

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

Claim No:

**IN THE MATTER OF AN APPLICATION FOR PERMISSION TO CLAIM JUDICIAL
REVIEW**

BETWEEN:

THE QUEEN

-on the application of-

**(1) PETER SANDERS
(2) BRIAN ROSS**

Claimants

-and-

**(1) SECRETARY OF STATE FOR TRANSPORT
(2) AIRPORTS COMMISSION**

Defendants

DETAILED STATEMENT OF FACTS AND GROUNDS OF CHALLENGE

Introduction

1. By pre-action protocol letters, dated 19th August 2013, representatives of Stop Stansted Expansion (“SSE”) gave notice of an intention to seek judicial review of decisions of the Secretary of State for Transport (“the Secretary of State”) and the Airports Commission (“the Commission”) related to the role of Mr Geoff Muirhead CBE (“Mr Muirhead”) as a Commissioner on the Commission. The ground of potential challenge specified in the pre-action protocol letters was that Mr Muirhead had tainted, and was continuing to taint, the activities and decisions of the Commission by reason of apparent bias.

2. On 20th September 2013, and in response to the pre-action protocol letters, it was announced that Mr Muirhead would step down from his role as Commissioner with immediate effect. This was confirmed by formal responses to the pre-action protocol letters sent on behalf of the Commission, dated 20th September 2013, and on behalf of the Secretary of State, dated 26th September 2013.
3. However, and by the same letters of response, the Commission and the Secretary of State refused to accede to formal requests, made in the pre-action protocol letters, that the Commission look afresh at an important decision previously made by the Commission and in which, SSE now knows, Mr Muirhead had been actively involved, namely the determination of the “sift criteria for long term capacity options at UK airports” (“the sift criteria”), from which certain other matters would necessarily flow.
4. Accordingly, the same representatives of SSE now seek permission to claim judicial review of the following:

The Secretary of State for Transport

- (1) The refusal to require the Commission to look afresh at the sift criteria.
- (2) The refusal to require the publication of the Commission’s “short-list”, presently due to be published in December 2013, be delayed until the sift criteria have been redetermined.

The Airports Commission

- (3) The refusal to redetermine the sift criteria.
- (4) The refusal to delay publication of the Commission’s “short-list”, presently due to be published in December 2013, until the sift criteria have been redetermined.

Relevant Factual Background

The Claimants

5. The Claimants are longstanding and key members of the SSE's Executive Committee: Mr Peter Sanders ("Mr Sanders") is the Chairman of SSE, a position he has held since July 2004; and Mr Brian Ross ("Mr Ross") is SSE's Economic Advisor, a position he has held since November 2003¹.
6. SSE was established in 2002 in response to the Government's consultation on expanding UK airports and, particularly, to address the threat posed by expansion plans for Stansted Airport, subsequently defined in the "Air Transport White Paper" in December 2003. SSE's objective is to contain the development of Stansted Airport within tight limits that are truly sustainable and, in this way: to protect the quality of life of residents over wide areas of Cambridgeshire, Essex, Hertfordshire and Suffolk; to preserve the heritage of the area; and to protect the natural environment.
7. In particular, one of the main difficulties associated with expanding Stansted Airport is that this would have very serious landscape and cultural heritage impacts, far more so than any other airport location. For example, Uttlesford District, where Stansted Airport is situated, is one of only two local authorities in the whole of England with more than 2,000 listed buildings dating from before 1700 (the other being Mid-Suffolk); and whenever the Government has appointed an independent inspector or commission to consider the option of major expansion at Stansted in the past, the conclusion reached has been that there should be no development at Stansted beyond the existing single runway². The main deciding factor has always been the scale of damage that would be inflicted upon the local landscape and cultural heritage.

The Formation of the Commission

8. On 11th May 2010, the Coalition Government took office after a coalition agreement was negotiated between the Conservative Party and the Liberal Democrat Party. The

¹ Mr Ross was one of two Claimants in *R (Carol Barbone and Brian Ross on behalf of Stop Stansted Expansion v. (1) The Secretary of State for Transport and (2) The Secretary of State for Communities and Local Government and Others* [2009] EWHC 463 (Admin), a challenge made under section 288 of the Town and Country Planning Act 1990 to the grant of permission for a previous expansion of Stansted Airport.

² Blake in 1966, Roskill in 1971, Eyre in 1984.

agreement included the following commitments: "We will cancel the third runway at Heathrow"; and "We will refuse permission for additional runways at Gatwick and Stansted", reflecting the manifesto commitments of both parties prior to the May 2010 General Election.

9. The aviation industry was dismayed by the Coalition Government's opposition to new runways at Heathrow, Gatwick and Stansted and began lobbying for a change of policy. Industry bodies such as the CBI, the Institute of Directors, London First and the London Chamber of Commerce joined a chorus of voices arguing that London needed more airport capacity. The Mayor of London also called for a new airports policy, although he opposed expansion at Heathrow and favoured the development of a new airport in the Thames Estuary.
10. The industry lobbying campaign continued into 2011 but the Coalition Government showed no sign of changing tack. On the contrary, it was viewed as reinforcing its "no new runways" policy by appointing Justine Greening, MP for Putney and a fervent campaigner against a third Heathrow runway, as Secretary of State for Transport in October 2011. The Department's Minister of State at that time, Theresa Villiers, MP for Chipping Barnet, was also a longstanding opponent of new runways at Heathrow, Gatwick and Stansted.
11. However, the lobbying campaign for a change of airports policy intensified in 2012 and, on 27th August 2012, Timothy Yeo MP laid down a "Man or Mouse" challenge to the Prime Minister on the issue of Heathrow expansion, prompting a great deal of media coverage on the issue of airport expansion. A week later, on 4th September 2012, Justine Greening MP and Theresa Villiers MP were both removed from the Department for Transport and the Conservative Former Chief Whip, Patrick McLoughlin MP, became the new Secretary of State. Within just three days, on 7th September 2012, he announced the establishment of the Commission.

The Role of the Commission

12. The purpose and objectives of the Commission are stated in its terms of reference to be as follows:

“The Airports Commission will examine the scale and timing of any requirement for additional capacity to maintain the UK’s position as Europe’s most important aviation hub, and it will identify and evaluate how any need for additional capacity should be met in the short, medium and long term.

It should maintain a UK-wide perspective, taking appropriate account of the national, regional and local implications of any proposals.

It should engage openly with interested parties and members of the public, providing opportunities to submit evidence and proposals and to set out views relevant to its work.

It should seek to engage with a range of stakeholders, including with local and devolved government as well as the opposition, to build consensus in support of its approach and recommendations.”

13. The Commission was tasked to examine the need for additional UK airport capacity and, if there was such a need, to recommend to Government how this could be met in the short, medium and long term. To these ends the Commission is responsible for:

- Submitting a report to the Government by the end of 2013 of its assessment of the evidence on the nature, scale and timing of the steps needed to maintain the UK’s global hub status; and its recommendation(s) for immediate actions to improve the use of existing runway capacity in the next 5 years – consistent with credible long term options; and
- Submitting a final report to the Government by summer 2015 of its assessment of the options for meeting the UK’s international connectivity needs, including their economic, social and environmental impact; its recommendation(s) for the optimum approach to meeting any needs; and its recommendation(s) for ensuring that the need is met as expeditiously as practicable within the required timescale.

- As part of its final report in summer 2015, the Commission is also to provide materials, based on this detailed analysis, which will support the Government in preparing a National Policy Statement to accelerate the resolution of any future planning applications for major airports infrastructure.

The Membership of the Commission

14. The Department for Transport appointed Sir Howard Davies as chair of the Commission, along with five other Commissioners: Professor Ricky Burdett; Professor Dame Julia King; Vivienne Cox; Sir John Armitt CBE; and Mr Muirhead. Of these Commissioners, only one had expertise of the aviation industry, Mr Muirhead, who joined Manchester Airport in 1988 as their Director of Development and Planning, becoming Chief Executive in 1994. Sir Howard Davies has no particular expertise in airport expansion, being a financial expert, and neither do the remaining four members of the Commission.
15. Mr Muirhead's biography, as published by the Commission, contained no declaration of interest and no hint that, after being appointed to the Commission, he continued to act for Manchester Airports Group ("MAG")³, stating only as follows:

"Geoff is a qualified civil and structural engineer who joined Manchester Airport in 1988 as their Director of Development and Planning, becoming Chief Executive in 1994. During his time at Manchester Group he was responsible for leading the planning and delivery of Manchester Airport's second runway. He retired from the role in October 2010."

16. However, whilst Mr Muirhead retired from the role of Group Chief Executive in autumn 2010, he did not sever his links with MAG. Indeed, in June 2010, the Chairman of MAG said as follows in respect of Mr Muirhead in the company's annual report:

"The forthcoming retirement of our Group Chief Executive, Geoff Muirhead, has also been announced during the year. Geoff will be retiring in Autumn 2010 after 22 years service with MAG. Geoff has led a number of major

³ At that time MAG owned Manchester Airport, East Midlands Airport and Bournemouth Airport. Manchester airport already has two runways and only a slightly greater passenger throughput than Stansted (with one runway), and East Midlands and Bournemouth airports have enough runway capacity to handle far more traffic than could ever be imagined they could attract up until the planning horizon of 2050 and, indeed, well beyond.

positive changes across our Group including the construction of Manchester's Terminal 2 and second runway, as well as overseeing the acquisition of Humberside, East Midlands and Bournemouth Airports, and I anticipate that he will continue his links with us, primarily⁴ through an ambassadorial role within the industry."

17. The role of an ambassador is to represent his client's interests. Consistent with this, subsequent examination of MAG's annual accounts for the year ending 31st March 2011 revealed that, after his retirement as Group Chief Executive, and from October 2010 to March 2011 inclusive, Mr Muirhead was paid £82,000 by MAG in respect of his ambassadorial role for MAG. Mr Muirhead's consultancy fees in respect of acting as an ambassador for MAG in the year ending 31st March 2012 and the year ending 31st March 2013 have not been disclosed despite a specific request for this information in question 8 of section 9 of the Claimants' pre-action protocol letter. If the remuneration for his ambassadorial role was maintained at the same level as disclosed in the accounts for the year ending 31st March 2011, it would equate to £164,000 per year. The MAG accounts for the year ending 31st March 2011 also show that Mr Muirhead accumulated a pension lump sum of £450,000 and an accrued pension of £95,000.

Chronology of Relevant Events

18. **20th August 2012:** After a 3½ year legal battle seeking to resist a Competition Commission ruling that it must sell Stansted Airport, BAA finally conceded defeat, issuing a statement saying as follows:

"Having carefully considered the Court of Appeal's recent ruling, BAA has decided not to appeal to the Supreme Court and is now proceeding with the sale of Stansted Airport."

19. Upon the above announcement, MAG was immediately tipped in the media as the frontrunner to buy Stansted Airport, having previously declared its interest in acquiring the same in the event that BAA decided to sell or was forced to sell and having already agreed a conditional deal with an Australian investor, Industry Funds Management, to

⁴ Please note the word "primarily" – i.e. not exclusively.

sell 35% of MAG in return for a £1 billion investment to be used to finance such acquisition.

20. **7th September 2012:** As above, the Government set up the Commission, under Sir Howard Davies, as a means of tackling the issue of airport expansion.

21. **16th October 2012:** Charlie Cornish, the Group Chief Executive of MAG (having replaced Geoff Muirhead as Chief Executive of MAG in October 2010), gave an interview to the Financial Times, reported under the headline "MAG pledge to boost Stansted traffic" and stating as follows:

"Manchester Airports Group would return Stansted's traffic to 2007 levels within a decade if it were to win the contest this autumn for London's third biggest airport, according to the operator's chief executive.

Charlie Cornish said on Tuesday that his plans for Stansted included an improvement of the airport's retail offering and better relationships with its airline customers, including Ryanair, the dominant carrier at Stansted.

He also played down the prospect of the sort of big capital investments, such as a new train line into London, that would attract resistance from airlines, whose landing fees pay for such projects."

These were relatively modest ambitions for the development of Stansted Airport, limited to making best use of the existing runway and other airport infrastructure.

22. **2nd November 2012:** Sir Howard Davies held a launch meeting for the Commission where he announced and introduced his team of five Commissioners. The Claimants attended the launch meeting, at which Mr Ross had a brief discussion with Mr Muirhead, whom he had met several times before, and put it to him that he would be in an awkward position if, as everyone seemed to be suggesting, MAG succeeded in buying Stansted, which it was actively trying to do at that time. Mr Muirhead's reply was that since he had retired from MAG two years earlier there would be no conflict of interest even if MAG acquired Stansted. Checking afterwards, however, Mr Ross discovered the matters set out in paragraphs 16 and 17 above from the MAG accounts

and with respect to Mr Muirhead’s ongoing paid ambassadorial role for MAG and his pension.

23. **18th January 2013:** MAG announced that it had reached agreement to acquire Stansted Airport and that it expected to complete the deal at the end of February.

24. **1st February 2013:** The Commission published “Guidance Note 01: Submitting evidence and proposals to the Airports Commission”, setting out its programme of work. Sir Howard Davies stated as follows in the Foreword:

"A fresh and independent view, at arm’s length from politics, may well be able to make progress. A body without any vested interests or preconceived views, which is able to review the evidence dispassionately, to engage widely, to exercise its judgement and make well-considered and integrated recommendations, provides the best chance of enabling broad agreement to be reached and lasting decisions taken.

It is my ambition that the Airports Commission will be able to play that role objectively and rigorously in considering the crucial questions of whether new airport capacity is needed and, if so, where and how it should be provided. As this paper explains, we will follow a process which is comprehensive, rigorous, open and inclusive."

Guidance Note 01 went on to set down the timetable for submitting evidence which includes the following key dates:

Short and medium term measures	Long term measures
Submissions received no later than: 17 May 2013 (to be published)	Expressions of intent sought by: 28 February 2013 (not for publication)
	Suggestions for sifting criteria to be used in developing the interim report sought by: 15 March 2013 (to be published)
	Outline proposals sought by: 19 July 2013 (to be published)

Section 3 of Guidance Note 01 specified the information to be included in the confidential expressions of intent, under the heading “Proposals for providing additional airport capacity in the longer term”, as follows:

“3.5 The information required by the end of February is not extensive. As a minimum, we would request the following:

- if the proposal relates to the expansion of an existing airport, the name of that airport and the number (or range of numbers) of additional runways proposed;
- if the proposal relates to the construction of a new airport, the general location of the proposed site and an indication of capacity;
- a summary of any work that the submitter intends to carry out on developing the proposal; and
- contact details for the team or individuals leading the development of the proposal.

3.6 These submissions need not be lengthy documents; a few pages should be sufficient.

3.7 Following the submission of expressions of intent in February, the next deadline for submissions will be 19 July 2013. By this date, we will need to receive outline proposals. These should give an overview of the level of additional capacity that would be provided, along with some of the key economic, social and environmental considerations. As stated above, we do not require detailed design and assessment materials at this stage; we are envisaging submissions of no longer than 40 pages. They may not need to include detailed designs for new runways and terminals, though in some cases those bringing proposals may wish to include them where they are fundamental to other areas of their analysis.”

25. **4th February 2013:** SSE wrote to Sir Howard Davies, copying the same to the Secretary of State for Transport, referring to the announcement that MAG was to acquire Stansted Airport, expressing concern about apparent bias in the light of Mr Muirhead’s position on the Commission, and asking when Mr Muirhead ceased to be employed by MAG.

26. **20th February 2013:** Mr Sanders and Mr Ross attended a briefing seminar with Mr Phil Graham, Head of the Commission Secretariat, along with about 40 other stakeholders. After the end of the seminar, Mr Sanders had a conversation with Mr Graham, asking if SSE’s letter dated 4th February 2013 had been received (since SSE had not been sent a reply), and raising concerns about Mr Muirhead and apparent bias. Mr Graham

confirmed that the letter had been received and went on to defend Mr Muirhead's role on the Commission, saying that whoever had been appointed to the Commission to provide expertise on airport/operational issues would have had some career history which would have rendered him or her open to suggestions that he or she could not be entirely impartial and independent.

27. **27th February 2013:** MAG sent a confidential “expression of intent” to the Commission in accordance with timetable set out in Guidance Note 01 and paragraph 24 above.

28. **28th February 2013:** MAG completed its acquisition of Stansted Airport and MAG’s Chief Executive, Charlie Cornish, gave another interview to the Financial Times reported under the headline: “New owner sets out Stansted’s growth plan”. The report included the following:

“Charlie Cornish is determined to return passenger numbers at Stansted to pre-recession levels over the next five years – or at least get close. Whether he eventually wants those travellers taking off from one runway or two is another question.

The Chief Executive of Manchester Airports Group on Thursday completed his £1.5bn purchase of London’s third biggest airport by passenger numbers – a ranking the facility still keeps despite an annual traffic fall of more than a quarter since 2007, to slightly more than 17m passengers a year.”

29. **14th March 2013:** SSE wrote again to Sir Howard Davies, having still not received a reply to its letter dated 4th February 2013, reiterating its concerns about apparent bias, a concern which had now been heightened by the fact that MAG was the owner of Stansted Airport.

30. **15th March 2013 (1):** SSE finally received a reply to SSE’s letter dated 4th February 2013. The reply was dated 25th February 2013 but postmarked 11th March. It stated that Mr Muirhead's “ambassadorial role on behalf of MAG ended in January 2013”, i.e. between two and three months after his appointment to the Commission.

31. **15th March (2):** In accordance with the timetable tabulated in Guidance Note 01 and paragraph 24 above, SSE submitted its suggestions to the Commission for the “sifting criteria” to be used in developing its interim report setting down the shortlist of options. SSE emphasised the importance of taking fully into account the landscape and cultural heritage impacts of any airport development proposal. In its submission, SSE also emphasised the importance of assessing market demand at the different airport sites where major expansion was proposed, listing this as its first point in the section of its submission which dealt with the assessment criteria, and explaining: "In examining potential sites for expansion, the logical starting point is to consider the level of market demand at each site." Moreover, SSE pointed the Commission to Annex D.8 of the most recent Department for Transport aviation forecasts so that the Commission had a ready source of information projecting the underlying market demand for the UK's 31 largest airports, for 2020, 2030, 2040 and 2050.
32. **19th March 2013:** SSE replied to Sir Howard Davies's letter, dated 25th February 2013 but post-marked 11th March 2013, asking for confirmation that he had meant “January 2013”, when stating that this was when Mr Muirhead’s ambassadorial role on behalf of MAG had ended, believing this to have been a typographical error and that Mr Muirhead could not conceivably have still been working for MAG whilst serving on the Commission.
33. **17th April 2013:** The Commission met with MAG. The Claimants are unaware of the attendees at this meeting and request a list of attendees and the Minutes of the meeting from the Defendants pursuant to their duty of candour.
34. **3rd May 2013 (1):** The Commission published its sift criteria, set out in Table 1.1. of its “Guidance Note 02”. The only environmental impacts specifically mentioned were “air quality”, “noise”, “designated sites” and “climate change”. There was no mention of “cultural heritage” or “countryside” or “listed and historic buildings”, albeit paragraph 3.19⁵ of Guidance Note 02 did list some examples of “other environmental impacts”

⁵ The Commission’s reference to paragraph 3.10 at paragraph 12 of its pre-action protocol response appears to be in error, and should be a reference to paragraph 3.19.

including “landscape and/or townscape, water availability and flooding, biodiversity or historical and archaeological sites”.

35. Further, there was no mention of market demand anywhere in the sift criteria, notwithstanding that the Department for Transport published unconstrained demand forecast for individual UK airports, and so the information was readily available. The following is an extract from that forecast showing the UK's five largest airports:

Unconstrained demand forecasts millions of passenger per annum ('mppa')

	2010	2020	2030	2040	2050
Heathrow	69.4	86.6	109.4	134.8	170.1
Gatwick	33.6	38.3	39.8	45.3	51.9
Stansted	17.5	23.4	26.3	32.2	37.9
Manchester	18.8	24.5	30.3	37.0	45.7
Luton	9.5	11.4	13.9	17.2	22.7

Source: UK Aviation Forecasts, DfT, Jan 2013, Annex D.8.

36. **3rd May 2013 (2):** On the same day that the sift criteria were published, the Commission issued a press release: “Airports Commission unveils new expert panel”. This advisory panel, which consists of 13 members, includes experts on noise, health and climate change impacts and other topics directly related to the sift criteria. However, there is no one on the panel who is described as having any expertise on landscape, countryside or cultural heritage impacts.

37. **8th May 2013:** Sir Howard Davies replied to SSE, acknowledging SSE’s letters of 14th and 19th March 2013, and confirming that January 2013 was, indeed, the correct date upon which Mr Muirhead had ceased to act for MAG.

38. **17th May 2013 (1):** SSE wrote for a fourth time to Sir Howard Davies, copied to the Secretary of State as before, referring again to concerns about apparent bias, stating inter alia as follows:

“As yet, however, it may be that the question of operative effect has not arisen – whether or not Mr. Muirhead’s participation could influence your Commission’s deliberations in favour of MAG. We are aware that you have invited those with an interest in developing proposals for airport expansion to submit expressions of intent by 28 February 2013 and outline proposals by 19 July 2013. We are also aware that you do not intend to publish the expressions of intent but that you do intend to publish the outline submissions. We are therefore reserving judgement on the question of apparent bias until the outline submissions are published. When we have had an opportunity to review these we shall be better placed to form a view on whether it is appropriate and proper for Mr. Muirhead to continue as a member of your Commission. I shall write to you again at that stage.”

39. In writing, SSE Chairman, Mr Sanders, also stated as follows with regard to the Commission’s sift criteria:

"Finally, I have to express dismay that the Commission’s “sift criteria” relegate the impacts of landscape and cultural heritage to the final residuary line of the environmental section, i.e. “Other. Are there other significant local environmental impacts which should be taken into account?” Whenever the Government has allowed an independent voice to be heard in the past - Blake in 1966, Roskill in 1971, Eyre in 1984 - the conclusion reached has been that there should be no development at Stansted beyond the existing single runway. And on the most recent occasion when the question was considered, and rejected, by Inspector Graham Eyre in the Airport Inquiries 1981-83 (reporting in 1984) he made it very clear that the special character of the local landscape and cultural heritage was a critical factor in his decision."

40. **29th May 2013:** Sir Howard Davies replied to SSE’s letter, dated 17th May 2013, saying that he remained confident that there was no impropriety in Mr Muirhead's involvement with the Commission but advising that it was, in any event, the Department for Transport which selected and recruited the Commissioners and if SSE wished to pursue the matter further it should address its concerns to the Department for Transport, specifically Rosie Snashall. In the same letter Sir Howard Davies also sought to allay SSE’s concerns over the sift criteria by simply saying: "I can assure you that, as for all

criteria in the decision-making process, local environmental impacts will be given full consideration in the course of our work."

41. **12th June 2013:** SSE wrote to Rosie Snashall at the Department for Transport, copied to both Sir Howard Davies and the Secretary of State, referring her to the previous correspondence and, in particular, to SSE's letter of 17th May 2013 in which SSE explained that it was waiting to see whether MAG would be submitting any major expansion plans for Stansted Airport by the 19th July 2013 deadline that had been imposed by the Commission.

42. **4th July 2013:** The Commission published a Discussion Paper on "Aviation Noise". This included the Commission's own analysis, using a new yardstick, concluding that almost 50 times more people are affected by aircraft noise at Heathrow per passenger compared to Stansted.

43. **19th July 2013:** MAG made a submission to the Commission asking for Stansted to be considered either for one extra runway, increasing its capacity to up to 90 mppa; or as the location for the UK's future hub airport, to replace Heathrow and grow to handle up to 160mppa. By way of comparison, Stansted handled 17.5mppa last year, Heathrow 70mppa, and the world's busiest airport, Atlanta, USA, 95mppa. There had been no previous hint (in the public domain) that MAG would be submitting proposals to the Commission for additional runways at Stansted. In particular, the interviews given by MAG Chief Executive to the FT on 16th October 2012 (paragraph 21 above) and 28th February 2013 (paragraph 28 above) had indicated that MAG's plans for Stansted were limited to making best use of the existing runway and other airport infrastructure.

44. **26th July 2013:** SSE wrote again to Rosie Snashall at the Department for Transport (copied to Sir Howard Davies and the Secretary of State, as before) referring to the MAG submission for massive expansion at Stansted and stating that the apparent bias very clearly now had an operative effect:

“I refer to my letter of 12 June regarding Mr Geoff Muirhead's involvement with the Airports Commission and the apparent bias which stems from this. I said in that letter that we would reserve judgement on the issue of apparent bias until after 19 July, the date by which long-term airport expansion proposals were to be submitted to the Commission. This delay was to allow it to become clear whether or not any apparent bias could have an operative effect, i.e. dependent on whether or not the Manchester Airports Group (MAG) submitted proposals to the Commission for major long-term expansion at Stansted Airport.”

45. SSE concluded by saying:

"In the circumstances we consider it unacceptable for Mr Muirhead to continue to serve on the Airports Commission and the longer he continues to serve, the more the process risks being tainted. Mr Muirhead is bound to have significant influence within the Commission since he is its only member with first-hand knowledge and experience of the aviation industry, having spent 24 years with MAG. Moreover, as its Chief Executive, he led MAG's expansion policy and the construction of a second runway and terminal at Manchester Airport.

In the light of MAG's submission to the Commission on 19 July, we regard it as imperative that Mr Muirhead steps down from the Commission forthwith. Failing this, and in the absence of any satisfactory commitment from you within fourteen days, we will take further legal advice with a view to initiating legal proceedings to challenge Mr Muirhead's role on the Commission."

46. **29th July 2013:** The Commission published a list of all the stakeholder submissions it had received in response to its Discussion Papers. SSE is one of only nine organisations to have submitted responses to all of its Discussion Papers and its Guidance Note dealing with the sift criteria.

47. **7th August 2013:** Sir Howard Davies was interviewed on BBC Radio 4's "Today" programme to coincide with the publication on the Commission's website of the submissions it had received for increasing airport capacity in the UK. He said that, in total, about 50 proposals had been received, and he commented as follows:

"So we're publishing all of these today and we're asking people to comment on them. We know that we need to get down to a handful by December because it's really not reasonable to leave large areas of the country uncertain

about whether a runway will be going past the bottom of their garden. So we need to work quickly now to produce a manageable shortlist which we'll look at in detail."

48. **19th August 2013:** Despite the clear request made by SSE, through its letter dated 26th July 2013, for the Secretary of State to give a commitment within 14 days that Mr Muirhead would step down from the Commission, Mr Muirhead remained on the Commission and, accordingly, the pre-action protocol letters were sent on behalf of the Claimants (representing SSE) to both the Secretary of State and the Commission upon the ground that Mr Muirhead's role as a Commissioner had tainted, and was continuing to taint, the Commission's proceedings in that any fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Commission was biased by his presence on that Commission; and that, as a result of Mr Muirhead's participation on the Commission, its past decisions were unlawful having been infected by operative apparent bias⁶.

49. The pre-action protocol letters asked for further information to be forwarded, including as follows:

- "8. Please provide details of Mr Muirhead's ambassadorial role with MAG, including any letter or contract of engagement, a description of his duties and responsibilities, his starting and finishing dates, and his level of remuneration for each of the MAG fiscal years ending 31st March 2012 and 31st March 2013.
9. Please provide details of any other links Mr Muirhead has had with MAG since 1st October 2010, having regard to the Chairman's statement in the MAG Annual Report: "I anticipate that he will continue his links with us, primarily through an ambassadorial role within the industry."
10. Please provide details of any meetings and/or discussions that Mr Muirhead has had with any director of MAG since 1st October 2012.

⁶ See: *Competition Commission v. BAA Ltd* [2010] EWCA Civ 1097 at §§10-14

11. Please provide details of any involvement Mr Muirhead has had with the development of the "Sift criteria for long term capacity options at UK airports" published by the Airports Commission on 3rd May 2013.
12. Please provide details of any involvement Mr Muirhead has had in process of reducing the 50 or so proposals submitted to the Airports Commission (as reported by Sir Howard Davies on the BBC Radio 4 Today programme on 7th August 2013) to "a handful of options ... a manageable shortlist", by December 2013.
13. Please advise us of any quarantining or other measures put in place at the Airports Commission, from its inception or since, to reduce the risk of contamination of the decision-making process by Mr Muirhead, either during the time that he continued to act for MAG or since."

50. In addition, the pre-action protocol letters asked for the following action to be taken:

"The Secretary of State for Transport

- (1) To require that Mr Muirhead ceases to have any role in the Airports Commission forthwith.
- (2) If it transpires that Mr Muirhead was involved in the determination of the "sift criteria for the long term capacity options at UK airports", to require the Airports Commission to look afresh at the said sift criteria upon Mr Muirhead ceasing to be a member of the Airports Commission.
- (3) To require the Airports Commission's "short-list", presently due to be published in December 2013, not to be published until it has been looked at afresh upon Mr Muirhead ceasing to be a member of the Airports Commission.

The Airports Commission

- (1) If it transpires that Mr Muirhead was involved in the determination of the "sift criteria for the long term capacity options at UK airports", to look afresh at the said sift criteria upon Mr Muirhead ceasing to be a member of the Airports Commission.

- (2) Not to publish the Airports Commission's "short-list", presently due to be published in December 2013, until it has been looked at afresh upon Mr Muirhead ceasing to be a member of the Airports Commission."

51. **20th September 2013:** The Treasury Solicitor's Department responded to the pre-action protocol letter on behalf of the Commission:

- (1) Paragraph 6 of the letter stated that "Mr Muirhead accepts, as does the Commission, that now MAG's proposal for expansion of Stansted Airport is under consideration by the Commission as a potential long term option, there is a risk that his continued involvement on the Commission might give rise to an appearance of bias".
- (2) Paragraph 8 went on to assert that Mr Muirhead's resignation "fully addresses any legitimate concern that your clients have about the Commission's process going forward". Paragraph 8 also argued that there was no "operative apparent bias" prior to MAG's submission on 19 July 2013 and that accordingly there was "no need for the Commission to take any retrospective action in respect of its process to date".
- (3) Paragraphs 9 to 14 went on to provide a partial response to some of the questions set out in the Claimants' pre-action protocol letter. As noted at paragraph 17 above, there was no response to question 8, nor was there an attempt to answer question 10.
- (4) Paragraph 11(c) emphasised that, despite MAG's expression of intent to submit to the Commission on 27 February 2013, Mr Muirhead was "not aware of what, if any, proposals for expansion MAG would make in relation to Stansted Airport until its submission was received by the Commission on 19 July 2013".
- (5) Paragraphs 12 and 13 confirmed Mr Muirhead's involvement in the development of the sift criteria and stated that he participated in a "preliminary discussion" relating to the sifting of proposals on 4 September 2013, though it stated that he withdrew from the part of the meeting at which "short and medium term options, some of which were likely to relate to Stansted Airport" were discussed.
- (6) Paragraphs 17 and 18 of the letter rejected the Claimants' request that the sift criteria be looked at afresh for the reasons there stated.

52. **26th September 2014:** The Treasury Solicitor's Department responded to the pre-action protocol letter on behalf of the Secretary of State. Like the response on behalf of the Commission, it was asserted that Mr Muirhead's resignation dealt fully with SSE's concerns and, in paragraph 10, repeated the Commission's argument that as Mr Muirhead had no prior knowledge of what expansion proposals, if any, MAG would submit on 19th July 2013, there could be no operative effect, asserting, also, that this was "as previously acknowledged in the correspondence you have set out in your letter" (meaning the pre-action protocol letter).

53. **7 October 2013:** Sir Howard Davies gave a speech in which he set out, among other things, the Commission's provisional conclusion that some net additional runway capacity will be needed in the south east of England in the coming decades. Sir Howard took questions afterwards and was asked whether Mr Muirhead would be replaced. His reply was that the Commission was so "well advanced" in its thinking for the interim report that no useful purpose would be served in replacing Mr Muirhead at this stage. Since Mr Muirhead stepped down just 17 days previously, this reply can only mean that, by the time he stepped down (or very shortly afterwards) the Commission's thinking, as regards its interim report, was already "well advanced". Hence, it appears that the Commission's thinking on these points must have reached this "well advanced" stage when Mr Muirhead was an active and influential member, especially given that there had been no appointment of any Commissioner with aviation expertise after Mr Muirhead stepped down.

The Law on Apparent Bias

54. The law on apparent bias has recently been helpfully summarised by the Court of Appeal in *Competition Commission v. BAA Ltd* [2010] EWCA Civ 1097 at §§10-14 and §31 of the judgment, where the following points are set out:

"[10] There is no dispute as to the relevant legal principles. In *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465, Lord Hope expressed the objective test as follows (at para 103) "whether the fair-minded and

informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

[11] In *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2009] 2 All ER 1031, [2008] 1 WLR 2416, Lord Hope returned to the attributes of the fair-minded and informed observer. He said (at paras 2 to 3):

“The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

[12] Further elucidation was provided by Richards LJ in *National Assembly for Wales v Condrón* [2006] EWCA Civ 1573 (at para 50), [2007] LGR 87, [2007] 2 P & CR 38 “The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision.”

[13] It is common ground that the question whether, on the facts found by the CAT, apparent bias exists is a question of law: *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 All ER 731, [2006] 1 WLR 781, per Lord Hope at paras 2 to 7. At appellate level, it is for the courts “to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.”

(*AWG Group Ltd v Morrison* [2006] EWCA Civ 6 per Mummery LJ, at paragraph 20)

[14] It is also pertinent to keep in mind the words of Lord Bingham in *Locabail (UK) v Bayfield Properties Ltd* [2000] QB 451, 472, [2000] 1 All ER 65, [2000] IRLR 96, that, because proof of actual bias is very difficult “the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring to show that such bias actually exists.””

...

“[31] It is important in this regard to keep in mind that we are considering apparent and not actual bias and that, for this purpose, “appearances are not without importance”: *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679, at paragraph 16, per Lord Bingham. I accept Lord Pannick QC’s submission that BAA ought not to be put in the position of having to prove operative effect once apparent bias has been established. That would be to blur the distinction between actual and apparent bias. I therefore reject the ground of appeal relating to this aspect of operative effect...”

The Ground of Challenge

55. The essential context for this application can be summarised as follows:

- (1) The Secretary of State and the Commission have accepted the Claimants’ principal contention that any fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Commission would be biased by the presence on the Commission of Mr Muirhead in respect of any consideration related to MAG’s proposal for the expansion of Stansted Airport, not the least because he was MAG’s highly paid “ambassador” when appointed to the Commission, hence the agreement that he should step down from his role as Commissioner.
- (2) The Secretary of State and the Commission have not accepted that, as a result of Mr Muirhead’s participation on the Commission, its past decisions are unlawful having been infected by apparent bias.
- (3) Rather, the Secretary of State and the Commission argue that Mr Muirhead’s resignation fully addresses SSE’s concerns.

- (4) The Secretary of State and the Commission do so even though Mr Muirhead played a part in both the determination of the sift criteria and also in the initial sift of long term options (paragraphs 12 and 13 of the Commission's reply to the pre-action protocol letter).

56. However, and for the reasons given below, Mr Muirhead's involvement in developing the sift criteria means that the process has already been compromised such that these criteria need to be considered afresh. The short-listing process cannot logically begin until that has been done.

57. Firstly, whilst we will never know whether or not Mr Muirhead actually influenced the sift criteria so that Stansted would be more favourably assessed, that is not the test in law. Rather:

- (1) As stated in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465 by Lord Hope (at paragraph 103), the test in law is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

- (2) Further, and as stated by the Court of Appeal in *Competition Commission v. BAA Ltd* [2010] EWCA Civ 1097 (at paragraph 14), it is necessary to keep in mind the words of Lord Bingham in *Locabail (UK) v Bayfield Properties Ltd* [2000] QB 451, 472, [2000] 1 All ER 65, [2000] IRLR 96, that, because proof of actual bias is very difficult, "the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring to show that such bias actually exists".

- (3) Accordingly, SSE ought not to be put in the position of having to prove operative effect once apparent bias has been established, since, as stated in *Competition*

Commission v. BAA Ltd [2010] EWCA Civ 1097 (at paragraph 31), that would be to blur the distinction between actual and apparent bias.

58. Secondly, whilst we do not know whether or not Mr Muirhead actually influenced the sift criteria, we do know that:

- (1) Mr Muirhead played a part in determining the sift criteria (paragraph 12 of the Commission's reply to the pre-action protocol letter); and that
- (2) Mr Muirhead was the only Commissioner with any direct knowledge and experience of the UK airports sector and it is reasonable to consider that other Commissioners would tend to defer to his judgement on airport-specific issues, including in relation to the determination of the sift criteria.

59. The Commission seeks to play down the significance of the above by saying (also paragraph 13) that:

"This preliminary discussion has focused only on identifying on a provisional basis options which are fundamentally unworkable, duplicatory or outside the Commission's remit. Mr Muirhead participated in this sift. Given the nature of this initial sift, it was not considered that it was necessary for Mr Muirhead to withdraw even on a precautionary basis. No substantive discussion of MAG's proposals at Stansted Airport took place at that meeting."

60. However the sift criteria will plainly influence, or have the potential to influence, the entire decision-making process of the Commission, which will be forced to wrestle with many competing considerations as they decide upon the recommendations to make to Government on the issue of airport expansion, and when any recommended expansion of aviation will have very different impacts and benefits depending upon where that expansion takes place. To explain SSE's concern about Mr Muirhead's involvement in the determination of the sift criteria more fully:

- (1) The sift criteria are, in effect, the selection criteria. They will be used as the basis for deciding which options should be short-listed. The short-listed options will then be assessed in more detail, again in accordance with the sift criteria, before the Commission makes its final recommendations in mid-2015.

- (2) Given his depth of knowledge and experience in the industry, Mr Muirhead will be familiar with the characteristics of the UK airports market, and with the environmental problems associated with expansion at the main London airports. In particular, he will know very well that the dilemma for policymakers for many years has been that:
 - i. There is a very strong case for expansion at Heathrow in terms of market demand but there would be some very serious environmental impacts, especially the air quality and noise impacts upon the population of West London.
 - ii. On the other hand, there is a very weak case for expansion at Stansted in terms of market demand but the air quality and noise impacts are far less serious than at Heathrow because the area around Stansted is sparsely populated.
 - iii. The main environmental blockage to expansion at Stansted has always been the impacts that this would have upon the largely unspoilt countryside and ancient woodlands in the immediate vicinity of the airport and the number of listed and historic buildings that would be lost in the event of any expansion beyond Stansted's existing runway. However, the Commission's sift criteria make no mention of "market demand" or "cultural heritage" or "countryside" or "listed and historic buildings".

- (3) Guidance Note 02 gives the clear impression that environmental impacts are listed in order of their importance, as judged by the Commission:
 - i. "Air quality" and "Noise" are the first two items listed in Table 1.1;

- ii. Whereas at the foot of the list is a residual catch-up question, as follows:
“Other: Are there other significant local environmental impacts which should be taken into account?”
- (4) The impression that the environmental impacts are listed in order of their importance is reinforced by the facts that:
- i. On the same day that the sift criteria were published, the Commission unveiled its new expert panel, including experts on noise, health and climate change impacts and other topics directly related to the sift criteria, but no-one described as having any expertise on landscape, countryside or cultural heritage impacts.
 - ii. In contrast to the scant reference to landscape, countryside and cultural heritage impacts, the Commission has given a great deal of prominence to noise impacts, including publishing its detailed “Discussion Paper” on the topic in July 2013, using a new yardstick to conclude that almost 50 times more people are affected by aircraft noise at Heathrow per passenger compared to Stansted.
 - iii. Sir Howard Davies, the Chairman of the Airports Commission, in his speech on 7th October 2013 (referred to in paragraph 53 above), made no mention of landscape, countryside or cultural heritage impacts but made repeated references to noise, air quality and climate change impacts.
- (5) The failure to mention market demand in the sift criteria is an extraordinary omission since, when examining the relative merits of potential options for airport expansion, the logical starting point is to consider the underlying market demand at each location. Moreover:
- i. The published unconstrained demand forecast for individual UK airports demonstrates a very strong case, in terms of underlying market demand, for two additional runways at Heathrow by 2050, as well as a case for an additional runway at Gatwick, but indicates that there is not enough

underlying market demand to justify an additional runway at Stansted until 2050.

- ii. Mr Muirhead should be familiar with this, and even if unfamiliar with the latest edition of the Department for Transport forecasts (January 2013), the relative market strength of the airports listed above has not materially changed over the past decade and would be well known to anyone with Mr Muirhead's level of experience and knowledge of the industry.
- iii. It would, however, be surprising if any of the other Commissioners were aware, when agreeing the sift criteria, of the Department for Transport published forecasts of market demand by airport. In any event, it would not have been difficult for Mr Muirhead to have influenced the sift criteria to enable Stansted to be more favourably assessed simply by not proposing to his fellow Commissioners that market demand should be one of the criteria. Influence, and thus bias, can arise just as readily through omitting to speak as through speaking.

61. In the premises, it makes no sense for the Secretary of State and the Commission to assert that Mr Muirhead withdrew from one part of the discussion on 4th September 2013 precisely because matters had the "potential" for a direct impact on Stansted Airport (paragraph 14 of the Commission's reply to the pre-action protocol letter) and because, in the factual circumstances described above, Mr Muirhead's involvement in the decision making process may therefore have given rise to a risk of apparent bias (paragraphs 6 and 15 of the Commission's reply to the pre-action protocol letter), but then argue that Mr Muirhead's participation in the determination and publication of the sift criteria had no such potential and gave rise to no such risk. Plainly it did. Indeed, whilst actual bias need not be proved to demonstrate illegality, only apparent bias, the sift criteria have the strong appearance of having been designed to ensure that Stansted options would be favourably assessed.

62. Moreover, it is completely false for the Secretary of State and Commission to argue, in the factual circumstances described above, that Mr Muirhead's involvement in the

decision making process gave rise to no apparent bias of operative effect because “it was not known what, if any, expansion proposal at Stansted might be put forward by MAG” and because Mr Muirhead has confirmed that he had no advance knowledge of what the content of MAG’s submission might be.

63. Firstly, the Claimants remind the Court what was said in *Competition Commission v. BAA Ltd* [2010] EWCA Civ 1097 (at paragraph 31):

“[31] ... I accept Lord Pannick QC's submission that BAA ought not to be put in the position of having to prove operative effect once apparent bias has been established. That would be to blur the distinction between actual and apparent bias. I therefore reject the ground of appeal relating to this aspect of operative effect...”

64. Secondly, the appearance of bias was inherent in Mr Muirhead’s appointment to the Commission when he had an ongoing relationship with MAG. Mr Muirhead was already conflicted and the Commission was already tainted. That apparent bias, already extant, thereafter became operative as soon as MAG submitted its proposals, as foreshadowed by Mr Sanders in his letter of 17th May 2013 to Sir Howard Davies, copied to the Secretary of State (paragraph 38 above).

65. Thirdly, and with regards to the letter to Sir Howard Davies, dated 17th May 2013, and to Ms Rosie Snashall, dated 12th June 2013, at the time that SSE wrote even the first of these two letters, the Commission had two important pieces of information which SSE did not have, and which meant that, unknown to SSE but known to the Commission, any apparent bias was already capable of having an operative effect.

66. **First**, the Commission had already received a confidential expression of intent from MAG on 27th February 2013, advising that MAG would be submitting proposals by 19th July 2013 for providing additional airport capacity in the longer term. It is inconceivable that it did not occur to the Commission, including Mr Muirhead, that these MAG proposals might well relate to Stansted. In particular:

- (1) The main challenge faced by the Commission is to address a predicted shortage of airport capacity (according to the Department for Transport forecasts to 2050) in London and the south east and Stansted is the only MAG airport which serves that market.
- (2) It is inconceivable that the Commission believed that MAG would be bidding for extra runways at any of its other three airports, i.e. Manchester, East Midlands and Bournemouth. Manchester already has two runways and only a slightly greater passenger throughput than Stansted (with one runway), and East Midlands and Bournemouth already have enough runway capacity to handle far more than the Department for Transport forecasts for these airports in 2050, just 6.8m passengers and 2.5m passengers, respectively.
- (3) Yet further, section 3 of the Commission's "Guidance Note 01: Submitting evidence and proposals to the Airports Commission" specified the information to be included in the confidential expressions of intent, from which it is clear that, in order to comply with the Commission's Guidance, MAG's expression of intent should have stated which airport(s) its long term expansion proposals would relate to and how many additional runways would be proposed. This therefore begs certain obvious questions (answers to which are requested from the Defendants pursuant to their duty of candour): If the Commission did not include that information, then why not? Was MAG being given favourable treatment even at that stage? And why did the Commission not contact MAG to seek clarification of the proposals set out in its expression of intent? Was that not the Commission's purpose in asking for contact details to be provided?
- (4) Moreover, and even if the Commission did not think to contact MAG at that stage (late February/early March) to seek clarification of MAG's expression of intent, the Commission held a meeting with MAG on 17th April 2013 and it is implausible to think that the subject would not have been raised at that meeting (as indicated at paragraph 33 above, the Claimants are unaware of the attendees

at this meeting and request a list of attendees and the Minutes of the meeting from the Defendants pursuant to their duty of candour).

- (5) In addition, it was not only MAG which submitted long-term expansion proposals for Stansted on 19th July 2013. In particular, Transport for London, on behalf of the Mayor of London, submitted proposals for a new four runway hub airport at Stansted on 19th July 2013, and a large London-based firm of architects, "MAKE", also submitted proposals on 19th July 2013 to expand Stansted Airport to four runways. That, too, begs important questions (answers to which are again requested from the Defendants pursuant to their duty of candour): Are we being told that both of these proposals for Stansted also caught the Commission by surprise? In other words that neither of those had submitted an expression of intent, as required, by 28th February 2013?

67. **Second**, at the time of SSE's letter of 17th May 2013, SSE had no knowledge that Mr Muirhead was involved in the determination of the sift criteria which the Commission published on 3rd May 2013. It has already been explained why these sift criteria are a cause of such concern to SSE: the sift criteria have the strong appearance of having been designed so that Stansted options would be favourably assessed compared to other options.

68. Moreover, Mr Muirhead participated in the determination of the sift criteria even though, for all of the above reasons, it is impossible for the Commission to argue that they could not have predicted that MAG would submit proposals for long term expansion at Stansted, and so it was not until these proposals landed on their desk, on 19th July 2013, that they realised there might be a potential problem. If SSE could see a looming conflict of interest so long ago, formally drawing this to the attention of the Secretary of State and Sir Howard Davies as early as 4th February 2013, it is inexplicable how the Commission and/or the Secretary of State and/or Mr Muirhead himself could not.

69. Despite this, however, and even after 4th February 2013 when SSE brought their concerns to the notice of the Commission, Mr Muirhead continued to play a full role within the Commission, helping to determine the sift criteria which were published by the Commission on 3rd May 2013 and which cause SSE so much concern.
70. Further, even after MAG and others had submitted their proposals to the Commission on 19th July 2013 for major long term expansion of Stansted Airport, including for the building of up to four more runways, the Secretary of state continued to defend Mr Muirhead's ongoing position on the Commission and Mr Muirhead continued to be involved in decisions made by the Commission for a further two months. His removal came only in response to the Claimants' pre-action protocol letter. It is clear from the comments of Sir Howard Davies described at paragraph 53 above that during this period the Commission's thinking on its interim report was reaching or had reached a "well advanced" stage. Given: (a) that the interim report is expected to include the shortlist of options for long term airport expansion and the Commission's recommendations "for immediate actions to improve the use of existing runway capacity in the next 5 years"; and (b) that Stansted is in the frame for both of these, the retention of Mr Muirhead on the Commission during this period is a very striking defect in the decision-making process.

Conclusions

71. In the premises, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that certain aspects of the process have been compromised, specifically the determination of the sift criteria, such that they need to be redetermined. As stated above, the short-listing process cannot, logically, begin until that has been done. Accordingly, the Claimants seek the following final relief:
- (1) A declaration that the sift criteria are infected by apparent bias;
 - (2) An order quashing the sift criteria;
 - (3) An order prohibiting the Commission from publishing its "short-list" until such time as:
 - i. the sift criteria have been redetermined;

- ii. further appointments have been made to the expert panel in the light of the redetermined sift criteria; and
 - iii. the redetermined sift criteria have been used to produce the short-list.
- (4) Such other relief as the Court may see fit;
- (5) Costs.

72. Since the Commission intends to publish its short-list in December 2013, and since such publication would lead to inevitable blight of those areas near to options short-listed, the Claimants also seek an interim order prohibiting publication of the short-list until further order.

Paul Stinchcombe QC
Ned Helme
39 Essex Street Chambers
London WC2R 3AT