Neutral Citation Number: [2011] EWHC 3356 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/4160/2011

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 26 October 2011

B e f o r e:

MR JUSTICE COLLINS

The Queen on the application of

STOP BRISTOL AIRPORT EXPANSION LIMITED

Claimant

- v -

NORTH SOMERSET COUNCIL

Defendant

and

BRISTOL AIRPORT LIMITED

Interested Party

Computer Aided Transcription by
Wordwave International Ltd (a Merrill Communications Company)
190 Fleet Street, London EC4
Telephone No: 020 7421 4040
(Official Shorthand Writers to the Court)

Miss Nathalie Lieven QC (instructed by Harrison Grant, London WC1X UE) appeared on behalf of the Claimant

Mr Neil King QC and Mr Richard Moules (instructed by the legal department of North Somerset Council) appeared on behalf of the First Defendant

Mr James Pereira (instructed by Osborne Clarke, London EC2Y 5EB) appeared on behalf of the Second Defendant

---

J U D G M E N T
(As Approved by the Court)

Wednesday 26 October 2011

MR JUSTICE COLLINS:

1. This is a renewed application for permission to seek judicial review of the decision of the North Somerset Council to grant planning permission to the owners of Bristol Airport Limited (the interested party) to carry out works to the airport, the effect of which would be to increase their capacity from their present four million passengers per annum to ten million passengers per annum.

2. The claim has generated a considerable amount of paper. Lengthy and detailed skeleton arguments have been put before me, together with substantial submissions made on behalf of the claimant, on behalf of the defendant, and in writing by the interested party. That in itself does not mean that the claim is in the end to be regarded as arguable.

3. There are essentially two issues that arise, the second of which is divided into two. The first, which is relied on in particular by Miss Lieven QC and has given rise to the most extensive argument, is that the government policy which stems from the Air Transport White Paper ("ATWP") of 2003 is out of date, does not properly consider, as is indicated in subsequent observations of the Secretary of State, or deal properly with greenhouse gas emissions and the effect on the climate of such emissions from aircraft and in addition from the extension of airports. This case is concerned with the effect from aircraft.

4. It is said that the error into which the defendant Council fell was in the advice given by the officers in their lengthy reports to the relevant committees which was in these terms:

> "Climate change and aviation's contribution to it is clearly an important issue, but it is a global problem that requires a global response. Thus, as has been seen in recent planning appeals, it is not the role of local planning controls to managing emissions from aircraft. However, a local planning authority can influence the emission arising from ground operations and many planning authorities have resolved to condition the expansion plans submitted by airports for the delivery of carbon management plans.
>
> Taking the above into account, together with the comments made in the Stansted appeal and the House of Commons Report in December 2009, there is no basis to refuse this application on the effects of the development on climate change."

It is said that that is an error and that the Committee was not only entitled to have regard to the effect on climate change and to ask itself whether the policy which stemmed from the 2003 ATWP was one which could override such concerns and evidence which was put before it of the effects of the expansion and more particular the difficulties that would result in maintaining what had by then become the government policy, namely that there must be a reduction by 2050 to levels of emissions which antedated 2005.

5. I have read and taken into account the detailed skeleton arguments and oral submissions. As this is a permission application it is not only unnecessary but it is undesirable that I should go into enormous detail in this judgment and I do not propose to do so. What is important is that I

make clear my views on the important aspects which have led me to the decision which in due course I reach.

6. The reference by the officers to recent planning appeals included R(Barbone) v Secretary of State for Transport [2009] EWHC 463 (Admin) (the Stansted appeal) decided on 13 March 2009 by Sir Thayne Forbes. The application was under section 288 of the Town and Country Planning Act 1990 to quash the decision made by the Secretary of State allowing an appeal against the decision of the district council to refuse planning permission for BAA's proposals to increase the capacity of Stansted Airport. Of importance Sir Thayne said this:

> "4. On behalf of the claimants, Mr Stinchcombe accepted that the G1 proposal was supported as a matter of national policy by the Future of Air Transport White Paper ('the ATWP') which was published by the Government on 16 December 2003. However, Mr Stinchcombe pointed to a number of statements made by or on behalf of ministers .... following publication of the ATWP .... to the effect that when making any decision on a project supported by the ATWP the decision-maker would be required to take into account all the environmental impacts and economic effects of the project (including, so far as the latter was concerned, a 'rigorous economic assessment'), even if to do so might lead to a refusal of planning permission for the project in question, in frustration of the national policy support for it expressed within the ATWP. In effect, it was Mr Stinchcombe's submission (a submission that lay at the heart of the claimants' case) that the Secretaries of State were bound to give proper effect and/or to observe those ministerial statements in their decision-making with regard to BAA's appeal.
>
> 5. On behalf of the Secretaries of State, Mr Mould QC (supported by Mr Humphries QC on behalf of BAA) made it clear that there was not and never has been any issue between the parties about this aspect of the matter. Thus, Mr Mould acknowledged that the general approach identified in paragraph 4 had been readily accepted as correct by the Secretary of State in R(Essex County Council and others) v Secretary of State for Transport [2005] EWHC 20 (Admin) [the Wandsworth case] ....: see paragraphs 10 to 12 of the Secretary of State's Detailed Grounds of Defence in that case, which Mr Mould summarised in the following terms:
>
> 1) The ATWP does not itself authorise any particular development.
>
> 2) It would be legitimate for any interested party to make a case to a public inquiry into a planning application for airport development that the adverse environmental

> impacts of the proposed development were such that planning permission should, on balance, be refused -- notwithstanding that such refusal would frustrate national policy.
>
> ...."

The ATWP at that time (in 2009) indicated that expansion both at Heathrow and at Stansted was appropriate, although it could not itself give permission for expansion, and so it was properly to be regarded as government policy. However, it is important to note that the observations in Barbone and the reflection of Mr Mould's concession (if that be the right word) does not in any way indicate that the issue of the global effect (the effect resulting from the aircraft flights) on the environment were matters that could be taken into account by local planning authorities. It is also worth bearing in mind that Barbone was an appeal against a decision of the Secretary of State, not against a decision of a local planning authority. I do not think that Barbone helps one way or another on this particular issue.

7. The next case in point of time is R(Borough of Hillingdon and others) v Secretary of state for Transport [2010] EWHC 626 (Admin), which concerned a challenge to the policy in relation to a third runway at Heathrow Airport. That case did not involve an application for planning permission for such a runway. The observations of Carnwath LJ which are relied on are these:

> "60. .... Whilst I have no reason to question the decision in Barbone, I do not see it as laying down any general principle, beyond the particular aspect of the ATWP with which it was concerned. Furthermore, the decision was made without reference to the new legal framework introduced by the 2008 [Planning] Act. ....
>
> 61. More generally, I do not accept that Bushell [the House of Lords case where observations of Lord Diplock are material] can be read as laying down any general rule that government 'policy' is automatically outside the scope of debate at a local planning inquiry [or, by analogy, council decision-making]."

Earlier in his judgment Carnwath LJ observed:

> "51. .... Consistency of policy is of course a legitimate objective. Having adopted a favourable approach to the third runway proposal in 2003, the government was entitled to maintain that general approach unless and until circumstances demanded a

> change of view. However, it could not be regarded as immutable. It is a trite proposition in administrative law that no policy can be set in stone. It must be open to reconsideration in the light of changing circumstances. This position has been acknowledged in the 2003 ATWP itself, which had recognised the need for periodical review and consultation to take account of changing circumstances.
>
> 52. Further, common sense demanded that a policy established in 2003, before the important developments in climate change policy, symbolised by the Climate Change Act 2008, should be subject to review in the light of those developments. Even if the immediate purpose of the 2007 consultation was limited to the three specific conditions identified in 2003, that did not remove the need for a general reappraisal of the policy in the light of other material changes since that time.
>
> ....
>
> 63. I do not find it necessary to consider how a planning inspector or the IPC might deal with arguments directed to the merits of aspects of the 2003 ATWP or the 2009 Decision in advance of Airports NPS. I would only observe that I find it hard to see why arguments based on material changes since 2003 should carry less weight merely because the operator has chosen to pre-empt the NPS process. There is nothing in Bushell which would require such arguments to be disallowed as a matter of law."

Those observations are heavily relied upon by Miss Lieven as an indication that it was not only open to the Council to consider the submissions made by the claimant and to have regard to them in deciding whether the ATWP policy was one which should be followed, but they had an obligation so to do. The advice given to them by their officers that they need not do that was thus wrong.

8. Whether or not Carnwath LJ's general observations can be considered to have any weight, one has to consider the specific matters that have been considered and the specific approach that has been adopted in relation to the global effect, which is the important aspect of this case, and whether in that respect it was open to the Council to consider the more general aspect of effect on climate change. It is worth posing the question what would they have done had they been able so to consider it, because there is as yet no final decision reached as to what should be the policy in this regard. The Secretary of State has made it clear that the government's view is that aviation is a global industry and that it is best governed by international action, rather than by

individual states, and in particular the UK taking its own view independently of the views particularly of the European Union.

9. The matter came before the Divisional Court (Pill LJ and Roderick Evans J) in R(Griffin) v London Borough of Newham [2011] EWHC 53 (Admin). That case concerned the permission granted by Newham for the expansion of the London City Airport. Many of the arguments which are now raised were advanced in connection with that claim. It was said that government policy in the form of the ATWP was out of date and that the change in policy should have been taken into account. The argument was presented in that case by Miss Lieven. The decision was given on 9 July 2009. On that date, as Pill LJ pointed out at paragraph 38, the ATWP remained (and still remains) the appropriate policy statement. There is no question but that that is the position still today. In the course of the judgment Pill LJ observed:

> "44. I do not consider that the Hillingdon decision assists the claimant. Carnwath LJ referred to matters, particularly the 2050 target, which will need to be taken into account under a new National Policy Statement but Carnwath LJ was not required to focus, and did not focus, on a decision such as the present to be made in the meantime.
>
> 45. When making his announcement on 15 January 2009, the Secretary of State expressly requested the CCC's advice as to policy. It was not for the Council to work out a new policy in the meantime. The Council would, in my judgment, have been wrong to do so. The important questions which arise call for national guidance and not speculation by a local planning authority as to the effect of a target announced for 2050."

Miss Lieven submits that those observations were obiter, were not necessary for the decision, and should be reconsidered because they are contrary to the approach taken in Hillingdon. More importantly, she submits, they are qualified by observations of Sullivan LJ who refused leave to appeal in the Newham case.

10. However, in refusing leave Sullivan LJ gave reasons which depended on the papers before him. He had heard no oral argument. He made the point that the Climate Change Commission's review of progress towards achieving the 2050 target and the emphasis on new technologies and the sustainable use of renewable fuels are illustrations how the two policies (ie the new 2050 target and the continued adherence to the capacity increases in the ATWP) were, on their face, inconsistent. Sullivan LJ referred specifically to the December 2009 CCC Report, which supports the appellant's view that there was such an inconsistency. However, that aspect was not known to Newham at the time they made the decision, and could not be taken into account in considering whether their decision was unlawful. Miss Lieven submits that Sullivan LJ's observations contradict the approach indicated in Pill LJ's judgment.

11. Undoubtedly the concern about the effect of climate change has persuaded the Secretary of

State that the 2003 ATWP is out of date. Indeed, in the Forward to the scoping document which was issued by the Department of Transport in March 2011, he says in the introduction this:

> "The previous government's 2003 White Paper Future of Air Transport is fundamentally out of date because it fails to give sufficient weight to the challenge of climate change. In maintaining support for new runways, in particular at Heathrow, in the face of the local environmental impacts and mounting evidence of aviation's growing contribution towards climate change, the previous government got the balance wrong, failed to adapt its policies to the fact that climate has become one of the gravest threats we face. .... Aviation is a global industry and carbon is a global challenge. The biggest single contribution to tackling emissions is therefore through effective international action. This is why we are committed to improving aviation in the EU emissions trading system, but aviation needs to do more, not just on emissions but also in terms of its other environmental impact, particularly noise ...."

12. It is to be noted that in May 2010 the government cancelled new runways at Heathrow and Stansted, partly on the grounds of climate change. The ATWP was modified to that extent. It is to be noted that the ATWP specifically deals with Bristol, which is one of the most important regional airports, and indicated support for expansion in that airport. I recognise that that by itself does not mean that planning permission had to be granted, but it is to be noted that in modifying the effect of the ATWP it was open to the government to have indicated that expansion generally had to be held back and limited in particular airports. It did not do so.

13. The latest government reaction is its response to the Climate Change Commission's Report on reducing the emissions by 2050. The was produced in August 2011. It is to be noted that in the Forward the Secretary of State reins back somewhat on the observations that he made in the earlier document. He said:

> "Aviation makes a positive contribution to our lives. It gives us the freedom to travel and enables UK businesses to compete in the global economy, but a responsible government cannot ignore its climate change impacts. I believe that to present the challenge we face as one of deciding between economic growth and reducing carbon emissions is a false choice. This government is anti-carbon, not anti-aviation, and our goal is to find ways to meet our carbon reduction targets while supporting economic recovery.
>
> Aviation is a global business and so is best governed by international action. We fully support the inclusion of aviation in the EU Emissions Trading System from next year and we will

> continue to work to secure global solutions. This approach provides an important way to ensure that the aviation sector takes strong, cost-effective action to address its climate change impacts while avoiding competitive disadvantage to the UK. However, it is right that we also consider the potential for action at home where that makes sense.
>
> Tackling climate change should be seen in the context of the economic opportunities for the UK in developing low-carbon technologies. These opportunities can help boost the economy while maintaining the UK's leadership role in tackling carbon emissions. ...."

It is indicated that it is hoped that by March 2013 "a sustainable framework" can be produced. Nowhere is it suggested that, despite the 2003 ATWP being regarded as out of date, it is not still to be regarded as the relevant policy, however desirable or otherwise that may be. It is, as Griffin made clear. Indeed, the documents indicate that a 60% increase in capacity is capable of being put in place without compromising the reduction to the 2005 levels by 2050. So expansion in individual airports is not in any event ruled out by all the material that is produced.

14. The officers' report was that the global effect was not for the Committee. In their lengthy and detailed report the Committee dealt with aspects of the problem created by emissions and the details put before it. It was not in any way hidden from the Committee. In my judgment it was correct to advise the Committee that it should approach the matter in that way.

15. Miss Lieven submits that the Committee should have been able to consider the matter. She recognises the difficulty that it would have faced in reaching any decision on this aspect which, after all, was said by the government to be a matter for consideration on a very much wider basis than merely national. They were local councillors who dealt with local planning matters. It was much more difficult for them to have regard to global matters and to reach decisions upon them. Miss Lieven submits that in those circumstances if they felt unable to reach a conclusion they should have refused permission on the basis that the application was premature. The logic behind that is that any airport expansion would be likely to be put on hold until at least 2013. She also submitted that an environmental impact assessment was directed by the Council. That was to include as part of it consideration of the global impact because it needed to be comprehensive and therefore, by virtue of paragraph 3(2) of the relevant regulations, that was a matter that they were obliged to take into account. I do not think it is arguable that paragraph 3(2) in any way should override the policy which has to be taken into account.

16. I have no doubt that the decision in Griffin is correct. At things stand at the moment, notwithstanding the matters which have been put forward and the problems created by the question of expansion as against effects on climate, greenhouse gas emissions, and the counter-balancing economic arguments, particularly in present times are not at all easy, but the government for good or ill has maintained the ATWP for the time being as the relevant policy document and as it seems to me it cannot be an error of law for advice to be given that the

Committee should follow that policy.

17. Miss Lieven submits that as a general proposition it is open to local planning committees to have regard to but decide, if they have good reasons for so doing, not to follow a particular government policy. That may be so, but one is concerned here with whether the advice given by the officer was wrong in law. In my judgment it was not even arguably so. Accordingly, that first ground does not give rise to an arguable case.

18. Grounds 2 and 3 go together. I will deal shortly with ground 3 first. The submission is that in observations made by the Committee based upon the information obtained from the Council's own advisers and the submissions put forward on behalf of BIA by their advisers was misleading in that it indicated that the economic arguments presented were robust. I do not need to undertake the exercise. Suffice it to say that in my judgment it is impossible to support an argument that the officers' advice to the Committee in that respect was misleading.

19. Miss Lieven's final point is that in referring to one of the important matters, which was the change in the approach to the cost of carbon, the officers advised the Council in a way which effectively meant that they did not follow government policy. It is said that this was done in a way which did not properly present the various arguments which had been presented.

20. The answer to that, in my view, is properly put forward by counsel for both the defendant and the interested party. The explanation in respect of carbon cost was given by the interested party in a report which it presented. This stated, so far as material:

> "The treatment of carbon costs is discussed separately in Bristol Airport's response to the representations from [the claimant]. For the sake of completeness, calculations of the cost of carbon are included here based on the shadow price of carbon. Alternative treatments of air passenger duty are also discussed as above. Whilst it is noted that the air passenger duty benefit may be overstated as a result of displacement effects, it should be noted that the same issue may be applicable to CO_2 emissions as a portion of these emissions will be attributable to other airports outside the south west. The sensitivity of impacts of the inclusion of air passenger duty and carbon costs is very low. This is due to higher economic benefits in terms of jobs, GBA and system efficiencies through time and cost savings as a result of the BIA development proposal. Tourism sector benefits contribute significantly to the total additional impact and benefits, and whilst there are some issues surrounding the estimation of additionality of tourism impacts, the results shown here follow tourism impact, modelling adopted widely in the UK....."

It is submitted that the low sensitivity of economic impacts to the inclusion of carbon costs

made it not unreasonable for the Council to accept in the circumstances the interested party's analysis. That is what the Committee was advised to do and that is what the Committee did. In my view it was not in any way misled, nor was there an error of law in that aspect.

21. I have not gone into that in any great detail. I take the view, together with Silber J, that essentially that amounts to a disagreement on fact. The Council was entitled to exercise its planning judgment on that issue in the way that it did. On standard principles that was an appropriate way of dealing with the matter. For those reasons, given at somewhat greater length than I would have hoped, I refuse this application.

MR KING: My Lord, I was going to say something about costs.

MR JUSTICE COLLINS: I am not surprised.

MR KING: My Lord, your Lordship will have seen that Silber J's order dealt with the matter of costs.

MR JUSTICE COLLINS: Yes.

MR KING: So far as the Acknowledgement of Service is concerned -- I will come on to the costs of today's hearing separately in a moment.

MR JUSTICE COLLINS: Well, as you know, the general rule is that you do not get the costs of a renewal application.

MR KING: I do know that --

MR JUSTICE COLLINS: Obviously you know that.

MR KING: -- but I am going to suggest that there are exceptional circumstances.

MR JUSTICE COLLINS: Oh, there are exceptions.

MR KING: But so far as the Acknowledgement of Service, the general rule is that we do get our costs.

MR JUSTICE COLLINS: Indeed.

MR KING: What we are asking for, with respect, from your Lordship is an order in the terms that Silber J made the order on the second page of his --

MR JUSTICE COLLINS: That is £2,290?

MR KING: £2,290. That is for the Acknowledgement of Service.

MR JUSTICE COLLINS: Yes.

MR KING: My Lord, I do want to make an application against the claimant for the costs of the hearing. As your Lordship points out, I have to demonstrate under the Mount Cook principles exceptional circumstances. I have copies of Mount Cook, but I doubt your Lordship will need it.

MR JUSTICE COLLINS: I am aware of it.

MR KING: If your Lordship needs a copy, we have copies, and we have a copy for my learned friend if she would like it, but I know that she will be very familiar with the principles.

The exceptional circumstances we would submit justifying an award of costs in respect of turning up at today's hearing are these. The first is that the expansion of the airport is a major development proposal which is a matter of, I think it is fair to say, exceptional importance in certainly economic terms not only to the local area for which the defendant is responsible, but also to the whole of the south west region. So it is an exceptional circumstance, I would respectfully submit, in that sense.

The second exceptional circumstance which we invite your Lordship's attention to is that grounds 2 and 3 -- or ground 2 in both its aspects, and your Lordship will know which points I am referring to -- is put differently in the claim form from the way it has been put in argument today.

MR JUSTICE COLLINS: Well, it has been adapted, yes.

MR KING: Yes, that is a fair way of putting it. All I would in that respect draw your Lordship's attention to is paragraph 70 of our skeleton argument, where that point is made.

MR JUSTICE COLLINS: Yes. To know precisely how it was put was helpful. I am not sure there is anything exceptional in that.

MR KING: My Lord, what I would submit is that it was appropriate and necessary in the light of that. It is not the only reason, but it was appropriate and necessary in the light of that for the defendant to be represented at the hearing today.

MR JUSTICE COLLINS: I have no doubt it was appropriate for the defendant to be represented, but that, unfortunately for you, is not the test.

MR KING: It is one of the circumstances which we invite your Lordship's attention to.

MR JUSTICE COLLINS: It can be material.

MR KING: My Lord, the third is that, just in relation to Sullivan LJ's order in Griffin, which obviously has become an important aspect of the ground 1 issue, and on which my learned friend -- and I criticise her in no way for this -- has placed substantial reliance, as your Lordship said in his judgment, that effectively has become an issue since the Acknowledgement of Service was served. What I understand -- what I believe -- happened was, and I will be corrected if I am wrong, is that that order was appended to the interested party's

Acknowledgement of Service, and the claimant thereafter submitted a reply outside the procedural rules. I make no complaint but simply make that observation.

MR JUSTICE COLLINS: The rules are going to be changed, I think, but there we are. It is about time.

MR KING: That is what the claimant did and nobody objected to it, but it happened after the Acknowledgement of Service, and again I suggest that it was necessary --

MR JUSTICE COLLINS: True, but there is a problem with these replies to know where one stops. Do you then have rejoinders and surrejoinders and so on? But if something new is raised in a Reply, it is at least arguable that it ought to be open to the defendant to deal with that new issue as part of the Acknowledgement of Service.

MR KING: Yes --

MR JUSTICE COLLINS: But I agree there are difficulties as things stand.

MR KING: The Acknowledgement of Service had already been served.

MR JUSTICE COLLINS: I recognise that.

MR KING: We had to attend. That is another reason why the defendant had to be represented --

MR JUSTICE COLLINS: Yes. As I say, I have no doubt that you are properly here.

MR KING: I am grateful to my Lord for that at least. It is a specific Mount Cook point. I would go so far as to say it was made clear by the defendant in its Acknowledgement of Service that the grounds were, we would say, hopeless. We drew attention to all the relevant documents, as we have done in our skeleton in the Acknowledgement of Service. So far as grounds 2 and 3 are concerned, I think they can genuinely simply be described as "hopeless" either in their original form or as put, with the greatest possible respect obviously to my learned friend, by her in her skeleton.

MR JUSTICE COLLINS: They were put very well.

MR KING: But so far as ground 1 is concerned, I do maintain the submission that I made earlier. The point at issue has really been decided by Griffin. The only new factor is --

MR JUSTICE COLLINS: Well, Griffin is not binding.

MR KING: No, it is not, but your Lordship --

MR JUSTICE COLLINS: I think perhaps one could say that ground 1 was arguably arguable, if you see what I mean.

MR KING: Well, my Lord, that is not what I would say. I am saying it was not. Obviously your Lordship will have to take a view on that, but my submission is that it was not arguably arguable. A further fact on which I rely is again a Mount Cook consideration which is that the claimant has, I think it is fair to say, had in effect the advantage of an early substantive hearing of the claim. Your Lordship has mentioned in his judgment the skeleton arguments and the substantial documentation. We have spent a full day in court and your Lordship has given judgment dealing with it. So that is listed as one of the potential exceptional circumstances that could justify an award of the costs in favour of the defendant against the claimant for attending the hearing. Those are my submissions, my Lord.

MR JUSTICE COLLINS: Are your caught by Bolton?

MR PEREIRA: My Lord, I am. I am only rising because of the way Mr King put the matter in relation to the costs of the Acknowledgement of Service. I was rather approaching that on the basis that that order had been made --

MR JUSTICE COLLINS: Yes, but I am slightly wondering about that. Are you caught by Bolton on the Acknowledgement of Service? I am not sure.

MR PEREIRA: My Lord, I am not. It is paragraph 76(1) of Mount Cook which makes it clear.

MR JUSTICE COLLINS: I started this ball rolling in Leech, did I not?

MR PEREIRA: You did, but that ball has been picked up. My Lord, I do not ask you to reconsider the question of costs that Silber LJ made --

MR JUSTICE COLLINS: Well, I think it is material if there is an overlap, is it not, because one would expect, where the interested party and a defendant are running the same way, that they might liaise as to the work that needed to be done. You spent more than the defendant, partly, no doubt, because you are private rather than local authority, but you did.

MR PEREIRA: Well, my Lord, I can deal with the matter of approach first of all. You will see from our Acknowledgement of Service that we did just as my Lord said should be done. We had sight in advance of the defendant's Acknowledgement of Service and therefore, rather than repeating what is there, we adopted it and we supplemented it. In other words --

MR JUSTICE COLLINS: Well, that you say you did, and so it makes it slightly surprising that you spent rather more than they did in preparing yours.

MR PEREIRA: Well, my Lord, not really, because that simply depends upon the amounts that are charged --

MR JUSTICE COLLINS: One goes back to Lord Woolf whose view was that judicial review applications should not be put to expense. Is this not an Aarhus case, because we are concerned with the effects on the environment?

MR PEREIRA: My Lord, yes.

MR JUSTICE COLLINS: And, accordingly, there is all the more reason why costs should be kept lower in this type of case, otherwise one runs up against the Aarhus objections, does one not?

MR PEREIRA: Well, my Lord, can I make three submissions so that our position is clear?

MR JUSTICE COLLINS: Yes.

MR PEREIRA: Firstly, as a matter of principle, we are entitled to our costs. That is Mount Cook --

MR JUSTICE COLLINS: Certainly. That I accept.

MR PEREIRA: Secondly, as a matter of approach --

MR JUSTICE COLLINS: No, you are not entitled to your costs; you are entitled to what the court regards as reasonable costs.

MR PEREIRA: My Lord, yes --

MR JUSTICE COLLINS: Which is not necessarily the same thing.

MR PEREIRA: My Lord, no, but one might sensibly say that implicit in that is that one is entitled to some form of costs.

MR JUSTICE COLLINS: That I recognise, and that I entirely accept.

MR PEREIRA: My Lord, secondly, we did adopt the approach that my Lord said we ought to have adopted, which is to liaise and to make our Acknowledgement of Service compliment rather than duplicate what --

MR JUSTICE COLLINS: It is a horrifying thought that if you had not, it would have been rather more expensive, but there we are.

MR PEREIRA: My Lord, so far as Aarhus is concerned, as I understand it, it is not being said -- at least it has not yet been said -- that the costs of the Acknowledgement of Service are prohibitively expensive.

MR JUSTICE COLLINS: No, no, but the only point I make is that the general approach in Aarhus cases is that the costs -- or the potential costs -- to a claimant in this sort of case should be not such as would inhibit them from making a claim which was not on the face of it a hopeless claim.

MR PEREIRA: My Lord, yes, and the claimant has not been inhibited from making a claim.

MR JUSTICE COLLINS: No.

MR PEREIRA: There has been a paper application for permission with costs were awarded.

MR JUSTICE COLLINS: There was an application -- and would have been -- for a PCO. Remind me of the amounts that they wanted it to be capped at?

MISS LIEVEN: My Lord, we asked for an interim protective costs order of £2,500, and a protective costs order of £5,000.

MR PEREIRA: My Lord, if I might just address the last point, of course the claimant has not been inhibited from pursuing the claim --

MR JUSTICE COLLINS: No, no --

MR PEREIRA: -- at the permission stage and has been able to employ Miss Lieven's services for the oral permission hearing.

MR JUSTICE COLLINS: I am not going to go into that.

MR PEREIRA: For all of those reasons, my submission is that the costs that we applied for for our Acknowledgement of Services is proportionate and is entirely appropriate at that amount.

MR JUSTICE COLLINS: Yes. Miss Lieven?

MISS LIEVEN: My Lord, I can deal with the last point very clearly. I would not place any reliance on being able to afford my services because I am certainly here pro bono, and I strongly suspect Mr Forsdick was as well.

MR JUSTICE COLLINS: I was not having regard to that at all.

MISS LIEVEN: No, I am glad.

MR JUSTICE COLLINS: Miss Lieven, they are clearly entitled to some costs, prima facie.

MISS LIEVEN: Well, my Lord, I am not resisting Mr King's costs on the Acknowledgement of Service.

MR JUSTICE COLLINS: That is the £2,290?

MISS LIEVEN: That is the £2,290. I will come to Mr Pereira's cost in a moment, if I may, but so far as Mr King's costs are concerned, the Acknowledgement of Service accords with Mount Cook, and I would not argue that that was prohibitively expensive in respect of the order as to principle.

MR JUSTICE COLLINS: It does not seem to be certainly.

MISS LIEVEN: No. So far as Mr King's costs -- Mr King's client's costs -- of today are concerned, I would say that there are two reasons why those costs should not be allowed: first of all, Mount Cook, and secondly, the Aarhus principles. If one starts allowing defendants the costs of hearings against claimants in this kind of case -- and this is a fundamental environment case; there is no private interest here; it is all about wider environmental consequences; it falls four square within the Aarhus principles.

Looking at the Mount Cook approach, are there exceptional circumstances here? I would say plainly not. It is important to note there was no application for interim relief, which is often a reason why a defendant and an interested party say they have to attend.

MR JUSTICE COLLINS: I do not think you can conceivably submit, sensibly, that they were not properly here.

MISS LIEVEN: No, I am not for a moment, but that is often part of the justification. In terms of Mr King's exceptional circumstances, the first one was: this is a major development, it is an expansion of an airport --

MR JUSTICE COLLINS: That is not an exceptional circumstance.

MISS LIEVEN: No, my Lord. The second one is that grounds 2 and 3 changed. Well, my Lord, one, they have not changed in any way that could --

MR JUSTICE COLLINS: I do not think those are, frankly, exceptional.

MISS LIEVEN: Thirdly, Griffin, and the reference in, first of all, Mr Pereira's Acknowledgement of Service and then Mr Forsdick's reply to the order of Sullivan LJ, my Lord, to the degree anything more needed to be said about that, if the defendant had been really concerned, they would have made the point in writing. In my submission, that cannot possibly be an exceptional circumstance because there was an additional document, it was dealt with on the papers, and there was nothing exceptional about that situation whatsoever.

Fourthly, my learned friend says "hopeless arguments". Well, my Lord, ground 1 -- this is always difficult because your Lordship has just heard almost a day of argument about the case and so you will have your own views, -- but in my submission --

MR JUSTICE COLLINS: No, I do not think they were hopeless, Miss Lieven.

MISS LIEVEN: I am grateful.

MR JUSTICE COLLINS: I think they were wrong, but I do not think they can be categorised as being hopeless.

MISS LIEVEN: I am grateful, my Lord. And finally, the argument that there has been a day in court. My Lord, in my submission, that would be phenomenally unfair and arbitrary on a claimant if the misfortune that their case took a whole day could then become --

MR JUSTICE COLLINS: No, but permission applications normally do not take that long, and there is the Mount Cook point, is there not, that because it has been a very lengthy argument it can be treated rather more closely to a decision really on the claim, because the aspects which would have been put forward on the claim have been considered. I do not suppose that there will have been any further material, subject to any changes in the meantime in the policy, there would have been any other arguments put forward which have not already been -- or any further evidence which is not already there.

MISS LIEVEN: No, no, my Lord. But, in my submission, to accept that as being a ground for giving costs in this situation would be fundamentally contrary to the Aarhus principles.

MR JUSTICE COLLINS: Well, I am not sure about that, but it is certainly something that Mount Cook recognises as a possible reason for awarding not necessarily all costs, but some costs.

MISS LIEVEN: Yes, but, my Lord, Mount Cook did not consider Aarhus and the environmental-type cases.

MR JUSTICE COLLINS: No, that is true, and we have had Sullivan LJ's Report, have we not?

MISS LIEVEN: And, indeed, Garner --

MR JUSTICE COLLINS: Yes.

MISS LIEVEN: -- but the consequence of that argument is that the more important the environmental case, the more lengthy the arguments, the bigger the development, the more likely that the costs are going to be prohibitive.

MR JUSTICE COLLINS: No, that is wrong way, I agree.

MISS LIEVEN: In my submission, that would be an extraordinarily retrograde step.

MR JUSTICE COLLINS: It is a very difficult situation. I personally have thought for a long time -- and indeed Mount Cook make clear (I forget when it was decided) -- that nothing has been done to amend the rules.

MISS LIEVEN: No.

MR JUSTICE COLLINS: And they really ought to be, and I confess my view has always been that the rule as it stands is wrong. It should be open to the discretion of the judge in individual cases to decide whether it is appropriate to award costs on renewals, and Aarhus, of course, is a very relevant consideration --

MISS LIEVEN: Yes.

MR JUSTICE COLLINS: -- in this sort of case. But I cannot do that because the rules are the rules.

MISS LIEVEN: Yes, but trying to get the rules, Mount Cook and Aarhus to sit together, in my submission, to accept that the lengthier the argument and the more important the case, the more likely the claimant has to pay the costs of the hearing is against the principle of allowing environmental justice and not keeping claimants out by being prohibitively expensive.

MR JUSTICE COLLINS: It has a risk, yes.

MISS LIEVEN: There is nothing exceptional here that could, in my submission, justify that costs of today. So, my Lord, that, in my submission, deals with my learned friend's costs.

As far as the interested party is concerned, in my submission, Silber J was wrong to order a second set of costs on the Acknowledgement of Service. I completely accept that Mount Cook says that such costs can be awarded by the court. Mount Cook says they can; it does not say they must. It is a matter for the court --

MR JUSTICE COLLINS: I think it was reasonable of them to add, but I am entirely persuaded that they should not have the full amount.

MISS LIEVEN: No.

MR JUSTICE COLLINS: I think it is excessive.

MISS LIEVEN: My Lord, in my submission, this is a total overlap case. They do not take any points which are different. The do not have what I would describe as a different interest in this sense. What one sometimes gets in the Acknowledgement of Service is the developer saying there are particular delay points, or particular prejudice points, and those are points which have to be taken by the developer and not by the Council. But here Mr Pereira's points and Mr King's points are the same. In my submission, there is really no justification for a second set at all. But if there are, it should be a minimal amount to reflect that total overlap.

MR JUSTICE COLLINS: Yes.

MISS LIEVEN: My Lord, I hope that deals with all the points.

MR JUSTICE COLLINS: Anything you want to add?

MR KING: Shall I go first?

MR JUSTICE COLLINS: I do not mind.

MR KING: Very briefly, the only point I want to come back on is on this last one about the Mount Cook head of potentially exceptional circumstances, whether as a result of the deployment of full argument by both sides at the hearing of a contested application the unsuccessful claimant has had in effect the advantage of an early substantive hearing of the

claim. It is my submission that that is, in effect, what has happened today --

MR JUSTICE COLLINS: I am not sure that the claimant in such circumstances would regard it as an advantage, but there we are.

MR KING: Nevertheless, as I understand it, the principle underlying that -- or at least part of the principle underlying that -- is if the matter goes to a full hearing, and the claimant loses, then the claimant will normally -- normally -- be liable to pay the defendant's costs.

MR JUSTICE COLLINS: Yes. I confess, I have my difficulties with those observations in Mount Cook, but I suppose they are binding.

MR KING: With respect, what I have just suggested is correct. The claimant would normally pay the defendant's costs on a full substantive hearing, and therefore, by having a permission hearing, they have avoided the potentially bigger costs liability of a full hearing.

MR JUSTICE COLLINS: I forget whether in the Mount Cook days rolled-up hearings were ordered.

MISS LIEVEN: I think Mount Cook was in 2003.

MR JUSTICE COLLINS: We do not like rolled-up hearings now anyway. The fewer the better, but I am not sure they really existed then. Anyway, there we are.

MR KING: I am ceratin that I can remember at least one rolled-up hearing.

MR JUSTICE COLLINS: You are probably right. I simply cannot remember.

MR KING: My Lord, just on the Aarhus point --

MR JUSTICE COLLINS: I was judge in charge then, so I ought to remember.

MR KING: You would have known at the time certainly. My Lord, can I just draw attention, in the context of Aarhus, to the observations of Silber J again?

MR JUSTICE COLLINS: Yes.

MR KING: At the bottom of the first page -- these are his observations in relation to his application for the PCO, which was refused: "The claimant already has costs protection through its status as a limited liability company".

MR JUSTICE COLLINS: I am sorry, where is this?

MR KING: I am so sorry. This is the bottom of the first page of Silber J's order.

MR JUSTICE COLLINS: Yes, I have it.

MR KING: That is perhaps relevant to the objection that my learned friend has made to an award of costs against her client for the defendant's costs of today's hearing. It is a limited liability company. As Mr Pereira observed, obviously there is no suggestion that the risk of costs has inhibited this claimant from bringing the claim and bringing it to a hearing here.

MR JUSTICE COLLINS: No, that is true.

MR KING: And I would suggest, with respect, that Aarhus is not an answer to an application like this for costs in a particular case -- on the specific circumstances of the case. Obviously if your Lordship is against me that there are exceptional circumstances that would justify an award of costs, then in a sense Aarhus does not matter. That is all I wanted to come back on.

MR JUSTICE COLLINS: Thank you.

MR PEREIRA: My Lord, I am not going to repeat the submissions I made earlier --

MR JUSTICE COLLINS: No.

MR PEREIRA: -- but can I make two additional points? Firstly, Mount Cook says that the interested party should generally receive their costs --

MR JUSTICE COLLINS: Yes, I am not doubting that, but the question is: what is reasonable in the circumstances?

MR PEREIRA: My Lord, secondly, my learned friend Miss Lieven said that this is not one of those cases where the interested party has had to say this, that and the other. There are two matters in particular to which we would draw the court's attention and which the defendant did not. The first was we asked for expedition in our Acknowledgement of Service. The second was that we specifically drew the court's attention to the Secretary of State not calling in the application, and that was one of the reasons why Mr Greenwood made his witness statement to deal with that. So there were those additional matters.

MR JUSTICE COLLINS: Those additional matters, yes. Miss Lieven, the only thing -- or one of the things -- that I have omitted to take into account was the fact that your clients are a limited liability company.

MISS LIEVEN: Yes

MR JUSTICE COLLINS: So any order, of course, may or may not be enforceable were they to go into liquidation.

MISS LIEVEN: Well, my Lord, yes, but that is not, in my submission, really an answer to the point. There should be a principled decision as to what is the appropriate order for costs.

MR JUSTICE COLLINS: Yes.

MISS LIEVEN: And then the next question is: to what degree is that order enforceable? I do not know --

MR JUSTICE COLLINS: You say that is an irrelevancy, do you?

MISS LIEVEN: I would say that at this stage that is an irrelevancy, my Lord.

MR JUSTICE COLLINS: All right.

J U D G M E N T (RE COSTS):

MR JUSTICE COLLINS:
1. The question arises as to costs. So far as the Acknowledgements of Service are concerned, the general principle is that a defendant and an interested party, from both of whom the rules require an Acknowledgement of Service to be sure of being able to take part fully in the claim, are entitled to their reasonable costs of producing those Acknowledgements of Service.

2. The defendant has an order from Silber J for payment in the sum that they claim of £2,290. That is not contested by Miss Lieven.

3. The interested party claimed, and Silber J ordered, £3,250. The point is made before me by Miss Lieven, that in fact there was a very limited -- she says no, but the reality is a very limited -- need for the interested party to put in an Acknowledgement of Service to deal with matters not dealt with by defendant. It is accepted by the interested party -- indeed it is asserted -- that it had received and taken account of the defendant's Acknowledgement of Service for producing its. However, there were matters, as Mr Pereira makes clear, which required, in its view, a statement, notably the fact that the Secretary of Statement had not called in this application for planning permission. There are also other matters to which they refer in their Acknowledgement of Service, which perhaps underline certain matters which were put forward by the defendant.

4. In my view, they are entitled to a sum; but I am satisfied that the amount claimed is in all the circumstances more than is justified. I propose to reduce the sum payable -- and I appreciate that one is inevitably applying a somewhat broad-brush approach -- to a sum of £1500, which is just under half of what they claimed.

5. The question then is whether the defendant is entitled to the costs of appearing today. Mr King has submitted various matters which he says make this an exceptional case, and thus costs should be awarded in accordance with the relevant rule, which regrettably has not been amended since the decision of the Court of Appeal as long ago as 2003 in Mount Cook. Nonetheless, I have to deal with it as it is.

6. One of the relevant considerations in a case such as this is the Aarhus approach which means that those who wish to challenge decisions such as this, which have important environmental impacts, should not be inhibited from making claims by the anticipated expense should the claim not succeed.

7. I am entirely satisfied that this was not a hopeless point, particularly on ground 1, although, as I have indicated, I think it was wrong. I entirely agree with Silber J that it was wrong.

8. This has been a lengthy hearing before me. I think there is some force in the reliance on Mount Cook by Mr King, that effectively the claimant has had what the court there said was an advantage (although I am not sure they would regard it as such) of a rather fuller consideration of the claim than otherwise is usual in permission applications.

9. In those circumstances I think that the defendant is entitled to some sum. I put it advisedly on the basis of "some sum" because regard must be had to Aarhus. I appreciate that the claimant is a limited company, and so in the end it may not be disastrous for any individual so far as amounts are concerned no matter what the order is. I propose to limit the amount to £2,000.

10. So the total liability falling upon the claimant will be £5,790. I appreciate that I may be accused to some extent of sitting under a palm tree, but one has to do the best one can with these costs.
