Neutral Citation Number: [2023] EWHC 171(Admin)

Case No: CO/928/2022

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

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 31/01/2023

**IN THE MATTER OF AN APPLICATION FOR STATUTORY REVIEW UNDER SECTION 228 OF THE TOWN AND COUNTRY PLANNING ACT 1990**

**Before** :

**MR JUSTICE LANE**

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**Between :**

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| **BRISTOL AIRPORT ACTION NETWORK CO-ORDINATING COMMITTEE (ACTING THROUGH STEPHEN CLARKE)** | **Claimant** |
| **- and –** | |
| **SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES** | **Defendant** |
| **(1) BRISTOL AIRPORT LTD**<br>**(2) NORTH SOMERSET COUNCIL** | **Interested parties** |

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**Ms Estelle Dehon KC** (instructed by **Leigh Day Solicitors**) for the **Claimant**
**Mr Mark Westmoreland Smith and Mr Charles Streeten** (instructed by **The Government Legal Department**) for the **Defendant**
**Mr Michael Humphries KC and Ms Daisy Noble** (instructed by Womble Bond Dickinson (UK) LLP), for the **First Interested Party**
The **Second Interested Party** was not represented.

Hearing dates: 8 & 9 November 2022

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 31 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

**Judgment Approved by the court for handing down.**

**Mr Justice Lane :**

1. Climate change, with its consequences for human and other life on this planet, is generally regarded as a matter of very great importance. In the same month in which this appeal was heard in Bristol, world leaders and other policy makers gathered in Sharm El-Sheik, Egypt for COP27, in order to discuss this matter. There is an international consensus on the need to achieve substantial reductions in $CO_2$ emissions. The Intergovernmental Panel on Climate Change 2021 was widely reported as being a "Code Red for Humanity", such is the present level of concern.

## *A. BACKGROUND*

2. This appeal is about the proposed expansion of Bristol Airport. The first interested party, Bristol Airport Ltd ("BAL"), applied to North Somerset Council ("NSC") for outline planning permission and the amendment of four existing planning conditions, which together would enable the capacity of Bristol Airport to rise by 2 million passengers per year, an increase of about 20 per cent on current numbers.

3. NSC refused the application in February 2020 and BAL appealed against that refusal to the defendant under section 78 of the Town and Country Planning Act 1990 ("the 1990 Act"). The appeal was heard by a panel of three inspectors ("the Panel"), over a period of some nine weeks, between July and October 2021. On 2 February 2022, the Panel allowed BAL's appeal.

4. The claimant is a network of groups comprised of members of various environmental organisations in the south-west region of England, as well as residents from local communities affected by the proposed expansion of Bristol Airport.

5. The claimant appeared at the inquiry. The broad thrust of the claimant's case was that BAL's appeal should be dismissed because the expansion of Bristol Airport would have a serious and unacceptable effect on climate change. The claimant led evidence from Professor Kevin Anderson, who holds a joint Professorship in energy and climate change in the School of Engineering at the University of Manchester, as well as other appointments; Mr Finlay Asher, an aerospace engineer formerly employed by Rolls-Royce, with expertise on new aircraft technology and sustainable aviation fuels; and Mr Sam Hunter-Jones, a solicitor practising as an in-house lawyer at ClientEarth.

6. On 9 May 2022, Lang J granted the claimant permission to apply for planning statutory review on each of six grounds. The first five of those grounds can be grouped under the broad heading of challenges to the Panel's decision in respect of emissions of greenhouse gases from aircraft (predominantly, but not exclusively, in the form of $CO_2$). The sixth ground concerns the effect of the Airport's expansion upon a special area of conservation in which horseshoe bats roost and breed.

7. So far as climate change is concerned, the general question underlying Grounds 1 to 5 is whether and to what extent aviation emissions should play a role in deciding whether permission should be granted under the 1990 Act.

## *B. AN OVERVIEW OF THE PANEL'S DECISION LETTER*

8. The following is an overview of the relevant parts of the Panel's decision letter ("DL"). It will be necessary to examine passages of the DL in more detail, when dealing with the claimant's grounds of challenge.

9. At DL33, the Panel referenced section 38(6) of the Planning and Compulsory Purchase Act 2004. This requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise. The development plan in the present case includes the North Somerset Core Strategy, adopted in January 2017 ("CS"). At DL37, the Panel noted that, *inter alia*, CS1 was concerned with addressing climate change and reducing greenhouse gas ("GHG") emissions. CS1 was described as stating, amongst other matters, that NSC is committed to reducing carbon emissions and tackling climate change, mitigating further impacts and supporting adaptation. One of the principles guiding development is that it should demonstrate a commitment to reducing carbon emissions.

10. Beginning at DL45, the Panel addressed the National Planning Policy Framework ("NPPF"). For present purposes, we are concerned with paragraph 188 of the NPPF. At DL62, the Panel described paragraph 188 as requiring the focus of a decision to be on whether a proposed development is an acceptable land use, rather than focusing on the control of emissions, which are the subject of separate pollution control regimes. Paragraph 188 states that it should be assumed that such other regimes will operate effectively.

11. Beginning at DL65, the Panel addressed National Aviation Policy, beginning with the Aviation Policy Framework (March 2013) ("APF"), which sets out the government's high-level objectives and policy for aviation. A key priority of the APF is to make better use of existing runway capacity at all UK airports. The APF recognises, however, that development of airports can have negative as well as positive local impacts "including on noise levels". As a result, proposals for expansion should be judged on their individual merits.

12. At DL68, the Panel referred to a document entitled "Beyond the Horizon - the Future of UK Aviation: Making Best - Use of Existing Runways" (June 2018) ("MBU"). The Panel described the MBU as recognising "the importance of aviation growth while acknowledging the need to tackle environmental impacts" and as providing "that increased carbon emissions be dealt with at the national level" (DL70).

13. DL 78 to 82 are headed "Climate change policy". Here, the Panel made reference to the Paris Agreement, which is an unincorporated treaty on climate change within the United Nations Framework Convention on Climate Change. The Paris Agreement set a long-term temperature goal of limiting global warming to well below 2 degrees above pre-industrial levels. It remains the foundation for much subsequent legislation and guidance. It is worth mentioning here that the legal nature of the Paris Agreement has been examined by the Supreme Court in R (Friends of the Earth Limited) v Heathrow Airport Limited [2020] UKSC 52 ("Friends of the Earth") and, very recently, by the Court of Appeal in R (Friends of the Earth Limited) v Secretary of State for International Trade/Export Finance and another [2023] EWCA Civ 14.

14. At DL80, the Panel noted that the Paris Agreement was reflected in the United Kingdom by the Climate Change Act 2008 ("CCA"). At DL81, the Panel referenced two government documents published in July 2021. These were "Decarbonizing Transport:

A Better, Greener Britain" and the "Jet Zero Consultation". The latter was a consultation document "but the main messages are not dissimilar, and they both emphasise the need for very significant action to be taken". At DL 82, the Panel noted that COP26 was held in Glasgow in the autumn 2021, following which the "Glasgow Climate Pact" was adopted (November 2021).

15. At DL103, the first of the "main issues" debated in the inquiry was described by the Panel as follows:-

> "The impact of the proposed development on GHG emissions and the ability of the UK to meet its climate change obligations".

16. The section of the DL entitled "Climate Change" runs from DL143 to 216. It will be necessary to address a good many of these paragraphs in more detail, in dealing with grounds 1 – 5. The Panel observed that there was no dispute between the parties about the importance of climate change – "at the local, national and international levels". There was also agreement that there would be an increase in GHG, especially $CO_2$, if the appeal scheme went ahead, compared with the position if it did not. Under those circumstances "the climate change position would be worse" (DL146).

17. At DL147, the Panel was categoric that "the contribution of the appeal scheme to climate change related to $CO_2$ admissions is an important material consideration".

18. At DL149, the Panel recorded there being "no substantial dissent" from the formulation of the key question, which was whether emissions from the proposal would be so significant that they would materially affect the ability of the UK to meet its carbon budgets and the target of net zero GHG emissions by 2050. The Panel considered that the "mathematics of the increase" was almost entirely agreed.

19. At DL150, the Panel said it was "common ground that an international response is necessary", with individual nations determining their own contributions. At DL151, the Panel considered that the main difference between BAL and NSC (and other parties) was about "the way in which the issue of the emissions from this proposal should be addressed". BAL relied on national action to address aviation carbon limits, whereas the other parties looked to airport capacity limits, including the restriction of individual airport expansion, such as that envisaged at Bristol Airport.

20. The DL then turned to the development plan and the NPPF in respect of the climate change issue. It described NSC's Policy CS1 as the key development plan policy, concluding there was "every reason to conclude that the policy does not directly address aviation omissions". Policy CS23, which relates specifically to Bristol Airport, "takes one little further than policy CS1".

21. DL153 to 155 addressed the NPPF. DL156-162 concern the CCA and carbon budgets, about which considerably more needs to be said later in this judgment. Carbon budgets are ways in which the Secretary of State seeks to comply with his duties under the CCA.

22. In DL160, the Panel recognised that, in order to achieve the target of the sixth carbon budget, and of any previous budgets, any increased emissions in one sector arising from the proposals will necessitate reductions elsewhere. In this regard, the Panel detected a

difference between BAL and the other parties to the inquiry as to the current position in relation to future carbon budgets.

23. In DL161, the Panel recognised that the government "is not on track to meet the 4th and 5th carbon budgets – with significant reductions needed in relatively short periods." The Panel, however, considered "the suggestion that the Government is off track at this time means little in relation to budget periods which have not yet started."

24. DL162 reads:

> "162. There are three important points to make in relation to the carbon budgets and the way in which they operate. Firstly, although the approach to Net Zero and the carbon budget is a material consideration, the CCA places an obligation on the SoS, not local decision makers, to prepare policies and proposals with a view to meeting the carbon budgets. Secondly, as advised in the NPPF, there is an assumption that controls which are in place will work. Finally, and consequent on the previous points, NSC's position that grant of permission in this case would breach the CCA and be unlawful is not accepted. That does not mean that these matters are not material considerations, but the CCA duty rests elsewhere".

25. Beginning at DL163, the Panel examined carbon "offsetting schemes". I shall describe these further in due course. There are two such trading schemes. The first is the UK Emissions Trading Scheme ("UK ETS"). In the UK, this replaced the former EU Emissions Trading Scheme ("EU ETS"). The second trading scheme is CORSIA. This was adopted by the International Civil Aviation Organisation in 2016. Both offsetting schemes are time-limited, being scheduled to stop "well short of 2050" (DL168).

26. At DL183, the Panel said there had been no disagreement between BAL and NSC concerning the methodology and calculation of the $CO_2$ effects of the Airport's expansion proposal. For that reason, the numerical position was not considered in any depth. BAL's position was that the increase would not amount to a significant effect, as described in the Environmental Statement and its Addendum. The proposal's opponents, however, argued that the effect would consume the local carbon budget of NSC between 2028 and 2032. The Panel, at DL188, was unpersuaded that the arguments surrounding the local carbon budget were of significance. The Panel then said:-

> "189. Overall, it remains the case that the extent to which this decision, related to a local scheme, would increase the amount of GHG emissions is a material consideration. The issue is how such increases, of whatever magnitude, should be addressed."

27. Beginning at DL190, the Panel examined the cumulative impact of the Airport's expansion. It observed that the position of NSC and other objectors (including the claimant) was that the impact of all airport development should be assessed before permission was granted in the present case. No such national assessment was, however, before the Panel. In the absence of any national assessment, the implication of the approach of the objectors would be that the appeal should be dismissed. But, even in

the absence of a national assessment, the Panel concluded that the approach of the objectors was not supported by policy. There was no requirement to conduct a cumulative assessment of GHG emissions on the global climate and, in any event, it would not be feasible to do so (DL194, 195).

28. At DL204 to 207, the Panel set out its approach to the issue of non-$CO_2$ emissions. The Panel concluded that there was considerable uncertainty in assessing these emissions and no policy as to how they should be dealt with. Given the extent of scientific uncertainty, and the intention of BAL to consider non-$CO_2$ emissions further in its Carbon and Climate Change Action Plan, ("CCCAP") the Panel concluded that it would be "unreasonable to weigh this matter in the balance against the proposal" (DL207).

29. The draft CCCAP was discussed by the Panel at DL208 to 210. Noting that the production of a final version of the CCCAP would be the subject of a planning condition, and that the CCCAP's current status was "as a draft", the Panel concluded that "it has very limited weight" (DL210).

30. DL211 to 216 contain the Panel's conclusions on climate change. At DL211, the Panel reiterated there was "no doubt that climate change is a very serious issue facing this country and the world". Nor was there any doubt that BAL's proposal would increase $CO_2$ emissions from aircraft.

31. At DL212, the Panel recorded the "in principle support at the national level for the increased use of runways and other existing facilities", albeit subject to addressing environmental issues. The development plan reflected the need to reduce carbon emissions and tackle climate change. The key point of difference between the parties at the inquiry was over how this was to be achieved.

32. DL213 said that, whilst an increase in $CO_2$ emissions in one location will have consequences elsewhere and make the Secretary of State's duty under the CCA more difficult, the comparative magnitude of the increase from the proposal was limited and it had to be assumed the Secretary of State will comply with his legal duty under the CCA. There were several options and future approaches to assist in the attainment of the target, albeit there were problems and uncertainties associated with some approaches. On the other hand, there was no national policy that seeks to limit airport expansion.

33. The conclusion of the Panel was that the aviation emissions would not be so significant as to have a material impact on the government's ability to meet its climate change target and budgets. "Overall, this matter [climate change] must be regarded as neutral in the planning balance" (DL214 to 216).

34. Biodiversity was addressed by the Panel, beginning at DL481. The Panel noted that the proposed development would result in a loss of 3.7 HA of agricultural land in order to allow the expansion of an Airport car park, and a small area (0.16HA) of woodland edge in order for improvement works to the A38 road to be delivered.

35. At DL482, the Panel noted that these two areas were outside of, but relatively close to, the North Somerset and Mendip Bats SAC. The SAC had been designated because of the presence of lesser and greater horseshoe bats. The two areas provided foraging land for the bats and were therefore functionally linked to the SAC.

36. At DL488, the Panel observed that BAL's proposal was to provide land as replacement habitat in exchange for the functionally-linked land, "thereby avoiding any impact on the SAC itself". The Panel considered that this would be a "protective mitigation measure" which would "ensure that the project does not adversely affect the integrity of the SAC". The replacement land "would be provided in advance of any works being carried out that would affect existing foraging land".

37. At DL490, the Panel observed that the Parish Council Airport Association ("PCAA") raised the legal status of the proposed replacement land. The issue was whether the replacement foraging habitat would be "mitigation" or "compensation". At DL490, the Panel noted that the only expert ecological evidence, presented by BAL, was that the proposed replacement foraging land met the test for "mitigation", and that this position had been agreed by NSC officers and Natural England. There was "no contrary expert evidence".

38. The argument put by PCAA was that the replacement land was intended to replace "significant" bat habitat which would be destroyed by the proposal. Accordingly, the replacement land had to be viewed as "compensation" rather than "mitigation". This meant that planning permission could not be granted, compatibly with the relevant legislation concerning SACs (DL491).

39. At DL492, the Panel concluded that there would not, in fact, be any adverse effect on the integrity of the SAC.

### *C. THE CLIMATE CHANGE ACT 2008 AND LEGISLATION MADE UNDER IT*

40. As will already be apparent, the CCA and the legislation made under it feature heavily in the DL. It is therefore necessary at this stage to describe these in some detail.

41. The Long Title of the CCA explains that one of its purposes is to set a target for the year 2050 for the reduction of targeted greenhouse gas emissions. The Act also provides for a system of carbon budgeting, establishing a Committee on Climate Change ("CCC"); and conferring paths to establish trading schemes for the purpose of limiting greenhouse gas emissions. Further purposes of the CCA include providing financial incentives to produce less domestic waste and making provision about charging for single use carrier bags.

42. When the CCA came into force, it placed a duty on the Secretary of State to ensure that the "net UK carbon account" for the year 2050 was at least 80% lower than the 1990 baseline: section 1. This target was, however, amended in June 2019 to be at least 100% below the baseline (the "net zero" target). This is a balanced figure and does not mean absolute zero emissions. The "net zero" target was substituted in 2019, following the Paris Agreement.

43. Section 4 of the CCA imposes a duty on the Secretary of State to set carbon budgets for each succeeding period of five years, beginning with 2008-2012. The Secretary of State must ensure that the net carbon account for a budgeting period does not exceed the carbon budget. Section 5 specifies the level of carbon budgets, whilst section 8 requires the Secretary of State to set the carbon budget for a budgetary period by order. The carbon budget for a period must be set with a view to meeting the target in section 1 and the requirements in section 5.

44. Each five yearly carbon budget is to be set 12 years in advance as a series of interim targets. The carbon budgets must be set to achieve the 2050 carbon target.

45. Section 30 of the CCA provides that emissions from international aviation do not count as emissions from sources within the UK. Section 10, however, requires that, in setting carbon budgets, the Secretary of State shall take into account the estimated amount of reportable emissions from international aviation and international shipping for the budgetary period or periods in question. The "estimated amount" of such reportable emissions means the aggregates of the amounts relating to emissions of targeted greenhouse gases from international aviation that the Secretary of State is required to report for that period in accordance with international carbon reporting practice: section 10(3).

46. Section 32 of the CCA establishes the CCC in order to advise the government on matters relating to climate change. This includes the carbon target and carbon budgets, as well as international aviation: section 35. The CCC's role is advisory. It is the Secretary of State who continues to make policy in this area.

47. Six carbon budgets have been adopted so far under the CCA. The fifth, set in 2016, runs from 2028 to 2032. Emissions from international aviation were not formally included within the first to fifth carbon budgets. Instead, these emissions were taken into account, pursuant to section 10, by setting the budgets at a level which allowed headroom for them. The budgets were, in other words, set lower by the amount of this headroom. The figure allowed for aviation emissions is known as the "planning assumption". This is explained in the Aviation Policy Framework 2013.

48. The Sixth Carbon Budget was announced in April 2021. It covers the period from 2033 to 2037. The government also announced a new target to reduce emissions by 78 per cent, compared with 1990 levels, to be achieved by 2035.

49. The Sixth Carbon Budget will, for the first time, formally include emissions from international aviation within the budget figure. The change does not, however, alter the fact that aviation emissions have hitherto been accounted for in the carbon budgets in the way described above. The decision formally to include international aviation in the Sixth Carbon Budget Order 2021 follows the recommendation of the CCC in its Sixth Carbon Budget Report on Aviation in December 2020.

50. I turn now to the trading schemes under Part 3 of the CCA. From 2005, the UK participated in the EU ETS. Since 2012, this has included the aviation sector. Following the UK's withdrawal from the EU, the UK ETS replaced the UK's participation in the EU ETS, with effect from 1 January 2021.

51. The UK ETS was established through the Greenhouse Gas Emissions Trading Scheme Order 2020, made under section 44 of the CCA. Schedule 2 to that Act requires any trading scheme to specify the period to which it relates. Accordingly, the 2020 Order relates to the period up to 2030. The total of "given allocations" for all participants in the UK ETS, including airlines, is approximately 60% of the total number within the UK ETS. The remaining 40% is available for purchase by any participants in the scheme.

52. The UK ETS relates not solely to aviation but to the entire UK traded sector. Under the UK ETS, the cap on allowances each year has been initially set at five per cent below the UK's expected notional share of the EU ETS cap, with year on year reductions in the cap specified up to 2030.

53. Article 23 of the 2020 Order permits allowances to be traded, except where prohibited by other legislation. Article 28 prescribes the mechanism for aviation "monitoring plans". Under these, an "aircraft operator" monitors emissions and reports to government. Article 34 provides for the surrender of allowances against emissions and establishes a system of penalties in the following year for operators that exceed their allocated allowances. Enforcement provisions are contained in article 44. These take the form of enforcement notices.

54. The scope of the UK ETS is set out in Schedule 1 to the Order; namely, flights to and from the UK (including Gibraltar) and the EEA. BAL says that this includes 88-90 per cent of flights in and out of Bristol Airport.

55. As stated in the Explanatory Memorandum to the 2020 Order, the government intends to consult on an appropriate trajectory for the UK ETS cap, following the CCC's Sixth Carbon Budget Report. The aim is to align the cap with the net zero trajectory by January 2023.

### *D. THE AIR NAVIGATION (CARBON OFFSETTING AND REDUCTION SCHEME FOR INTERNATIONAL AVIATION) ORDER 2021: CORSIA*

56. The Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021 came into force on 26 May 2021. The Order is made under powers conferred by the Civil Aviation Act 1982. The Order notifies the International Civil Aviation Organisation of the UK's participation in "CORSIA", which is the Carbon Offsetting and Reduction Scheme for International Aviation. The monitoring, reporting and verification requirements of UK ETS, EU ETS and CORSIA are consistent, in that one tonne of $CO_2$ is accounted for in the same way under all three schemes.

57. CORSIA has three phases: a pilot scheme from 2021 to 2023, a first phase from 2024 to 2026 and a second phase from 2027 to 2035. The pilot and first phases are voluntary, albeit that the UK intends to participate in them. The second phase is intended to include the majority of countries based on the proportion of aircraft movements. From 2025, CORSIA facilitates the reporting and offsetting of the emissions of aeroplane operators.

58. The intention is for CORSIA to apply to those emissions not covered by the UK ETS. It will enable airline operators to purchase carbon credits from the carbon market to offset emissions. The apparently preferred option for the relationship between the UK ETS and CORSIA is a hybrid scheme, under which aeroplane operators can claim a reduction in their UK ETS obligations equivalent to their CORSIA obligations on flights from the UK and EEA States. In effect, each CORSIA carbon credit will be matched by the removal of one UK ETS allowance. The CCC considers that this approach will work but requires consideration of how to avoid the lower price of CORSIA carbon credits distorting the value of UK ETS allowances. The present intention is for a statutory instrument to come into force, which would either amend the existing CORSIA Order or replace it.

## *E. THE CLAIMANT'S GROUNDS OF CHALLENGE*

59. The claimant advances six grounds of challenge to the Panel's decision, pursuant to the grant of permission by Lang J.

60. Ground 1 contends that the Panel erred in law in its interpretation of development plan policies CS1 and CS23; alternatively, that the Panel failed to give adequate reasons for its interpretation of those policies. Ground 2 states that the Panel erred in law in its interpretation of the MBU; alternatively, that it failed to give adequate reasons for its interpretation. Ground 3 argues that the Panel erred in law in finding that it was required to "assume" that the Secretary of State would comply with his legal duty under the CCA. This ground concerns the correct interpretation of paragraph 188 of the NPPF. Ground 4 asserts that the Panel erred in law in discounting the impact of the expansion of Bristol Airport in relation to the local carbon budget for NSC. Ground 5 concerns an alleged error of law in the Panel's conclusion that the impact of non-$CO_2$ emissions from aircraft could be excluded from the EIA prepared by BAL and should not weigh in the balance against the proposed airport expansion; alternatively, that there was a failure to give adequate reasons for the Panel's decision. Ground 6 concerns what is said to be an error on the part of the Panel in determining that replacement habitat for the greater and lesser horseshoe bats amounted to "mitigation" rather than "compensation", contrary to the law regarding SACs; alternatively, that the Panel failed to give adequate reasons for its decision on this matter.

### *Ground 1*

61. Policy CS1 is entitled "Addressing Climate Change and Carbon Reduction". It provides that NSC is committed to reducing carbon emissions and tackling climate change, mitigating further impacts and supporting adaptation to its effects. In order to support this, CS1 sets out eleven principles to "guide development". Under these principles, development should demonstrate a commitment to reducing carbon emissions, including reducing energy demand through good design. Developers are encouraged to incorporate site-wide renewable energy solutions. Opportunities should be maximised for all new homes to contribute to tackling climate change. A network of multi-functional green infrastructure will be planned for and delivered through new development. Bio-diversity across North Somerset will be protected and enhanced. There should be emphasis on the re-use of previously developed land and existing buildings in preference to the loss of greenfield sites.

62. Under the heading "Background" there is the following:-

> "3.7 Tackling climate change is a key priority for the planning system and in particular implementing the national carbon reduction strategy of an 80% reduction in carbon dioxide emissions by 2050. Given the scale of development allocated to North Somerset there are significant opportunities and indeed a responsibility to deliver action on the ground which should be led by a strong policy framework. In terms of the Core Strategy this action is primarily aiming to reduce carbon emissions and to places for the likely impacts of climate change.
>
> The Core Strategy approach

> 3.8 Policy CS1 sets out a broad policy framework drawing together various themes where development can address climate change issues. Many of the specific themes are dealt with elsewhere in the Core Strategy including green infrastructure (Policy CS9) and sustainable construction and design (Policy CS2), but are included in this more general policy as a means of co-ordinating action to address climate change. Primarily the Core Strategy seeks to address climate change by:
>
> - Reducing unsustainable carbon emissions,
> - Making all buildings more sustainable,
> - Encouraging sustainable transport patterns, and
> - Planning for a sustainable distribution of land uses
>
> …
>
> 3.17 The scope of this policy translates to the variety of interests responsible for delivering action on climate change and meeting the strategic objectives and realising the visions set out in this strategy and the need to co-ordinate action, towards comprehensive place-making. Developers and other bodies with development interests should work closely with local communities, specialist groups and the council in order to bring development forward that meets the challenges climate change brings."

63. Policy CS23 is entitled "Bristol Airport". It provides that proposals for the development of Bristol Airport will be required to demonstrate the satisfactory resolution of environmental issues, including the impact of growth on surrounding communities and surface access infrastructure. It is stated that this policy contributes towards achieving Priority Objective 3. That objective concerns growth in North Somerset.

64. The background to CS23 states, amongst other things, that:-

> "3.294 As well as taking account of the wide range of environmental issues including climate change, the Core Strategy emphasises the importance of assessing the local impacts, particularly in relation to surrounding communities and surface access issues. "

65. The claimant's case before the Panel at the inquiry was that the impact of the expansion of Bristol Airport on climate change was relevant to determining whether the proposals complied with policies CS1 and CS23, as well as being capable of amounting to a standalone material consideration and being relevant to weight. As I have mentioned, section 38(6) of the 2004 Act requires a determination of planning permission to be made in accordance with the development plan, unless material considerations indicate otherwise. In its closing submissions to the inquiry, the claimant argued that the appeal proposal failed to accord with the development plan "because BAL cannot demonstrate satisfactory resolution of the impact associated with the increased greenhouse gas emissions (both $CO_2$ and non-$CO_2$) caused by the appeal proposal".

66. BAL's case was that CS1 was "of primary relevance to carbon emissions from airports, buildings, ground operations and surface access, which are matters of local policy concern". BAL did not submit that the impact of aviation emissions was excluded from CS1.

67. The Panel addressed the development plan in relation to climate change at DL152. This reads:-

> "152. Policy CS1 is the key development plan policy related to this issue and emphasises the reduction of carbon emissions and the need to tackle climate change. BAL's position is that this is of primary relevance to ground based carbon emissions. However, this is largely based on their position that climate change is a matter to be dealt with at the national level. Neither the policy nor the justification makes that distinction but, as will be discussed below, there is every reason to conclude that the policy does not directly address aviation emissions. CS policy CS23 does not provide unqualified support for growth of BA, but it takes one little further than policy CS1."

68. The claimant contends that the only place at which the Panel returned to discuss CS1 and CS23 was at DL216, where the Panel stated that "the two development plan policies summarised above are not considered to directly address aviation emissions".

69. The claimant says that, from what little reasoning it gave, the Panel appears to have taken the view that, despite the broad wording of Policy CS1, and the broad wording of the policy justification which followed it, aviation emissions are not included within the policy requirement that "development should demonstrate a commitment to reducing carbon emissions", or, indeed within any of Policy CS1's other requirements. It also appears, the claimant says, that the Panel took the view that the impact of the proposals on aviation emissions was not relevant under Policy CS23 to the requirement that BAL "demonstrate the satisfactory resolution of environmental issues", as required under that policy.

70. The claimant submits that the Panel's interpretation of Policy CS1 and Policy CS23 is incorrect as a matter of law. Interpreted objectively, in accordance with the language used in the policies and in their proper context, they both encompass the impact of aviation emissions. This is supported by the reasoned justifications for the policies.

71. For the claimant, Ms Dehon KC acknowledged the distinction drawn in the case law between the interpretation of a planning policy, which is a matter for the court, and the application of that policy, which is for the relevant decision-maker, in the exercise of their judgment, with the court's function in that regard being one of intervention only on public law grounds.

72. At paragraph 19 of Tesco Stores Ltd v Dundee CC [2012] UKSC 13, Lord Reed explained that policy statements are not to be construed as if they were statutory or contractual provisions. Development plans are broad statements of policy, many of which may be mutually irreconcilable. This means that, in a particular case, one such policy must give way to another. Furthermore, many of the provisions of development plans are framed in language whose application to a given set of facts requires the

exercise of judgment. Such matters fall within the jurisdiction of planning authorities, subject only to challenge on the grounds of irrationality or perversity.

73. However, as Lord Reed emphasised, "planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean." As was pointed out in R v Derbyshire County Council Exp Woods [1997] JPL 958, a decision-maker cannot attach a meaning to the words of a policy which those words are not properly capable of bearing.

74. With these authorities in mind, Ms Dehon submitted that, in relation to Ground 1, the Panel misinterpreted the words of Policies CS1 and CS23. In making that submission, Ms Dehon said the claimant was not resorting to "excessive legalism" which, as Lindblom LJ held at paragraph 50 of East Staffordshire BC v the Secretary of State for Communities and Local Government [2018] 1 P & C.R. 4, has no place in the planning system; in proceedings before the Planning Court; or in subsequent appeals. Courts should always resist over-complication of concepts that are basically simple. Nevertheless, "the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme" (paragraph 50).

75. Ms Dehon further submitted that, in the language of paragraph 7 of Lindblom LJ's judgment in St Modwen Developments Ltd v Secretary of State for Communities and Local Government and another [2018] PTSR 746, the claimant's criticisms of the DL did not amount to "hypercritical scrutiny that this court has always rejected"; nor that the claimant's analysis required the DL to "be laboriously dissected in an effort to find fault". Ms Dehon said that the defendant and BAL could not invoke the supporting text of the policies, in effect to rob those policies of what was their true meaning, based on their actual language. In this regard, she relied upon the judgment of Richards LJ in R (Cherkley Campaign Ltd) v Mole Valley District Council [2014] PTSR Digest D14. Richards LJ held that the supporting text of a policy was relevant to the interpretation of the policy to which it related but was not itself a policy or part of a policy. Nevertheless, that supporting text could not trump the policy. Thus, a proposed development which accorded with the policies in the local plan could not be said to lack conformity with that plan because it failed to satisfy an additional criterion, which was referred to only in the supporting text.

76. In Policy CS1(1), Ms Dehon emphasised the fact that reducing energy demand through good design etc was only a non-exhaustive example of the general requirement for development to "demonstrate a commitment to reducing carbon emissions". Paragraph 3.7 of the background to policy CS1 was, likewise, in broad terms, referring to the need to tackle climate change as a "key priority for the planning system" and stating that the need to deliver "action on the ground" was primarily "to reduce carbon emissions and to prepare places for the likely impacts of climate change".

77. In similar vein, policy CS23, which specifically concerns Bristol Airport, states that proposals for the development of the Airport need to demonstrate "the satisfactory resolution of environmental issues". The use of the word "including" before the phrase "the impact of growth on surrounding communities and surface access infrastructure" showed that this was merely an example of environmental issues. Properly read, the phrase "environmental issues" includes emissions from aircraft. Ms Dehon also drew attention to paragraph 3.294 under the heading "the core strategy approach", which

emphasises the importance of assessing local impacts "as well as taking account of the wide range of environment issues including climate change".

78. Ms Dehon said that, at the inquiry, none of the parties suggested to the Panel that Policies CS1 and CS23 did not apply to aviation emissions. BAL spoke about the primary relevance of the two policies being concerned with ground emissions, such as from buildings.

79. Ms Dehon emphasised the claimant's submission that the words "as will be discussed below" in DL152 can, at best, refer only to DL216. There, in its concluding paragraph about Climate Change, the Panel concluded that "aviation emissions are not so significant that they would have a material impact on the government's ability to meet its climate change targets and budgets" and that "the two development plan policies summarised above are not considered to directly address aviation emissions". This meant that overall, the issue of emissions "must be regarded as neutral in the planning balance".

80. According to the claimant, the defendant is unable to contend that policies CS1 and CS23 cannot encompass aviation emissions on the ground that BAL has no control over them. In R (Finch) v Surrey County Council [2022] PTSR 958, the majority of the Court of Appeal held that, in considering whether a particular impact on the environment was a "likely significant effect" of proposed development for the purposes of Council Directive 2011/92/EU and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 Regulations"), the real question was not the meaning of "the project" or "the proposed development" in the case concerned, but the ascertainment of the "effects" of the proposed development and the degree of connection needed to link that development with its putative effects. There was, accordingly, no merit in seeking to invoke the absence of control over aviation emissions in interpreting policies CS1 and CS23.

***Ground 1: discussion***

81. It is clear that Policy CS1 is broad enough to include the issue of aircraft emissions. I did not understand Mr Westmoreland Smith or Mr Humphries KC to contend otherwise. That said, none of the eleven principles contained in policy CS1 has anything specific to say about aviation emissions. This contrasts with what those principles say about other matters, such as maximising opportunities for new homes to contribute to tackling climate change, requiring developments of ten or more dwellings to demonstrate a commitment to maximising the use of sustainable transport solutions, particularly in Weston Super Mare; and reducing, re-using and recycling waste with particular emphasis on waste minimisation on development sites.

82. I accept what Ms Dehon says about paragraphs 3.7 and 3.8 of the background to Policy CS1, as regards the generality of some of the wording concerning climate change and reducing greenhouse gases. The fact remains, however, that no attempt is made in Policy CS1 or Policy CS23 to articulate the way in which aviation emissions might be addressed by NSC as planning authority. This is significant, given the obvious fact that aviation emissions, which can occur at any point in an aircraft's journey to and from Bristol Airport, are of a different character from, for example, carbon emissions that can be addressed by reducing energy demand through good design of buildings in the area of NSC.

83. It is also noteworthy that NSC has not sought to challenge the way in which the Panel dealt with that council's policies CS1 and CS23.

84. As is evident from my summary of the relevant parts of the DL, the Panel had regard to the way in which aviation emissions are addressed in the CCA, including the systems of carbon budgets. At DL149, the Panel recorded there being no substantial dissent from the formulation of the key question under the heading "Climate Change"; namely, whether the emissions from the BAL proposal would be so significant that they would materially affect the ability of the UK to meet its carbon budgets and the target of net zero GHG emissions by 2050.

85. The claimant contends that the Panel was, here, merely discussing whether aviation emissions fell to be treated as a material consideration in the purely general sense; and that this should be contrasted with what the claimant argues is the discrete section 38(6) issue of whether the proposed development was in accordance with the development plan. It would, however, be very odd if the Panel considered that the emissions issue fell be treated in the way described in DL149 only in this general sense, with the inevitable inference that the Panel considered the issue fell to be treated in some different (and unspecified) way for the purpose of assessing compliance or otherwise with Policy CS1 and Policy CS23. Reading the DL with the degree of benevolence demanded by the case law, one simply cannot draw such a conclusion.

86. I have set out DL152 above. DL152 shows that the Panel was concerned to determine how Policy CS1 and Policy CS23 bore on aircraft emissions. The Panel disagreed with BAL's submission that Policy CS1 was of "primary relevance to ground based carbon emissions". The Panel was clear that neither that policy nor the justification for it made such a distinction. Nevertheless, the CCA and its system of carbon budgets were relevant to explain the key question in respect of the development plan; namely, how that plan should apply to aviation emissions occasioned by the implementation of BAL's proposals for the expansion of Bristol Airport.

87. We are, here, firmly in the territory identified by Lord Reed in the first part of paragraph 19 of Tesco, rather than sitting on Humpty Dumpty's wall. Although Policy CS1 is capable of including aircraft emissions, the decision-maker is entitled to exercise their judgment in order to determine how such emissions are, in a particular case, to be dealt with under the policy.

88. This point was made by the Panel itself at DL212 where, as part of its conclusions on climate change, the Panel said that the "development plan reflects the need to reduce carbon emissions and tackle climate change – but the key point of difference is how this is to be achieved" (my emphasis).

89. I do not accept Ms Dehon's submission that the words "as will be discussed below" in DL152 are referable only to DL216, where the Panel said "that the two development plan policies summarised above are not considered to directly address aviation emissions." If that were the case, then I agree the Panel's explanation would have been circular. It is, however, plain that the quoted words in DL152 include the Panel's description and analysis of the CCA, carbon budgets, UK ETS and CORSIA, which begin at DL156 and which are specifically referred to in the last sentence of DL155.

90. Ms Dehon contends that, if the words "as will be discussed below" in DL152 do include those paragraphs, then they must also include DL153 to 155, in which the Panel discussed the significance of the NPPF. Ms Dehon says that this must mean the Panel impermissibly used the NPPF in order to interpret Policy CS1 and Policy CS23.

91. In fact, the NPPF applies to planning policies as well as to development control decisions, providing guidance to local planning authorities on the formulation of development plan policies. That said, there is no doubt as to what the Panel was about, in saying what it did. It was observing that the NPPF acknowledges that, where other systems of control exist, it is to be assumed that those systems or regimes will operate effectively: DL154.

92. On any fair and proper reading of DL143 to 216, all of which fall under the Panel's general heading of "*Climate Change"*, the Panel did not err in law, as alleged in Ground 1. As I have found, it did not find that Policy CS1 and Policy CS23 had no purchase upon the issue of aviation emissions arising from the proposal. That is not a proper reading of the Panel's conclusion that those policies did not "directly" address such emissions.

93. At DL216, the Panel found that "aviation emissions are not so significant that they would have a material impact on the government's ability to meet its climate change target and budgets". That was the test articulated in DL149, as to which there was "no substantial dissent". Aviation emissions fell to be addressed for the purposes of the policies "indirectly", in that these emissions become relevant for the purposes of the development plan if, and only if, they are likely to be such as to have a material impact on the Secretary of State's ability to meet his obligations under the CCA, including by means of carbon budgets. Since the Panel found this was not the position, and given that ground-based emissions could be addressed in the way described in DL216, this meant that granting permission for the development would not be contrary to the development plan. It also meant that aviation emissions were not otherwise a material consideration pointing to a dismissal of BAL's appeal.

94. I do not consider that, in the alternative, the Panel failed to give adequate reasons. Those reasons are contained in the paragraphs which follow DL152.

95. Ground 1 accordingly fails.

***Ground 2***

96. Ground 2 involves the Panel's approach to MBU. The claimant says that the Panel erred in its interpretation of MBU; alternatively, that it failed to give legally adequate reasons for that interpretation.

97. The claimant puts the first part of Ground 2 in two ways. It is said that the Panel ignored a material consideration in not considering the claimant's interpretation of MBU, as advanced at the inquiry. Further or in the alternative, the claimant says it is unclear whether, at DL70, in saying MBU "provides that increased carbon emissions be dealt with at the national level", the Panel was assuming that it could treat the admitted increase in $CO_2$ emissions from aircraft as a result of the proposal as not significant and thus neutral in the planning balance. If so, the claimant submits the Panel erred in law.

98. MBU followed a call for evidence, contained in the Aviation Strategy and the responses to it. Under the heading, "Implications for the UK's Carbon Commitments", 1.14 to 1.21 describe the carbon traded scenario and the carbon cap scenario. Under the first, UK aviation emissions could continue to grow provided that compensatory reductions are made elsewhere in the global economy. The carbon cap scenario was developed to explore the case for expansion even in the future where aviation emissions were limited to the CCC's planning assumption of 37.5Mt of $CO_2$ in 2050. 1.17 and 1.18 deal with the use of single-engine taxiing at UK airports and renewable fuels policy. 1.20 states that other measures are likely to be available and may turn out to be more cost effective or have greater abatement potential. 1.21 concludes that on balance it is likely that these or other measures would be available to meet the planning assumption under this policy.

99. Paragraph 1.8 of MBU identifies the main issues raised as including the need for environmental matters such as noise, air quality and carbon to be fully addressed as part of any airport proposals. Under the heading "Role of Local Planning" there is the following:-

> "1.9 Most of the concerns raised can be addressed through our existing policies as set out in the 2013 Aviation Policy Framework, or through more recent policy updates such as the new UK Airspace Policy or National Air Quality Plan. For the majority of environmental concerns, the government expects these to be taken into account as part of existing local planning application processes. It is right that decisions on the elements which impact local individuals such as noise and air quality should be considered through the appropriate planning process and CAA airspace change process."

100. Under the heading "Role of National Policy", MBU states:-

> "1.11 There are, however, some important environmental elements which should be considered at a national level. The government recognises that airports making the best use of their existing runways could lead to increased air traffic which could increase carbon emissions.
>
> 1.12 We shall be using the Aviation Strategy to progress our wider policy towards tackling aviation carbon. However, to ensure that our policy is compatible with the UK's climate change commitments we have used the DfT aviation model to look at the impact of allowing all airports to make best use of their existing runway capacity. 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.
>
> 1.13 The forecasts are performed using the DfT UK aviation model which has been extensively quality assured and peer reviewed and is considered fit for purpose and robust for producing forecasts of this nature. Tables 1-3 show the expected

> figures in passenger numbers, air traffic movements, and carbon at a national level for 2016, 2030, 2040, and 2050."

101. Under the heading "Local Environmental Impacts", 1.22 says that the government recognises the impact on communities living near airports and understands their concerns over local environmental issues. It is said to be important that communities surrounding those airports share in the economic benefits and that adverse impacts such as noise are mitigated where possible.

102. 1.23 says that for the majority of local environmental concerns, the government expects these to be taken into account as part of existing local planning application processes.

103. In 1.26 there is the following:-

> "1.26 … 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 prejudge 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."

104. The concluding paragraph, 1.29, as follows:-

> **"1.29 Therefore the government is supportive of airports beyond Heathrow making best use of their existing runways. However, we recognise that the development of airports can have negative as well as positive local impacts, including on noise levels. We therefore consider that any proposal should be judged by the relevant planning authority, taking careful account of all relevant considerations, particularly economic and environmental impacts and proposed mitigation. This policy statement does not prejudge the decision of those authorities who will be required to give proper consideration to such applications. It instead leaves it up to local, rather than national government, to consider each case on its merits."** (original emphasis)

105. The DL discusses MBU under the heading "National Aviation Policy". DL69 sets out in full paragraph 1.29, which the Panel described as "the key section".

106. As I have already mentioned, at DL70 the Panel stated that MBU, under the heading "Role of National Policy", provides that "increased carbon emissions be dealt with at the national level". DL71 recorded that the government reaffirmed its position on MBU on two occasions during the inquiry, confirming that MBU remains the most up-to-date policy on planning for airport development.

107. DL72 noted that NSC and others argued that MBU should be afforded limited or no weight as it pre-dates the government's adoption of the 2050 net zero target and the

sixth carbon budget in June 2021. The Panel considered those were material considerations. However, "MBU itself recognises there is uncertainty over climate change policy and over international measures, and notes that therefore matters might change after its publication".

108. At DL73, it was recorded that the status of MBU was debated in some detail at the inquiry. The Panel concluded that there was nothing from government to suggest that MBU should be given reduced weight. At DL74, the Panel said that, although many might disagree with the direction of current government aviation policy, it was not the role of the Panel to question the merits or otherwise of that.

109. DL75 reads as follows:-

> "75. There was also an argument put forward that MBU would only come into effect once the planning balance had been established. In effect, it would weigh for or against a proposal only once the overall conclusion has been reached. However, this approach to national policy was not supported by evidence of examples of this methodology being adopted elsewhere, and it does not appear logical. "

***Ground 2: discussion***

110. The claimant says that its approach to MBU was different from that of NSC at the inquiry. The claimant submitted to the Panel that although MBU and APF were the most up-to-date policies concerning the government's approach to airport capacity, they did not contain an unconditional mandate for expansion. At paragraph 8 of its written closing submissions, the claimant said that, in order to determine whether MBU and APF supported or counted against the proposed development, it was necessary to consider:-

> "the prior question of whether the general support for making best use of runways is reduced or removed because of environmental impacts of these specific applications. If so, the MBU and APF will weigh in the planning balance against the grant of planning permission. If, however, the environmental impacts of making best use of an airport runway are acceptable, the MBU and APF will lend support to the grant of permission in the overall planning balance".

111. The claimant contends that the Panel did not address the claimant's case in this regard. Thus, it either ignored a material consideration or failed to give adequate and intelligible reasons for rejecting the claimant's interpretation.

112. I do not consider there is merit in this submission. As set out above, DL75 did address the argument - which must be that of the claimant – that MBU would only come into effect once the planning balance had been established. The Panel gave a reason for rejecting this; namely that the approach was not supported by evidence of examples of the methodology being adopted elsewhere, and that it did not appear logical. There is no justification for saying that this finding was not open to the Panel.

113. The claimant also submits that the Panel did not take account of the part of its closing submissions which argued that 1.29 of MBU required account to be taken of all relevant

considerations, particularly environmental impacts. The claimant said this should be interpreted to include climate impacts assessed in the light of the UK's current climate change obligations. The Panel was thus told that it should take into account the introduction of the net zero target, the sixth carbon budget and its inclusion of international aviation, as well as the fact that the UK is off-track to meet the fourth and fifth carbon budgets, in deciding whether the airport expansion benefited from MBU's policy support.

114. So far as this criticism is concerned, I agree with Mr Humphries that it is readily apparent from the DL that the Panel considered in detail the carbon emissions from all sources. These included carbon emissions from aviation. It did so, as I have explained, by reference to whether the predicted aviation emissions from the proposal would have a material impact on the government's ability to meet its climate change targets and budgets.

115. That this was an appropriate approach is apparent from the judgment of Holgate J in R (Goesa Ltd) v Eastleigh Borough Council and Southampton International Airport Ltd [2002] EWHC 1221. At paragraph 122, Holgate J held that "acceptability is for the judgment of the decision maker" and that "there is nothing unlawful in the decision maker using benchmarks he considers to be appropriate in order to help arrive at a judgment on those issues. The statutory carbon budgets are one example…". At paragraph 123, Holgate J concluded that, given current policy and law, "it is permissible for a planning authority to look at the scale of GHG emissions relative to a national target and to reach a judgment, which may inevitably be of a generalised nature, about the likelihood of the proposal harming the achievement of that target".

116. The claimant argues the Panel misinterpreted MBU by taking it to mean that the admitted increase in $CO_2$ emissions was not a matter for local decision-making. As I have already said, there is nothing in the DL to suggest that, even if the Panel was wrong in its interpretation of MBU, it treated the increase in aviation emissions occasioned by the proposals as, for that reason, insignificant. On the contrary, as I have explained, the Panel had regard to the increase in emissions in determining the question (which it recorded as being agreed) of whether those emissions would materially affect the ability of the Secretary of State to comply with his obligations under the CCA etc.

117. Ms Dehon nevertheless contends that 1.29 of MBU requires planning decision makers to take into account all "environmental impacts", rather than leaving these to be addressed at the national level. Thus, even if the claimant's other arguments fail, the existence of MBU meant that the Panel erred in looking at aviation emissions from the proposal through the lens of the national system created by and under the CCA. She particularly relies on the closing words of 1.29, which say that it is for "local rather than national government, to consider each case on its merits".

118. I do not accept this submission. Although 1.29 is printed in bold type and is manifestly intended as a summation of the preceding paragraphs, MBU needs to be read in its entirety in order to understand what is meant by "environmental impacts" and considering "each case on its merits". It is apparent from 1.12 and 1.13 that one "important environmental element" which "should be considered at a national level" is the issue of "aviation carbon". It is in that important light that 1.29 falls to be read.

119. Accordingly, what the Panel said at DL70 was correct, as a matter of the interpretation of MBU.

120. The second part of Ground 2 asserts a failure by the Panel to give adequate reasons. I do not consider that the claimant has identified any unlawful failure by the Panel to give reasons for its approach to MBU. The case made by the claimant was addressed in the DL, either specifically (as at DL70 and 75) or in the wider context of the significance of increased aviation emissions in the planning process, in the light of the Secretary of State's responsibilities under the CCA.

121. Ground 2 accordingly fails.

***Ground 3***

122. Ground 3 involves paragraph 188 of the NPPF. This paragraph occurs in the part of the Framework headed "Ground conditions and pollution". Paragraph 188 reads as follows: -

> "The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities".

123. At DL62, the Panel summarised paragraph 188 of the NPPF as follows:-

> "62. At paragraph 188, the NPPF states that the focus of decisions should be on whether a proposed development is an acceptable land use, rather than focusing on the control of emissions which are the subject of separate pollution control regimes. It is stated that it should be assumed that such other regimes will operate effectively. "

124. At DL146, the Panel recorded all parties as agreeing that there would be an increase in GHG, especially $CO_2$, if the appeal scheme were to go ahead, when compared with the position if it did not. The Panel noted that under these circumstances "the climate change position would be worsened".

125. I have already set out DL162. It is, however, convenient at this point to do so again, along with the immediately preceding paragraph, as well as highlighting the sentence in DL162, relating to the NPPF, to which the claimant's Ground 3 relates:-

> "161. The evidence suggests that the Government is not on track to meet the 4th and 5th carbon budgets – with significant reductions needed in relatively short periods. This largely uncontested position is shown in the CCC report. However, we are not yet in the period of either budget and the suggestion that the Government is off track at this time means little in relation to the budget periods which have not yet started. However, no

> party has suggested that complacency is indicated or that the 4th and 5th budgets can be ignored.
>
> 162. There are three important points to make in relation to the carbon budgets and the way in which they operate. Firstly, although the approach to Net Zero and the carbon budget is a material consideration, the CCA places an obligation on the SoS, not local decision makers, to prepare policies and proposals with a view to meeting the carbon budgets. **Secondly, as advised in the NPPF, there is an assumption that controls which are in place will work.** Finally, and consequent on the previous points, NSC's position that grant of permission in this case would breach the CCA and be unlawful is not accepted. That does not mean that these matters are not material considerations, but the CCA duty rests elsewhere".

126. At DL213, the Panel said:-

> "213. It is self-evident that any increase in $CO_2$ emissions in one location will have consequences elsewhere and that this could make the duty of the SoS under the CCA more difficult. But in this case the comparative magnitude of the increase is limited and it has to be assumed that the SoS will comply with the legal duty under the CCA."

127. Ground 3 advances two criticisms of the Panel's decision concerning paragraph 188 of the NPPF. The first is that the Panel erred in law in treating the CCA and the various duties placed on the Secretary of State under it as a "separate pollution control regime", within the scope of that paragraph. The second criticism is that, even if that part of the challenge were to fail, the Panel still erred in treating the assumption in paragraph 188 as irrebuttable.

128. In support of its first head of challenge, the claimant relies upon Gladman Developments Ltd v Secretary of State for Communities and Local Government and others [2019] EWCA Civ 1543. Gladman concerned an appeal against the refusal of planning permission for a residential development. Following an inquiry, an inspector dismissed the appeal on grounds which included the impact of the development on air quality. The inspector took into account the fact that the government's air quality plan made in December 2015 had been quashed because it failed to comply with Article 23 (1) of Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe, and with the domestic Regulations which implemented the Directive. The inspector found it would be unsafe to rely on vehicle emissions falling between the years 2015 and 2020, to the extent assumed in the models relied on by the claimant, and that, despite proposed mitigation measures, the proposals would have an adverse effect on air quality.

129. The claimant applied under section 288 of the 1990 Act to quash the inspector's decision. It did so, amongst other grounds, on the basis that the inspector should have proceeded on the assumption that the government would comply with the law, rather than assuming breaches of the Directive and Regulations would continue; and that the inspector had failed to give effect to the principle in paragraph 122 of the NPPF (now

paragraph 188) that the planning system presumed other schemes of regulatory control were legally effective.

130. At first instance, the High Court refused the claimant's application. The Court of Appeal dismissed the claimant's appeal against that decision. In giving the Court of Appeal's judgment, Lindblom LJ said:-

> "43. Supperstone J. also rejected the submission, which Mr Kimblin sought to base on government policy in paragraph 122 of the NPPF, that the inspector failed to apply the principle that the planning system assumes other schemes of regulatory control will operate effectively. This policy, in his view, was directed at a situation where there is a parallel system of control, such as that operated by H.M.'s Inspectorate of Pollution (see *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1995] Env. L.R. 37), or the "licensing or permitting regime for nuclear power stations" (see *R. (on the application of An Taisce) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin)), the essential principle being that the planning system should not duplicate those other regulatory controls, but should generally assume they will operate effectively. As the judge saw it, the Air Quality Directive was "not a parallel consenting regime to which paragraph 122 is directed". There was "no separate licensing or permitting decision that will address the specific air quality impacts of [Gladman's] proposed development" (paragraph 39 of the judgment)."
>
> 44. Again, I agree with the judge. If it were right to regard the regime for the protection of human health and the environment against the adverse effects of air pollutants, under the Air Quality Directive and the 2010 regulations, as a regime to which the policy in paragraph 122 of the NPPF related, I do not think the inspector failed to assume it would "operate effectively". He manifestly had regard to it. And he did not doubt that, with the added urgency imparted by Garnham J.'s decision in *ClientEarth (No.2)*, the United Kingdom would discharge its responsibility under the Air Quality Directive to comply with the relevant limit values. But this broad assumption did not negate the conclusions he reached, in the light of the evidence before him, on the likely effects of the proposed development on local air quality in Newington and Rainham.
>
> 45. In my view, however, Supperstone J. was right to conclude that the policy in paragraph 122 was not engaged here. The policy was directed to situations where some proposed process or operation liable to cause pollution is subject to control under another regulatory regime. As the judge recognized, its purpose was to avoid needless duplication between two schemes of statutory control. It was concerned with "the control of processes or emissions … where these are subject to approval under

> pollution control regimes" and with "permitting regimes operated by pollution control authorities" (my emphasis). Such regulatory regimes would include those to which the judge referred, and also, for example, the regime for the issuing of environmental permits under the Environmental Protection Act 1990, which operates in parallel to the land use planning system.
>
> 46. As Mr Moules and Dr Bowes submitted, the Air Quality Directive and the 2010 regulations are not a licensing or permitting regime of that kind. The Air Quality Directive is "programmatic in nature". It imposes obligations on the state to comply with the relevant limit values within the shortest possible time, and by the means chosen to achieve compliance. In the United Kingdom the approach adopted by the Government is to promulgate an air quality plan for the relevant zones or agglomerations. Paragraph 122 of the NPPF, properly understood, did not contemplate any assumption being made about that process. It does not require a planning decision-maker to assume that the Government will have acted expeditiously to take the action required to discharge its own responsibilities under the legislative scheme for air quality.
>
> 47. Government planning policy did engage with air quality, explicitly, in paragraph 124 of the NPPF. The policy in that paragraph was not qualified or expanded by the policy in paragraph 122. It was directed both to planning policies – which were expected to "sustain compliance with and contribute towards EU limit values or national objectives for pollutants …" – and to individual planning decisions – which were expected to "ensure that any new development in Air Quality Management Areas is consistent with the local Air Quality Action Plan". But there was no requirement to assume the Government would have complied with the Air Quality Directive by the time the development was carried out.
>
> 48. It follows in my view that the NPPF did not compel the inspector to assume that the requirements of the Air Quality Directive would have been complied with soon enough, and in such a way, as to make the effects of the proposed development on air quality acceptable. He was not obliged by any such policy to disregard the Government's failure to comply with the Air Quality Directive, as found by the court in *ClientEarth (No.2)*, or to assume that it would comply within any given time. In submissions both before us and in the court below, effectively on behalf of the Government, this was accepted by Mr Moules."

131. The claimant submits that, just as with the air quality regime considered in Gladman, the CCA is "programmatic in nature", imposing obligations on the State to comply with relevant limit values. In Gladman, these were air quality plans. In what the claimant says is the same vein, the CCA imposes obligations on the Secretary of State to comply with relevant emission limits, set in the carbon budgets, by the time specified in those

budgets, via the policy means chosen by the Secretary of State. Properly understood, Ms Dehon submits that paragraph 188 of the NPPF does not require a planning decision-maker to assume that the Secretary of State will have acted within the time span of the carbon budgets to take the action required in order to discharge his responsibilities under the legislative scheme for climate.

132. Ms Dehon contends that the claimant is not questioning the application by the Panel of paragraph 188. Rather, it is a question of law as to whether the CCA is included within the type of "pollution control regime" referred to in that paragraph.

133. The second part of the claimant's case under Ground 3, is that, even if I do not accept the first part, the Panel assumed that the assumption in paragraph 188 is irrebuttable. Not only is such an assumption legally wrong; there was, in fact, evidence which the claimant says rebutted the assumption.

134. The claimant says that DL161 and DL162 do not "run together" and that DL161 does not, even on its most benign reading, expressly engage with rebutting the assumption. It does not mention the assumption at all. No connection is made in the DL between this paragraph and any of the paragraphs in which the assumption is applied. Ms Dehon submits it was implausible that the Panel, in saying what it did at DL161, accepted the argument put by BAL in paragraph 546 of its closing submissions, which was that "being off track now in relation to a budget period that [has] not even started and in respect of which further legal and policy matters can be taken is, in reality, meaningless".

135. In any event, DL161 fails to take into account or to explain the Panel's reasoning in relation to other relevant evidence that was before them; namely, the time it takes for policy to be developed and have a practical effect, meaning that it would be very difficult to get "on track" within the five year budget period when the government is presently so far off track; the physics of how carbon emissions work, particularly the length of time they persist in the atmosphere; and the fact that the emissions caused by the Airport's expansion would occur during the fourth and fifth carbon budget periods.

136. The claimant points out that Mr Melling, BAL's own witness, accepted that the United Kingdom is not on track to meet the fourth and fifth carbon budgets.

137. In her oral submissions to me, Ms Dehon said there was no illogicality in (i) the claimant's acceptance that the UK ETS was a pollution control regime falling within paragraph 188 of the NPPF and (ii) the claimant's stance that the Secretary of State's direct obligations under the CCA are not part of such a regime but, rather, fall to be excluded, on the authority of Gladman. Contrary to the defendant's case, the judgment in Gladman did not turn on whether air quality control was a "local" as opposed to a "national" issue. This can be seen from paragraph 46 of the judgment of Lindblom LJ.

***Ground 3: discussion***

138. I agree with the claimant that the mere fact the Panel accurately summarised paragraph 188 of the NPPF does not mean it must have correctly construed the meaning of that paragraph. Nevertheless, I do not consider that Gladman enables the claimant to make good the first part of its challenge under Ground 3.

139. The relationship between local and national decision-making in the area of air quality is significantly different from the position with regard to greenhouse gas emissions from aircraft. Such emissions are controlled at the national level, pursuant to the CCA. In contrast, air quality issues have a significant and discrete local element. As Mr Humphries points out, paragraph 186 of the NPPF states that decision-makers:-

> "should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and Clean Air Zones, and the cumulative impacts from individual sites in local areas … Planning decisions should ensure that any new development in Air Quality Management Areas and Clean Air Zones is consistent with the local air quality action plan."

140. A similar point is also to be seen at paragraph 47 of the judgment in Gladman. In marked contrast, the way in which the Secretary of State seeks to discharge his duty under section 1 of the CCA in the case of greenhouse gas emissions from aircraft involves the setting at a national level of carbon budgets and the use of both national and (through CORSIA) international trading schemes. All this is apparent from the above analysis of the CCA and the delegated legislation made under it, including the Greenhouse Gas Emissions Trading Scheme Order 2020. The application of the assumption in paragraph 188 of the NPPF in respect of emissions from aircraft would therefore not cut across any other requirements of the NPPF or other national planning policy.

141. Whilst it is the case that the CCA deals with a range of matters, including restricting the use of single use plastic bags, the fact remains that the overall responsibilities of the Secretary of State under the CCA in respect of emissions from aircraft needs, for this purpose, to be examined in its entirety, starting with section 1. It is artificial to contend, as the claimant does, that the UK ETS falls for this purpose to be considered in isolation. Some 88-90% of all flights to and from Bristol Airport are covered by the UK ETS. The CORSIA system is relevant to non-UK/EEA flights (see above).

142. The UK ETS system therefore cannot be separated for this purpose from the CCA, in the way the claimant contends. There is, accordingly, indeed an illogicality in the claimant's stance on this issue, from which the claimant cannot escape.

143. Furthermore, the consequence of accepting the claimant's first submission in respect of paragraph 188 of the NPPF would not merely be to duplicate the system of controlling aircraft emissions, put in place by the CCA. It would lead local planning decision-makers into an area of national policy, with which they are not directly concerned. This takes us back to Ground 1, where the Panel was, I have found, entitled to conclude that the relevant local planning policies did not directly address aviation emissions. Again, it is necessary to refer to what the Panel said at DL149; namely, that there was no substantial dissent at the inquiry from the formulation of the key question being whether the emissions from the proposal would be so significant that they would materially affect the ability of the UK to meet its carbon budgets and the target at net zero GHG emissions by 2050. The Panel was entitled to take that approach in determining the relationship between local development control and the progressive restriction of aviation emissions by the CCA etc.

144. At this point, it is instructive to look again at DL162. The highlighted sentence referring to paragraph 188 is not the primary reason why the panel found as it did. The primary reason was that the CCA places an obligation on the Secretary of State, not local decision makers, to prepare policies and proposals with a view to meeting the carbon budgets. Reading the DL fairly, the Panel's reference to paragraph 188 of the NPPF was not an essential part of the Panel's reasoning. On the contrary, the Panel's essential reasoning does not depend on that sentence. Accordingly, to treat the existence of the sentence as undermining the Panel's careful articulation of the relationship between emissions from aircraft and the development control decision would be wholly wrong.

145. For these reasons, the first part of the challenge under Ground 3 fails. I therefore turn to consider whether the Panel wrongly interpreted paragraph 188 of the NPPF as containing an irrebuttable assumption.

146. There was no disagreement by BAL at the inquiry that the paragraph 188 assumption can be rebutted. This is apparent from paragraph 533 of BAL's written closing submissions: "Of course a policy presumption may be rebutted". At paragraph 19 of Appendix 1 to those submissions, BAL reiterated that "this assumption could, logically, be 'rebutted'."

147. BAL's position was that no proper basis had been identified by the claimant and NSC for doing so.

148. Against this background, I find there is no basis for contending that the Panel, in the relevant paragraphs of the DL set out above, somehow assumed that the NPPF paragraph 188 assumption was irrebuttable. The claimant's submission that DL161 and 162 have to be read in isolation from each other goes directly against the Higher Courts' judgments explaining how planning decision letters are to be construed. The Panel's DL was written primarily to explain to the parties that had taken part in the inquiry why the Panel had decided matters as it did. There is no basis to assume that the Panel took a view which was contrary to what was common ground at the inquiry.

149. At this point, the claimant's challenge under Ground 3 becomes a "reasons" challenge. Ms Dehon says that, given the Panel accepted the cogency of the evidence before it (including from one of BAL's expert witnesses), which was that the proposal would make the meeting of the Secretary of State's obligations under the CCA more difficult, the Panel failed to explain why, on the basis that the assumption was rebuttable, it had come to the conclusion that the assumption was not rebutted.

150. I am unpersuaded by this residual element of Ground 3. I remind myself again that decision letters are not to be construed as if they were legislative instruments. Rather, they should be examined in the round. That is particularly important in the present case where, as will be apparent, the relevant issues were closely interrelated. It is plain that DL161 and 162 fall to be read together. In DL161, the Panel specifically engaged with the fact that the evidence shows the government is not on track to meet the fourth and fifth carbon budgets, with significant reductions needed in relatively short periods. Importantly, however, the Panel found that "we are not yet in the period of either budget and the suggestion that the government is off track at this time means little in relation to budget periods which have not yet started". Read in context, that is a legally sufficient engagement with the issue.

151. Furthermore, at DL163 to 170 the Panel engaged expressly with the alleged shortcomings of the UK ETS and CORSIA. At DL169, the Panel considered that neither the objectors nor BAL were "entirely correct" as to what should be drawn from these shortcomings; and that there was "currently an offsetting gap beginning in the next decade and, this cannot be ignored". However, the Panel went on to say that "given the international and national context it is not unreasonable to assume that something will come forward to fill the space." The Panel concluded that it remained to be seen whether there would be a refreshment of UK ETS/CORSIA or whether other available measures would be deployed. There is nothing unreasoned or irrational in the Panel's conclusions on that issue. Likewise, there is nothing unreasoned or irrational in DL170, where the Panel reiterated that "UK ETS/CORSIA are only two of the measures available to address aviation carbon emissions in the light of the legal duty to ensure that carbon budgets are not breached."

152. Ground 3 accordingly fails.

***Ground 4***

153. Ground 4 alleges an error of law by the Panel in discounting the impact of the expansion of Bristol Airport in relation to the local carbon budget for NSC. The Panel decided not to take into account the extent of the impact on NSC's carbon budget in determining the significance of the climate change impact of the proposal and, in so doing, the claimant says the Panel ignored the Institute of Environmental Management and Assessment ("IEMA") Guidance for assessing greenhouse gas emissions in environmental impact assessments. Alternatively, the claimant argues that the Panel did not give an adequate or intelligible explanation for its conclusions.

154. The IEMA Guidance provides that the significance of a project's carbon impact can be determined by comparing the project's carbon budget with "global, national, sectoral, regional, or local" carbon budgets "as available". It suggests that a "sense of scale" of the project's carbon footprint can be provided by "contextualising" that footprint against certain of those budgets.

155. Professor Anderson explained at the inquiry that carbon budgets have been calculated for every local authority in Britain. He set out the budget for NSC. Using BAL's forecast of the $CO_2$ emissions resulting from the Airport's expansion, Professor Anderson calculated the emissions from it which could reasonably be allocated to the NSC area. He then determined the extent of the impact of those admissions on the local carbon budget.

156. The claimant submits that Professor Anderson's conclusion was stark; namely, that NSC's share of Bristol Airport's aviation emissions will consume the local authority's entire carbon budget in the five years from the start of 2028. By 2040, a single year of NSC's share of aviation emissions from Bristol Airport will consume the entire carbon budget intended for the five years 2038-2042. Professor Anderson's view was that this was a far more appropriate comparison of the significance of aviation emissions, than comparing them with the national total.

157. The claimant points out that BAL's climate expert, Dr Ösund-Ireland, did not take any issue with the methodology of Professor Anderson and accepted that, based on the IEMA guidance, it was "one relevant approach which could be applied". The claimant

says that, when compared to the local carbon budget, the impact of the expansion is profound, overwhelming the local carbon budget.

158. The Panel addressed the $CO_2$ impact of the proposal at DL183 to 189. The Panel recorded BAL's evidence that the impact of the expansion would represent around 0.22 - 0.28% of the 37.5Mt $CO_2$ /annum of the planning assumption related to the fourth and fifth carbon budgets; and between 0.29 - 0.34% of the CCC "balanced pathway" assumption. The increase would, accordingly, "not amount to a significant effect as described in the ES/ESA [viz. BAL's environmental assessment and its Addendum]".

159. At DL188, the Panel said:-

> "… In contrast, the approach of opponents is that the increased emissions would consume the local carbon budget of NSC between 2028 and 2032. However limited detail of this approach was provided, and it was not suggested that local carbon budgets have any basis in law or policy. In addition, it is argued that any increase in emissions would limit the Government's room for manoeuvre in relation to the Net Zero target".

160. The claimant says it appears from this that the Panel discounted, or at any rate did not take into consideration, the extent of the impact on the local carbon budget in determining the significance of the climate change impact of the proposal. The Panel accordingly failed to take into account a material consideration; alternatively, it failed to give adequate reasons for its conclusion.

161. The claimant argues that the reasons given by the Panel ignore (a) the detailed evidence given by Professor Anderson; (b) the fact that BAL did not challenge his methodology or calculation; and (c) the IEMA Guidance, which is directly relevant and applicable guidance, that refers explicitly to the use of local carbon budgets in assessing the significance of impact of a project.

162. Ms Dehon says it is not an answer to Ground 4 to assert that there is no legal or policy basis which requires the local carbon budget to be taken into account. That is not the correct test in deciding whether the Panel's approach on this matter was lawful. Much, if not most, of the detailed professional guidance on best practice in undertaking an environmental impact assessment is neither statutory nor based on policy. The fact remains that the only practitioner guidance concerning the assessment of greenhouse gas emissions and evaluating their significance is that produced by IEMA. It advises comparison against local budgets, where they are available. The IEMA Guidance was plainly material to determining, as required by the 2017 Regulations, what constituted "the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment" (regulation 18(4)(b)).

163. In R (Goesa) v Eastleigh BC, Southampton International Airport Ltd [2022] J. P.L. 1309, Holgate J held it was well-established that whether an effect is significant and whether any assessment of significant effects is adequate are both matters of judgment for the decision-maker, in that case the local planning authority: paragraph 100. Such judgments are only open to challenge applying the conventional *Wednesbury* standard. Furthermore, at paragraph 102, Holgate J held that "the court should allow a substantial

margin of appreciation to judgments based upon scientific, technical or predictive assessments by those with appropriate expertise".

164. The environmental statement produced by Southampton International Airport Ltd in Goesa relied upon guidance from IEMA that, given ongoing research on how to measure significance in the approach of treating or GHG emissions as potentially significant "it is down to the practitioner's professional judgment on how best to contextualise a project's GHG impact": paragraph 105. Ms Dehon submits that Goesa affirms the relevance of the IEMA Guidance, albeit that compliance with that Guidance is not determinative of the lawfulness of the assessment. This emerges from paragraph 120 of the judgment.

***Ground 4: discussion***

165. The passages relied upon by the claimant in the IEMA Guidance occur in the following paragraph under the heading "Targets based on scientific projections":-

> "There is currently little evidence of these science-based targets being used in the UK's development consent system, or related EIA process to assess a project's significance. However, this quantitative approach provides a good indicator of significance and could be used in EIA to calculate a project's carbon budget. This budget can then be compared against an existing budget (global, national, sectoral, regional, or local - as available), to identify the percentage impact the project will contribute to climate change. Consequently, the greater the project's carbon budget, the greater its significance."

166. The Guidance then identifies a number of different methods which can be used to allocate a project's carbon budget, including grandfathering, carbon space, contraction and convergence, blended sharing and common but differentiated convergence. The Guidance says that due to inconsistencies between different methods and their assumptions for assessment, "there is not one single agreed method by which to assess a project's carbon budget". Therefore, the Guidance recommends that a review of these methods should be undertaken, to identify which one can best represent a project's potential carbon footprint.

167. In Friends of the Earth, the Supreme Court reiterated that, in determining whether a public authority has failed to take into account a relevant consideration, three categories of consideration can be identified. They are (i) considerations clearly identified by statute as ones to which regard must be had; (ii) considerations so identified as ones to which regard must not be had; and (iii) considerations to which the decision-maker may have regard if, in their judgment and discretion, they think it is right to do so.

168. The test of whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the *Wednesbury* irrationality test: paragraph 119 of Friends of the Earth. The third category of consideration can be subdivided into two. The first sub-category is where the decision-maker does not avert at all to a particular consideration falling within the third category. In such a case, unless the consideration is obviously material according to *Wednesbury* principles, the decision is not affected by any unlawfulness. The Supreme Court held that there "is no

obligation on a decision maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion": paragraph 120.

169. At paragraph 121, the Supreme Court described the second sub-category. This is where a decision-maker turns their mind to a particular consideration falling within the third category but decides to give the consideration no weight. The question here is, again, whether the decision-maker acts rationally in so deciding: paragraph 121.

170. It is quite apparent from DL188 that the Panel engaged with the approach of the claimant and others that the increased emissions would consume the local carbon budget of NSC. We are, therefore, concerned with the second sub-category of the third category of consideration, as described by the Supreme Court in Friends of the Earth. As it is apparent that the Panel gave the matter no weight, the claimant has to show public law illegality in an area where the courts are traditionally careful not to adopt a stance which may result in the court wrongly substituting its own view of weight for the view taken by the primary decision-maker.

171. Applying these principles, I am in no doubt that the Panel did not act irrationally in giving the issue of local carbon budgets no weight, on the ground that such budgets have no basis either in law or in policy. They plainly have no basis in law. Contrary to Ms Dehon's submission, the fact that they have no basis in policy is significant, given that, in the planning field, we are concerned with decision-making which is intensely concerned with matters of policy.

172. The fact that Professor Anderson's evidence on this issue was not contradicted by BAL's climate expert did not, therefore, mean the Panel had no alternative but to ascribe weight to what Professor Anderson had said about local carbon budgets.

173. BAL makes the point that its EIA had focused on aircraft emissions in the national context. As the IEMA Guidance indicates, this is one of the ways of assessing the impact of a project. Indeed, in the present context, looking at the effect of the Airport's expansion proposal in the national context was manifestly appropriate, for the reasons I have already given.

174. I accordingly find the Panel was entitled to ascribe no weight to the evidence about the local carbon budget.

175. Finally on Ground 4, I do not accept that the Panel failed to give a legally adequate explanation for its stance. The Panel's rationale for placing no weight on the impact on local carbon budgets emerges clearly from the DL, as just described.

176. Ground 4 accordingly fails.

***Ground 5***

177. Ground 5 is concerned with the impact of non-$CO_2$ emissions from aircraft. The claimant submits that the impact of non-$CO_2$ emissions was a matter of critical importance to determining the impact of the Airport's expansion on climate change. The claimant says that this impact was not lawfully addressed in BAL's environmental

statement, as required by the 2017 Regulations. The Panel therefore erred in finding that BAL's environmental statement was lawful.

178. The claimant says that non-$CO_2$ emissions had to be taken directly into account by the Panel in determining whether consent should be given to BAL. The Panel could not rely, in this regard, on BAL's Carbon and Climate Change Action Plan ("CCCAP") as a justification for not treating the effects of non-$CO_2$ emissions as weighing in the balance against the proposal. This is particularly so because, elsewhere in the DL, the Panel concluded that the CCCAP had only very limited weight.

179. The claimant also contends that the Panel failed to apply the precautionary principle which, had it been invoked, would in any event have required the Panel directly to consider non-$CO_2$ emissions.

180. Underlying these submissions is the claimant's contention that, despite any scientific doubts about the contribution made by non-$CO_2$ emissions to climate change, a relevant "multiplier" for assessing the potential effects from non-$CO_2$ emissions has nevertheless emerged. Had it been applied, this multiplier would have almost doubled the assessment of greenhouse gas emissions from aviation, resulting from the proposal, and so would have had a material effect on the Panel's assessment of whether that increase would make the Secretary of State's compliance with his duties under the CCA materially harder.

181. Finally, in the alternative, the claimant submits that the Panel failed to give legally adequate reasons for its stance on non-$CO_2$ emissions.

182. The Panel found as follows:-

> "Failure to Assess non-$CO_2$ Emissions
>
> 204. Along with $CO_2$ emissions, non-$CO_2$ effects have the potential to bring about climate change. These effects, such as contrails and cirrus clouds, appear (as far as is known) to be short term in duration. However, there is considerable uncertainty as to their effect and longevity.
>
> 205. As recognised by the CCC there is considerable uncertainty in assessing these emissions, and the ESA recognised this point and did not seek to quantify their effect. It has been suggested that a multiplier might take account of non-$CO_2$ effects but this has yet to emerge and there is no policy as to how they should be dealt with.
>
> 206. The criticism of BAL's position is the allegation that non-$CO_2$ effects have been ignored and that it is unreasonable to ignore the effects due to measurement issues.
>
> 207. However, the draft Carbon and Climate Change Action Plan (CCCAP) (below) provides that such emissions should not be ignored in future selection of GHG reduction measures. Given the extent of scientific uncertainty, and given the intention of the

> CCCAP to consider the effects further, it would be unreasonable to weigh this matter in the balance against the proposal."

183. DL208-210 then described the CCCAP. As I have earlier mentioned, the CCCAP was a draft. It envisaged BAL's operations and activities becoming carbon net zero by 2030 and becoming net zero as a whole, including aviation, by 2050. The draft CCCAP was published in May 2021. It set out a range of targets related to emissions from all sources. It would include a package of deliverable measures at agreed intervals. The submission of a CCCAP to NSC would be the subject of a condition, which would also require the CCCAP to be independently audited and reviewed. It should also reflect any changes arising from any updated emissions targets and national policy changes. The Panel noted that NSC and others were "concerned, understandably, about the nature and level of enforceable commitments related to $CO_2$ emissions reduction in the final document".

184. DL210 says:-

> "210. The CCCAP indicated the direction of travel of BA in this respect. It is necessary that the production of a final version will be the subject of a condition but, at the moment as a draft, it has very limited weight."

185. Regulation 3 of the 2017 Regulations provides that the relevant planning authority, the Secretary of State or an inspector must not grant planning permission for EIA development unless an EIA has been carried out in respect of that development. Regulation 2 defines "EIA development" as development which is either Schedule 1 development; or Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The Schedules in question are those contained in the 2017 Regulations. It is common ground that BAL's proposals constitute EIA development.

186. Regulation 4 describes the environmental impact assessment process. It involves, inter alia, the preparation of an environmental statement. The EIA must identify, describe and assess, in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on, amongst other things, "climate": regulation 4 (2)(c).

187. Regulation 18 explains what an environmental statement must include. One of the overarching, minimum requirements is "a description of the likely significant effects of the proposed development on the environment": regulation 18 (3)(b). Regulation 18(4)(b) states that an environmental statement must:-

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

188. Schedule 4 contains further provisions regarding information for inclusion in environmental statements. Paragraph 5 requires a description of the likely significant effects arising from:-

> "(f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;".

189. Paragraph 6 requires a "description of the forecasting methods or evidence, used to identify and assess the significant effects on the environment, including details of difficulties (for example technical deficiencies or lack of knowledge) encountered compiling the required information and the main uncertainties involved".

190. I have mentioned the claimant's reliance on the emergence of a multiplier for non-CO2 emissions. In August 2019, the Department for Business, Energy & Industrial Strategy ("BEIS") published the government's "Greenhouse Gas Conversion Factors for Company Reporting - Methodology Paper for Emission Factors, Final Report". The BEIS document provides the methodological approach and key data sources for the assumptions used to define the emissions factors provided in the 2019 Government Greenhouse Gas Conversion Factors for Company Reporting, expanding upon the information provided in the data tables of that report. Paragraph 1.8 states that the document is not intended to provide guidance on the practicalities of reporting for organisations but rather to provide an overview with key information, so that the basis of the factors provided can be better understood and assessed.

191. Later in the document we find the following:-

> "Non-$CO_2$ impacts and Radiative Forcing "
>
> 8.36 The emission factors provided in the 2019 GHG Conversion Factors section " Business Travel – air" and "Freighting goods" refer to aviation's direct $CO_2$, CH4 and $N_2O$ emissions only. There is currently uncertainty over the other non-$CO_2$ climate change effects of aviation (including water vapour, contrails, NOx, etc.) which have been indicatively accounted for by applying a multiplier in some cases.
>
> 8.37 Currently there is no suitable climate metric to express the relationship between emissions and climate warming effects from aviation, but this is an active area of research. Nonetheless, it is clear that aviation imposes other effects on the climate which are greater than that implied from simply considering its $CO_2$ emissions alone.
>
> 8.38 The application of a "multiplier" to take account of non-$CO_2$ effects is a possible way of illustratively taking account of the full climate impact of aviation. A multiplier is not a straight forward instrument. In particular, it implies that other emissions and effects are directly linked to production of $CO_2$, which is not the case. Nor does it reflect accurately the different relative contribution of emissions to climate change over time, or reflect the potential trade-offs between the warming and cooling effects of different emissions.

> **On the other hand, consideration of the non-$CO_2$ climate change effects of aviation can be important in some cases, and there is currently no better way of taking these effects into account. A multiplier of 1.9 is recommended as a central estimate, based on the best available scientific evidence, as summarised in**
>
> 8.39 Table 46 and the GWP100 figure... from the ATTICA research presented in Table 47 below…
>
> 8.40 It is important to note that **the value of this 1.9 multiplier is subject to significant uncertainty** and should only be applied to the $CO_2$ component of direct emissions...” (original emphases).”

192. A BEIS “Updated Energy and Emissions Projections 2019” document (October 2020) contains a paper by D.S. Lee and others titled “The contribution of global aviation to anthropogenic climate forcing for 2000 to 2018”. The paper states that “Historically, estimating aviation non-$CO_2$ effects has been particularly challenging” and that, although understanding aviation's impacts on the climate system has improved, it “remains incomplete”. The paper aims to present “a best estimate and uncertainty (sic) based on the results from global climate models employing process-based contrail cirrus parameterizations”.

193. Under the heading “7. Aviation $CO_2$ vs non-$CO_2$ forcings”, the paper notes that aviation non- $CO_2$ forcings are not covered by the former Kyoto Protocol and that it is “unclear whether future developments of the Paris Agreement… will include short-lived indirect greenhouse gases like N03 and $CO_2$, aerosol-cloud effects or other aviation non-$CO_2$ effects”. Although aviation is not mentioned explicitly in the text of the Paris Agreement, nevertheless total global greenhouse-gas emissions need to be reduced rapidly to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second-half of this century.

194. Later under the same heading, the paper says the fact that aviation's non-CO2 forcings are not included in global climate policy has resulted in studies as to whether they could be incorporated into existing policies, such as the European Emissions Trading Scheme, using an appropriate overall emissions “multiplier”. It is said, however, that “scientific uncertainty has so far precluded this”. As an alternative, proposals have been made to reduce aviation's non-$CO_2$ forcings by avoiding contrail formation by re-routing aircraft or optimising flight times to avoid the more positive (warming) fractional forcings (e.g. by avoiding night flights).

195. At DL205, the Panel said it had been recognised by the CCC that there is considerable uncertainty in assessing non-$CO_2$ emissions from aircraft. The source for this is a letter dated 24 September 2019 from the CCC to the Secretary of State for Transport. In the Annex to the letter, there is the following:-

> “Aviation and shipping both emit very small amounts of regulated non-CO2 greenhouse gases (methane and nitrous oxide) but also have additional warming and cooling effects that are not included in the basket of gases covered by the Paris Agreement and the Climate Change Act…

> - **Aviation** produces a range of different pollutants that affect the climate in different ways. The most significant effect is from creation of contrails and high clouds, although the impact of these are short-lived as these clouds are high in the atmosphere. Measuring these effects on an annual basis is challenging, given their short term nature and dependence on localised conditions. Overall, non-CO2 effects from aviation warm the climate and approximately double the historic warming effect of CO2 alone.
>
> …
>
> In both aviation and shipping these non-CO2 effects are mainly short-lived, meaning that if they were to stop, their effects on the climate would rapidly disappear.
>
> The appropriate approach to policy at this stage is not to include these effects within the net-zero target, but to improve scientific understanding (e.g. for annual reporting) and develop options to markedly reduce them over the coming decades that are not at the expense of GHG emissions.
>
> In aviation, policies are already in place to limit some non-CO2 effects due to their impact on air quality....
>
> While addressing non-CO2 effects is important, this does not change the need to reduce CO2 emissions which are the dominant factor contributing to IAS' impact on the climate.
>
> We will continue to monitor progress to reduce the non-CO2 effects of IAS in our annual progress reports to Parliament and in our advice on setting carbon budgets."

196. At the inquiry, Professor Anderson accepted the CCC had advised that non-$CO_2$ effects "should not be accounted for in the UK's carbon budgets, because it is challenging to aggregate their effects accurately". Having referred to the BEIS Journey Emissions Comparison Methodology, Professor Anderson said that "there is as yet no consistent methodology for applying emissions 'multipliers' for the non-$CO_2$ emissions from other sectors" and that "if we are to compare 'like with like' a multiplier for aviation alone is theoretically imbalanced".

197. Professor Anderson and Mr Asher referred the Panel to the precautionary principle. They considered that BAL's failure to apply the BEIS multiplier to calculate the full climate impact of the proposed development breached that principle.

198. In its closing submissions at the inquiry, the claimant argued that the environmental information before the Panel was flawed because it omitted any assessment of the non-$CO_2$ impacts of aviation at altitude. The claimant also submitted that the warming effect of the non-$CO_2$ emissions was relevant to the question of whether the expansion of the

Airport would materially affect the United Kingdom's ability to meet its climate change obligations.

***Ground 5: discussion***

199. Referring to DL204-207, Ms Dehon submitted that the Panel did not mention the BEIS 1.9 multiplier or any of the evidence that recommended it as a way of taking account of the full climate change impact of aviation. Nor did the Panel record what she said was a concession by BAL's expert witness, that the multiplier could have been used to calculate the climate impact of the proposal. Ms Dehon says this is an error of law, in that the Panel ignored a material consideration.

200. In my view, it is quite obvious, in the light of the evidence before and submissions made to the Panel, that the reference in DL205 to a multiplier is to the BEIS 1.9 multiplier. No other specific multiplier had been relied upon at the inquiry.

201. Ms Dehon says that, in any event, even if the BEIS multiplier was the one referenced in that paragraph of the DL, then, contrary to the Panel's conclusion, that multiplier had plainly "emerged". It was in both the 2019 and 2020 BEIS documents, which were before the Panel. There was, furthermore, no justification for requiring any separate policy obligation before non-$CO_2$ emissions fell to be taken into account by the Panel.

202. I do not accept these submissions. However much the claimant may seek to invoke the BEIS 1.9 multiplier, there is very far from being any scientific consensus that it is a relevant tool in determining non-$CO_2$ emissions from aviation, other than in the context of company reporting. Professor Anderson's evidence to the Panel was to that effect.

203. The CCC's attitude to non-$CO_2$ emissions is, plainly, of high relevance, given that the CCC is concerned with the discharge of the Secretary of State's obligations under the CCA. As I have already explained, the Panel properly concluded that the relevance of aviation emissions to the Panel's decision was whether the implementation of BAL's proposals for expansion "would materially affect the ability of the United Kingdom to meet its carbon budgets and the target of net-zero GHG emissions by 2050": DL149.

204. Given the CCC's view that non-$CO_2$ effects should not be included within the net-zero target, it is difficult to see how the Panel could make use of the BEIS 1.9 multiplier in order to answer that central question. In any event, the issue for this court is whether the Panel was entitled, in the exercise of its planning judgment, to refuse to make use of the multiplier. Plainly, it was.

205. Ms Dehon criticises the defendant's justification of the last phrase in DL205, concerning there being no policy as to how non-$CO_2$ aviation emissions are to be dealt with. The defendant says that there is no statutory duty to have regard to such non-$CO_2$ effects and no policy which identifies them as mandatory. Ms Dehon describes this approach as utterly wrong.

206. DL205 needs, however, to be read in its entirety. If the whole issue of non-$CO_2$ emissions had not been subject to uncertainty as regards assessing their effects, and if the CCC had regarded them as currently being relevant to the Secretary of State's CCA obligations, then it might have been problematic for the Panel to disregard all of that, purely because there was no specific policy requiring the Panel to use the multiplier.

That, however, was not the position. Everything pointed in the opposite direction. The Panel was entitled, for the reasons it gave, to conclude, as a matter of its judgment, that it was not appropriate to apply the multiplier.

207. Concise though they are, DL204 and 205 contain adequate reasons for the Panel's decision. Although Ms Dehon did not take the point, the words "these effects" in DL204 need to be read as "some of these effects", since the evidence before the Panel indicated that some non-$CO_2$ effects are longer term. That was, I consider, recognised by the Panel in the last sentence of DL204.

208. I need now to turn to the related issue of BAL's environmental statement. As I have recorded, the claimant contends that the statement is not compliant with the 2017 Regulations, in failing to deal with non-$CO_2$ emissions.

209. It is now well-established that a planning authority's or inspector's conclusion that an environmental statement is compliant with the 2017 Regulations is a matter of planning judgment, challengeable only on a *Wednesbury* basis. At paragraph 137 of R (Plan B Earth) v Secretary of State for Transport [2020] PTSR 1446, Lindblom LJ held that "it is not the Court's task to adjudicate on the content of an environment statement… unless there is some patent defect in the assessment, which has not been put right in the making of the decision". Ms Dehon submits that there is such a "patent defect" in the present case, indistinguishable from that found in R (Squire) v Shropshire Council [2019] ENV LR 36.

210. Squire was a challenge to the grant of permission for a poultry-rearing facility in the countryside. At paragraphs 65 to 69 of the Court of Appeal's judgment, Lindblom LJ held that the environmental statement prepared in connection with the project was unlawful. The statement did not specify the third party land on which manure from the chickens was going to be spread. Although it dealt with odour likely to emanate from the poultry buildings themselves, the environmental statement did not set out any parallel assessment or indeed any meaningful assessment of the effects of odour and dust from the storage and spreading of chicken manure, either on the land of the farmer who was the proposed developer or on that of any other farmer. It did not seek to anticipate the content of any future manure management plan, including the fields to which it would relate. It could not be inferred from the environmental statement that its authors had concluded that the proposed storage and spreading of manure was not a potential source of pollution, including odour and dust, which ought to be addressed in determining the application for planning permission. Finally, the future manure management plan was not a substitute for the assessment lacking in the environment statement. Not only was the manure management plan yet to come into existence, even when it did, it was only going to relate to the storage and spreading of manure on the land of the farmer seeking to build the facility, not to the substantial qualities that were going to have to be disposed of elsewhere.

211. All of this meant that "the environmental statement was deficient in its lack of a proper assessment of the environmental impacts of the storage and spreading of manure as an indirect effect of the proposed development": paragraph 69. Accordingly, it was not compliant with the requirements of the 2017 Regulations.

212. With these cases in mind, I return to the relevant paragraphs of the DL. At DL206, the Panel noted criticism of the position of BAL, which was said to have ignored non-$CO_2$ effects in its environmental statement.

213. In fact, BAL's environmental statement did deal with non- $CO_2$ emissions. In the environmental statement Addendum of November 2020, paragraphs 10.6.20 to 10.6.25 specifically addressed "consideration of non-$CO_2$ aviation emissions". The Addendum noted that (as the Panel subsequently accepted) non-$CO_2$ effects are associated with much greater uncertainty, compared with $CO_2$ emissions from aviation sources.

214. The Addendum opined that the state of scientific knowledge of non-$CO_2$ effects is too uncertain for accurate measurement at this stage. Accordingly, non-$CO_2$ effects for aviation "are not currently included in any domestic or international legislation or emission targets, including the Paris Agreement". Accordingly, whilst it was acknowledged that non-$CO_2$ effects may well have a climate impact, these had not been considered in the environmental assessment (10.6.25).

215. As can be seen from the 2017 Regulations, referenced earlier, the legislation specifically acknowledges there may be limits on "current knowledge and methods of assessment" (regulation 18)(4)(b)) and that forecasting methods or evidence should include "details of difficulties (for example technical deficiencies or lack of knowledge) encountered compiling the required information and the main uncertainties involved" (Schedule 4, paragraph 6).

216. I find that the Addendum to the environmental statement adopted an approach which discloses no "patent defect" that the Panel unlawfully failed to recognise. On the contrary, the Addendum articulated an approach to the issue of the non-$CO_2$ effects of aviation which commended itself to the Panel. For the reasons I have given earlier, the Panel's overall approach in that regard has not been shown to be legally flawed.

217. Importantly, at DL207, the Panel noted that BAL's draft CCCAP provides that non-$CO_2$ emissions should not be ignored in future selection of GHG reduction measures. In the light of that, together with the extent of scientific uncertainty, the Panel concluded that "it would be unreasonable to weigh this matter in the balance against the proposal".

218. The claimant submits that the Panel's reliance on the CCCAP is unlawful, for the same reason that the Court of Appeal (per Lindblom LJ) found reliance on a future manure management plan to be unlawful in Squire.

219. I find that Squire does not assist the claimant. The effects of the development as a result of odour and dust from the storage and spreading of manure were not subject to any scientific uncertainty. This contrasts with the position regarding non-$CO_2$ emissions where, as I have explained, there currently exist uncertainties in assessing effects, such that they do not at present feature in the CCC's assessment of what should be included within the net-zero target for the CCA. Accordingly, in Squire, requiring the issue to be dealt with by a future manure management plan was simply not open to the environmental statement. The management plan was, furthermore, only going to be of partial assistance, even when it emerged. In short, leaving matters to the future was, in Squire, not an option.

220. By contrast, leaving non-$CO_2$ aircraft emissions to be dealt with when the science enables them to be brought into account for the purposes of the CCA was a decision that was entirely open to those preparing the environmental statement. It was a decision that both NSC (which did not object to the environmental statement on this ground) and the Panel were entitled to accept.

221. That is not, however, the end of the claimant's challenge to the Panel's reliance on the CCCAP. The claimant argues that such reliance was, in effect, irrational, given that, in DL207, the Panel placed weight on the "intention of the CCCAP to consider the effects [of non-$CO_2$ emissions] further"; whereas at DL210, the Panel concluded that the CCCAP fell to be given "only very limited weight".

222. The claimant's argument is superficially attractive but dissolves upon analysis. The CCCAP fell to be given very limited weight in relation to its overarching aim of making BAL's own operations and activities net-zero by 2030 and by 2050, including aviation. In this regard, the CCCAP's draft status was significant. It had not yet been incorporated into a planning condition. In other words, at the relevant time, its overarching aims did not carry significant weight in favour of the grant of planning permission for the proposals.

223. On the separate issue of non-$CO_2$ emissions, given the current scientific position, the Panel was, by contrast, entitled to place weight on the fact that the CCCAP would, in effect, track and react to the way in which such emissions may (or, more likely, will) in the future be regarded by the CCC and thus, by the Secretary of State in setting targets under the CCA, and otherwise.

224. The penultimate aspect of the claimant's challenge under Ground 5 concerns the Panel's alleged failure to have regard to the precautionary principle. It is the case that there is no reference to the precautionary principle in the DL. The claimant's position is that, even if the Panel may have been justified in not having direct regard to non-$CO_2$ emissions for the reasons it gave, the existence of the multiplier, and what was said about it by BEIS and the claimant's expert witness, were such as to require the Panel to deploy it in pursuance of the precautionary principle.

225. The answer to this aspect of Ground 5 is to be found in the Supreme Court judgment in Friends of the Earth.

226. One of the issues addressed by the Supreme Court in Friends of the Earth was that of non-$CO_2$ emissions. The Court agreed with the Divisional Court it was not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-$CO_2$ emissions in the Airports NPS.

227. The Supreme Court said:-

> "164. The Court of Appeal (para 258) upheld FoE's challenge stating the precautionary principle and common sense suggested that scientific uncertainty was not a reason for not taking something into account at all, even if it could not be precisely quantified at this stage. The Court did not hold in terms that the Secretary of State had acted irrationally in this regard but said (para 261) that, since it was remitting the ANPS to the Secretary

> of State for reconsideration, the question of non-$CO_2$ emissions and the effect of post-2050 emissions would need to be taken into account as part of that exercise.
>
> 165. We respectfully disagree with that approach. The precautionary principle adds nothing to the argument in this context and we construe the judgment as equating the principle with common sense. But a court's view of common sense is not the same as a finding of irrationality, which is the only relevant basis on which FoE seeks to impugn the designation in its section 10 challenges. In any event we are satisfied that the Secretary of State's decision to address only $CO_2$ emissions in the ANPS was not irrational.
>
> 166. In summary, we agree with the Divisional Court that it is not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-$CO_2$ emissions in the ANPS for six reasons. First, his decision reflected the uncertainty over the climate change effects of non-$CO_2$ emissions and the absence of an agreed metric which could inform policy. Secondly, it was consistent with the advice which he had received from the CCC. Thirdly, it was taken in the context of the Government's inchoate response to the Paris Agreement. Fourthly, the decision was taken in the context in which his department was developing as part of that response its Aviation Strategy, which would seek to address non-$CO_2$ emissions. Fifthly, the designation of the ANPS was only the first stage in a process by which permission could be given for the NWR Scheme to proceed and the Secretary of State had powers at the DCO stage to address those emissions. Sixthly, it is clear from both the AoS and the ANPS itself that the applicant for a DCO would have to address the environmental rules and policies which were current when its application would be determined."

228. The precautionary principle is capable of being invoked where the nature of the decision-making leaves space for it. In the present case, as in Friends of the Earth, the decision-making process was about how to address at the present time an issue (non-$CO_2$ emissions), about which there is currently scientific uncertainty. In both cases, the decision was to leave that matter for further consideration, within the overall development consent process.

229. It was in this context that the Supreme Court held that the "precautionary principle adds nothing to the argument". In fact, to have recourse to the precautionary principle in such a situation would subvert the decision-making process, by requiring consideration here and now of the very issue which the decision-making process has rationally concluded should be dealt with later.

230. Ms Dehon submitted that, unlike Friends of the Earth - where the Secretary of State had powers under the Development Consent Order (DCO), whereby he could later address non-$CO_2$ emissions, according to whatever environmental rules and policies would be

in force when the DCO application was determined - there is no comparable future consenting process in the present case. The Panel has granted outline planning permission for the Airport's expansion.

231. There are, of course, differences between the decision-making regimes addressed by the Supreme Court in Friends of the Earth and the present case. Nevertheless, the fact of the matter is that, of the six reasons given by the Supreme Court in paragraph 166 for agreeing with the Divisional Court that the Secretary of State did not act irrationally in not addressing the effect of non-$CO_2$ emissions in the ANPS, only two involve the fact that the Secretary of State has powers to address those emissions at the DCO stage. In the present case, for the Panel to have attempted directly to address the non-$CO_2$ effects of aircraft emissions, in considering the appropriateness of the expansion of a regional airport, would have been highly anomalous. Therefore, even if the Panel might have acted lawfully if it had embarked on such an exercise, it was clearly not irrational for the Panel to conclude that it would not do so.

232. It is important to recognise that the CCCAP will be secured by way of a planning condition, requiring BAL to "reflect any changes arising from any updated emissions targets and national policy changes" ( DL209). Thus, the issue of non-$CO_2$ emissions will not be left hanging.

233. Accordingly, as in Friends of the Earth, properly understood, there was no "space" in the present case for the operation of the precautionary principle.

234. The final aspect of Ground 5 is the contention that the Panel failed to give legally adequate reasons for its conclusions on non-$CO_2$ emissions. It will, however, be apparent from the foregoing analysis that it has been perfectly possible to discern the Panel's reasoning in this regard.

235. Ground 5 accordingly fails.

***Ground 6***

236. As I have already mentioned, Ground 6 is about horseshoe bats. The proposal would result in the loss of 3.7ha of agricultural land in order to allow for the expansion of a car park, together with 0.16ha of woodland, in order for the A38 road improvement works to be delivered. These two areas lie outside, but relatively close to, the North Somerset and Mendip Bats Special Area of Conservation ("the SAC"). The SAC was designated because of the presence there of lesser and greater horseshoe bats.

237. The two areas which would be lost to the development provide foraging land for the horseshoe bats. The areas are, therefore, functionally linked to the SAC.

238. The conservation area objectives for the SAC include the need for the integrity of that site to be maintained or restored as appropriate, in relation to the habitats of qualifying species (in this case, the horseshoe bats). The conservation objectives accordingly seek to ensure that habitats for the bats are maintained. This applies to habitat used by the bats, when foraging outside the SAC. The agricultural land to be taken is, in particular, considered to provide foraging habitat needed to maintain the favourable conservation status of the SAC.

239. The above description comes from DL481-484. Beginning at paragraph 485, the Panel described the adoption by NSC in 2018 of the North Somerset and Mendip Bats Special Area of Conversation Guidance on Development: SPD (Supplementary Planning Documents). Amongst other things, the SPD set up a Bat Consultation Zone. Where existing habitats or features of value to bats cannot be retained as part of the development proposals, the SPD requires the provision of replacement habitat.

240. In connection with the proposal, NSC officers carried out an appropriate assessment, informed by the information provided by BAL. The Panel noted at DL487 that this matter "did not form a reason for refusal" and that "No party opposed to the overall proposal has presented contrary evidence". The only evidence of relevance was "the undisputed Technical Note presented by BAL".

241. The DL continues as follows:-

> "488. The proposal is to provide land as replacement habitat in exchange for the functionally linked land in bands B and C, thereby avoiding any impact on the SAC itself. This would be a protective mitigation measure which is part of the proposal, intended to avoid or reduce any adverse effects so as to ensure that the project does not adversely affect the integrity of the SAC. This replacement land, which would be controlled by conditions, would be provided in advance of any works being carried out that would affect existing foraging land."

242. At DL489, the Panel concluded that it was sufficiently certain that "the replacement land would make an effective contribution to avoiding harm, guaranteeing beyond reasonable doubt that the project would not adversely affect the integrity of the SAC". The Panel then continued as follows:-

> "490. Before concluding on this matter, the legal status of the proposed replacement land was raised, most particularly by [the Parish Council Airport Association] (notwithstanding the fact that they did not put forward any evidence on biodiversity). The issue is whether the proposed replacement foraging habitat is "mitigation" or "compensation". The only expert ecological evidence, that presented by BAL, is that the proposed replacement foraging land meets the test for "mitigation". This was also the position agreed by NSC officers and Natural England. There is no contrary expert evidence.
>
> 491. The argument put by PCAA is that the replacement foraging land is not "mitigation" but "compensation". This is on the basis that it is not intended to avoid or limit harm to an acceptable level, but is intended to replace "significant" bat habitat, which would be destroyed by the proposal. If that were the case it was argued that planning permission could not be granted. However, the case law cited by PCAA related to proposals within European sites - which were therefore directly affected by development.

> The measures proposed in those sites would replace directly lost habitat and were "compensation". This is in contrast with the measures currently proposed which are "mitigation" aimed at reducing or eliminating the effect of the proposal.
>
> 492. Overall, the impact on the functionally linked habitat is small in comparison to the overall availability of the functional habitat (as shown in the [Supplementary Planning Documents]) and the proposed mitigation would at least counter the impact. The Panel has considered the potential for likely significant effects on the qualifying features of the SAC. Taking account of the potential for adverse effects on integrity and mitigation proposed, it can be concluded that there would be no adverse effect on the integrity of the SAC".

243. SACs are the product of Directive 92/43/EEC (21 May 1992). Article 6(3) of the Directive requires any plan or project "not directly connected with or necessary to the management of the site but likely to have a significant effect thereon... [to] be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives". The Directive is given domestic effect by the Conservation of Habitats and Species Regulations 2017.

244. Regulation 63 provides, so far as relevant:-

> "(1) A competent authority before deciding to undertake, or give any consent, permission or other authorization for, a plan or project which –
>
> (a) is likely to have a significant effect on a European or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.
>
> …
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely

> affect the integrity of the European site or the European offshore marine site (as the case may be)".

245. Regulation 64 deals with considerations of overriding public interest:-

> "(1) if the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).
>
> (2) Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either –
>
> > (a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or
> >
> > (b) any other reasons which the competent authority, having due regard to the opinion of the appropriate authority, considers to be imperative reasons of overriding public interest."

246. The claimant submits that the Panel erred in finding that BAL's provision of replacement land for the bats was "mitigation", which accordingly complied with Article 6(3) and regulation 63. Instead, the claimant says that the Panel should have treated the replacement land as "compensation". This meant there should have been a negative assessment and thus consideration would have focused on whether there was an absence of alternative solutions; in the absence of which the project could be agreed only "for imperative reasons of overriding public interest".

247. There is, the claimant says, a distinction between "mitigation measures", which fall within Article 6(3) and regulation 63, and "compensation measures" which fall within Article 6(4) and regulation 64.

248. This distinction was addressed by the Court of Appeal in Smyth v SSCLG [2015] PTSR 1417. Smyth concerned a housing development outside an SPA and an SAC. The development included a grassland area of public open space in order to absorb recreational use by residents of the development and so alleviate adverse impacts on the SPA and the SAC.

249. The Court of Appeal held that if a preventative safeguarding measure "eliminates or reduces the harmful effects", so that "those harmful effects either never arise or never arise to a significant degree", then that is directly relevant to the question which arises at the Article 6(3)/regulation 63 stage and may be properly taken into account at that stage (Sales LJ at paragraph 66). On the other hand, where measures are proposed which would not prevent the harm from occurring but which would (once harm had occurred) provide some form of offsetting compensation, then:-

> "it cannot be said that those offsetting measures prevent harm from occurring so as to meet the preventative and precautionary objectives of Article 6(3). In such a situation the competent authority is asked to allow harm to a protected site to occur, on the basis that this harm will be counterbalanced and offset by other measures to enhance the environment elsewhere. However, in such a case, the competent authority "will have to be satisfied that such harm can be justified under Article 6(4), taking account of the offsetting compensation measures at the stage of analysis under Article 6 (4) … Such measures would not be capable of bearing on the application of the tests under article 6(3) and so could not be relevant at the Article 6(3) stage" (paragraph 68).

250. In RSPB v SSCLG [2014] Env LR 30, Ouseley J held, at paragraph 27, that the fact that functionally linked land was not within a protected site did not mean the effect which a deterioration could have on the protected site is to be ignored. The indirect effect was still protected. The fact that the functionally linked land, although not carrying a particular legal status, is linked to the protected site meant that "the indirectly adverse effects on a protected site, produced by effects on [functionally linked land] are scrutinised in the same legal framework just as the direct effect of acts carried out on the protected site itself" (paragraph 27).

251. The claimant argues that the RSPB case, which was not before the Panel, effectively determines the disagreement in favour of the PCAA. It is, the claimant says, absolutely clear that "the same legal framework" is used to scrutinise functionally linked land outside the boundary of the SAC, as is used to scrutinise acts carried out on the protected site itself. This meant the Panel erred in law in deciding that the replacement land was mitigation for the reason that it was outside the SAC. This issue cannot be resolved in favour of the defendant by categorising the issue as one of the *application* of the relevant law. Rather, the issue is about the applicable legal principles.

***Ground 6: discussion***

252. Mr Humphries points out that Smyth was before the Panel and that BAL quoted directly from it as authority for the legal definition of mitigation and compensation measures. It was, in fact, this legal definition that was applied by BAL's ecologist in carrying out the ecological assessment presented in the environmental statement (Appendix B, Ecology Technical Note). At paragraph 1.1.21 of this note, it was stated that the replacement habitat land was to replace land outside the SAC (albeit functionally linked land) "thereby avoiding any impact on the SAC itself". Accordingly, since there would be no impact, "the project does not adversely affect the integrity of the SAC". Paragraph 1.1.22 emphasised that the replacement land would make an effective contribution to avoiding harm "guaranteeing beyond all reasonable doubt that the project would not adversely affect the integrity of the SAC". The "success of the measure will be established prior to the taking of any action that has the potential to give rise to an adverse impact". There would, therefore, be "no adverse impact" in respect of "the SAC or the bats for which it is designated, and there is no impact on the integrity of the site".

253. The claimant says that at DL491, the Panel misunderstood the relevant law when it said that "the case law cited by PCAA related to proposals within European sites - which

were therefore directly affected by development. The measures proposed in those cases would replace directly lost habitat and were compensation". I agree with the defendant and BAL that, reading the relevant paragraphs as a whole, neither this statement in DL491 or anything else in the DL discloses that the Panel misunderstood the relevant law or misapplied it. The Panel's emphasis upon the uncontested ecological evidence from BAL, which I have just mentioned, puts it beyond doubt that the Panel did not reach its decision on the basis that the land to be lost as a result of the proposals was outside the SAC, with a result that any ameliorative measure to be taken by BAL would necessarily be "mitigation" as opposed to "compensation". Rather, the Panel reached its decision by reference to the uncontested evidence, which was that the replacement land would be provided in advance, so as to avoid any impact on the SAC. Since there would be no "deterioration", the RSPB case is therefore of no assistance to the claimant.

254. Once again, the claimant argues in the alternative that the Panel gave legally insufficient reasons. As can be seen, the Panel's reasons, are however, present, on any fair reading of the DL.

255. Ground 6 accordingly fails.

## *F. SECTION 31(2A) OF THE SENIOR COURTS ACT 1981*

256. Since I have found that all grounds fail to disclose any material error of law on the part of the Panel, it is unnecessary to address section 31(2A) of the Senior Courts Act 1981.

## *G. CONCLUSION*

257. This judicial review is dismissed.

258. By way of postscript, I should make clear that nothing in this judgment is to be taken as contradicting what is said in its opening paragraph, regarding the significance of climate change and GHGs. As will by now be apparent, the main issue in this case is not whether emissions from any additional aircraft using Bristol Airport should be ignored. Plainly, they should not. Rather, it is about how and by whom those emissions should be addressed.