalf of the Second Interested Party, Mr Twigg contends that the "50-55m" is clearly a reference to movements per hour on the runway, and not millions of passengers per annum as suggested by the Claimants.

109. The third piece of evidence is a note of a meeting between the First and the Second Interested Parties on 17th May 2017 in which it is noted "applying for 44½ million as NSIP is 45 million". The Claimants contend that this shows that the Second Interested Party was devising the limits of the application so as to avoid scrutiny under the 2008 regime; the Second Interested Party submit that this observation is wholly consistent with the airport's Sustainable Development Plan 2015 observing as a land-use plan that the maximum capacity of the airport's runway was "up to annual throughput of 40-45 million passengers".

110. Finally, the Claimants relied upon a note of a meeting with the Defendant dated 9th February 2018, in which the Second Interested Party were noted as saying that "[f]uture phases of the investment programme, particularly the arrivals terminal, are dependant on successfully raising the planning cap". The Claimants contend that this shows, again, that the planning application is part of a larger project and a wider ambition to expand the airport well beyond the current proposal and causing the current proposal to need consideration as an NSIP. The Second Interested Party responds by stating that the investment programme referenced in the note is the investment in terminal improvements and the associated improvements to the airport's infrastructure, which is referred to in the Planning Statement at paragraphs 2.89 to 2.96, which it is unnecessary to quote for present purposes, but which references planned improvements to parking and terminal facilities as well as works to the airfield including those comprised in the planning application.

111. It is important to appreciate that it is the decision of the Defendant which is under scrutiny in this application, and therefore it is necessary to focus on material of which he was aware at the time of the decision and not material which was not before him. In relation to this point, the meeting notes of the meetings between the First and Second Interested Party were not before the Defendant and could not properly be said to form part of his decision-taking process. In any event, they are not, in my view,

capable of bearing the forensic weight which the Claimants have ascribed to them. I accept the explanation provided by the Second Interested Party that the note from the 3rd May 2017 meeting was referring to 50-55 movements per hour: that is consistent with the other surrounding documents in relation to the Second Interested Party's proposals such as the Planning Statement accompanying the application which appeared subsequently (see paragraph 27 above). The note of the 17th May 2017 meeting is, as the Second Interested Party noted, consistent with the Sustainable Development Plan current at the time for the airport and to that extent unsurprising in that it refers to anticipating capacity for 40 to 45 mppa (see paragraph 12 above).

112. Turning to the material which was before the Defendant, I have no difficulty in accepting the Defendant and the Second Interested Party's explanation that the note of the meeting of the 2nd February 2017 was referring to unconstrained demand: the explanation is based on the personal recollection of two of the participants at the meeting and is supported by the graph alluded to above. Thus I am unable to accept that the meeting note is evidence of a larger project at the airport. Finally, in relation to the note of the meeting from 9th February 2018, it is clear in my judgment that the reference in that note to future phases of an investment plan is reference to the investment programme outlined in the broadly contemporaneous Planning Statement accompanying the application, as set out above and referenced in paragraphs 24 and 25 of the Ministerial Submission.

113. It follows that I am not satisfied that such of this material as was before the Defendant could have led to him properly concluding that the application he was considering was part of a wider or larger project which, taken together with that which was before him, justified the conclusion that the present proposal should be considered an NSIP on the basis of applying section 35 of the 2008 Act.

114. The next submission that the Claimants make in relation to the need for the Defendant to have exercised his discretion under section 35 of the 2008 Act relates to their criticisms of the Defendant's conclusion that the carbon emissions caused by the proposed development could be properly regarded as within the scope of the MBU policy and its analysis. They submit that the MBU modelling is flawed, and has underestimated the effects of growth in aircraft traffic at Stansted airport for the reasons which have been set out above.

115. In my view there is considerable force in the Defendant's submission that in reality this aspect of the Defendant's decision was essentially based on reliance on the MBU policy, and that the substance of the Claimants' case is in fact a challenge to the legality of that policy in disguise (see paragraphs 95 and 96 above). Certainly, the legality of that policy is now beyond argument. As such I accept that the Defendant was, lawfully, entitled to reach the conclusion which he did, based squarely on the MBU policy that "an increase in the planning cap at [Stansted]…could be adequately mitigated to meet the CCC's 2050 planning assumption". That was a conclusion which applied the provisions of the MBU policy (see paragraphs 38 to 40 above) which had considered that proposals of this scale would not imperil the achievement of climate change targets in the light of the modelling work which had informed the policy. This effectively brings the Claimants' argument in relation to this point to a close. What is set out below is therefore included for the sake of completeness.

116. The Claimants' contentions in relation to the reliability of the model bring into focus the discussion addressing the standard of review set out above. In my view there are formidable difficulties in the way of the Claimants seeking to persuade the court to adjudicate in an application for judicial review on the accuracy or reliability of a predictive model of the kind in question. The court, quite properly, has not heard any expert evidence examining whether the model is based on sound science or technical good practice. The court is not equipped to undertake the kind of scrutiny of this model which would, for instance, be undertaken at a public inquiry in relation to an appeal under section 78 of the 1990 Act, where the tribunal is seized of the merits of scientific or technical evidence of this kind.

117. The Defendant has provided in the evidence a clear and coherent explanation of the purpose of the modelling (namely for long-term forecasting at a national level) and the basis on which it was constructed so as to inform and justify the policy in MBU relating to whether planning proposals at airports could be adequately mitigated and dealt with at the local level. Once this background to the technical work is understood, then it becomes clear that the criticisms of the Claimants, based upon short-term analysis or examination of individual years is without substance. It is not an inaccuracy or flaw that the model is predicting a smaller number of ATMs than the planning cap: this arises because, as set out above, the model is predicting actual demand across the period being modelled. The various detailed points raised by the Claimants do not properly acknowledge the purpose of the model as one which was designed to forecast a national outcome across a lengthy time period. Certainly these points do not, measured against the earlier observations made about cases in which decisions are taken in the light of detailed scientific or technical material (including in particular that the court is not equipped to re-take the decision or determine the merits of the technical or scientific material unlike other forums), reach the threshold of demonstrating that reliance on the model was in all the circumstances unlawful. In my view there is nothing in the Claimants' submissions to substantiate their contention that the Defendant committed an error of law in relying upon the model and the MBU policy based upon it to reach the decision in relation to section 35 of the 2008 Act.

118. The next point raised by the Claimants is the suggestion that the proposal was not consistent with the MBU policy on the basis that it in fact represented a sub-optimal development, which did not make full use of available capacity or potential, as it had been trimmed back to avoid proper scrutiny under the 2008 Act. I am unable to accept this submission: it appears to me both that it was reasonable for the Defendant to conclude that the policy applied to the proposal, and that it was consistent with it. There was nothing to which the court was directed in the policy to require, as the Defendant observed in his submissions, that every last drop of capacity had to be squeezed out of infrastructure so as to ensure it was consistent with the policy. As the Ministerial Submission made clear in its reasons in paragraphs 26 to 28, the proposal is consistent with making best use of its existing infrastructure without being of a scale with wider or long-term implications.

119. Turning finally to the Claimants' submission in relation to the economic significance of the proposed development, in my view the judgment which the Defendant reached that the proposal could be "expected to deliver important, but largely local economic benefits" was one which was reasonable and entirely open to him on the material before him, for instance in the Environmental Statement (see paragraph 30 above).

This material demonstrated that the majority of the economic benefits of the proposal would be felt in London and the East of England. I am unable to accept that the Defendant's judgment in respect of this aspect of the case was unlawful.

120. It follows that it has to be concluded that there is no substance in the complaints raised by the Claimants in respect of the failure of the Defendant to treat the application as an NSIP pursuant to section 35 of the 2008 Act. Whilst I am satisfied, on balance, that the case made by the Claimants under Ground 2 is arguable, it is not made out in substance and this Ground must be dismissed.

121. For all of the reasons which have been set out above, the Claimants' application for judicial review in relation to the Defendant's decision to decline to accept that the development proposed within the Second Interested Party's planning application was an NSIP must be dismissed.