



Neutral Citation Number: [2013] EWHC 3754 (Admin)

Case No: CO/15340/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2/12/2013

Before :

MRS JUSTICE PATTERSON

Between :

(1) PETER SANDERS

Claimants

(2) BRIAN ROSS

- and -

(1) AIRPORTS COMMISSION

Defendants

(2) SECRETARY OF STATE FOR TRANSPORT

Paul Stinchcombe QC and Ned Helme (instructed by **Leigh Day**) for the **Claimants**
Dan Kolinsky and Zoë Leventhal (instructed by **The Treasury Solicitor**) for the **First Defendant**
Samantha Broadfoot (instructed by **The Treasury Solicitor**) for the **Second Defendant**

Hearing dates: 22nd November 2013

Approved Judgment

Mrs Justice Patterson :

Introduction

1. Peter Sanders and Brian Ross are members of the Executive Committee of Stop Stansted Expansion (“SSE”). They seek to challenge decisions on the part of the Airport Commission (“AC”) and the Secretary of State for Transport (“Secretary of State”) which relate to a time when Mr Geoff Muirhead CBE (Mr Muirhead) was a Commissioner with the AC.
2. The claimants seek a declaration that the sift criteria adopted by the AC for use in assessing proposals for long term capacity at UK airports are infected by apparent bias, an order quashing the sift criteria and an order prohibiting the AC from publishing its “short list” of proposals until such time as (i) the sift criteria have been re-determined, (ii) further appointments have been made to the expert panel in the light of the re-determined sift criteria; and (iii) the re-determined criteria have been used to produce the short list.
3. On the 23rd October 2013 Mr Justice Ouseley ordered that the application was to be listed in court as a “rolled up hearing”, on notice to the defendants, for one day on the 22nd November 2013. As part of the listing directions the parties were ordered to agree a timetable enabling oral submissions to be concluded within the day of the hearing. It was noted also that the case had been put in at short notice because of the urgency.
4. The urgency is because the Airports Commission has been set up by the Secretary of State under terms of reference which require it to publish an interim report by the end of 2013. As the report has been directly commissioned by government the latest day for publication is the 18th December 2013 as the House of Commons rises the following day and it is inappropriate to publish a directly commissioned report in parliamentary recess.
5. The Airports Commission has been given the task by the Secretary of State to examine the “scale and timing of any requirement for additional capacity to maintain the UK’s position as Europe’s most important aviation hub. It is to identify and evaluate how any need for additional capacity should be met in the short, medium and long term.” It is to report “no later than the end of 2013 on:
 - 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 recommendations for immediate actions to improve the use of existing runway capacity in the next five years – consistent with credible long term options.

The assessment and recommendations in the Commission's Interim Report should be underpinned by a detailed review of the evidence in relation to the current forecast in the UK with regard to aviation demand and connectivity, forecasts for how these are likely to develop, and the expected future pattern of the UK's requirements for international and domestic connectivity."

6. A final report is to be published no later than the summer of 2015 on,
 - i) An assessment of the options for meeting the UK's international connectivity needs, including their economic, social and environmental impact;
 - ii) Its recommendations for the optimum approach to meeting any needs;
 - iii) Its recommendations for ensuring the need is met as expeditiously as practicable within the required timescale;
 - iv) As part of the final report the AC is to provide materials based on a detailed analysis which will be contained within the report which will support the government in preparing a National Policy Statement to accelerate the resolution of any future planning applications for major airports infrastructure.
7. The Commission was established on the 7th September 2012 under the chairmanship of Sir Howard Davies, former deputy governor of the Bank of England and director of the London School of Economics. The other members of the Commission were announced on the 2nd November 2012. They were Sir John Armitt CBE, Professor Ricky Burdett, Vivienne Cox, Professor Dame Julia King and Geoff Muirhead CBE.
8. In outline the claimants assert that the role of Mr Muirhead as a Commissioner tainted the activities and decisions of the AC by reason of apparent bias because of his links with Manchester Airports Group (MAG).
9. In fact, Mr Muirhead stepped down from his role as a Commissioner on the 20th September 2013. He has not been involved with the Commission since that date. It is said by the defendants that the reason for Mr Muirhead stepping down was as a precautionary measure as there was a risk that his continued involvement on the Commission might give rise to an appearance of bias. That is because his former employers, MAG, submitted a proposal concerning the long term expansion of Stansted Airport which MAG had acquired on the 28th February 2013.
10. The defendants' case is that with Mr Muirhead stepping down the claimants achieved their main objective. The attempt to impugn the Commission's sift criteria which were adopted on the 3rd May 2013 is misconceived and is out of time.

11. The claimants maintain that their claim is perfectly valid because of the retrospective operative effect of the apparent bias of Mr Muirhead. They did not know that he had participated in the determination of the sift criteria until the AC responded to its pre-action protocol letter on the 20th September 2013. The claimants had asked the AC to look afresh at the sift criteria if it transpired that Mr Muirhead had been involved in their determination and likewise had asked the Secretary of State, as the sponsoring department, to require the Commission to do so. Both have refused. If the court considers the more appropriate target for the judicial review is against the original decision to adopt the sift criteria then the claimants ask for an extension of time within which to do so. For reasons set out they lacked the necessary knowledge to bring such a challenge until receipt of the responses to the letters before claim.

Factual background

12. SSE was established in 2002 in response to the government's consultation on expanding UK airports and, in particular, to address the threat posed by expansion plans for Stansted Airport. Its objective is to contain the development of Stansted Airport within tight limits that are truly sustainable and, in that way, to protect the quality of life for residents over wide areas of Cambridgeshire, Essex, Hertfordshire and Suffolk, to preserve the heritage of the area and to protect the natural environment.
13. The claimants are long standing and key members of SSE's executive committee: Mr Sanders is chairman, a post he has held since July 2004 and Mr Ross is SSE's economic advisor, a position he has held since 2003.
14. As set out the Commission is an advisory body set up by the Secretary of State for Transport to advise the government on the need for additional UK airport capacity and to provide recommendations based on an objective appraisal of the evidence. Its role is limited to that of an advisor based on the findings of its reports.
15. The Department for Transport is the sponsoring department for the Commission and responsible for its creation and findings. It was the Secretary of State who appointed Sir Howard Davies as chair along with the other five Commissioners. The Secretary of State has not committed to be bound by the conclusions of the Commission but has said that he will take its conclusions into account.
16. From 1994 until the 1st October 2010 Mr Muirhead was chief executive of MAG. He is a qualified civil and structural engineer with in depth experience of airports operations and management. He had worked at MAG from 1988.
17. From his retirement from MAG until January 2013 Mr Muirhead was in receipt of consultancy fees from MAG. First, he had an arrangement whereby for a period of two years until the 1st October 2012 for the provision of consultancy services he was paid an annual sum of £75,000. In fact, he was not asked to provide any such services.

Second, he had an arrangement for a period of three years (until October 2013) during which he agreed to be nominated by MAG to be a member of, or to provide advice to, a number of regional and industry bodies. His responsibilities included membership of the North-West Business Leadership team which mainly involved promoting economic investment in North-West of England, acting as a special advisor to the Airports Council International (ACI) world board and European board, which involved providing advice on international and European aviation legislation and as Chair of the North West Campaign for Rail which lobbied for rail investment across the north west England. The North West Business Leadership team nominated him to be a non-executive director on the board of the Atlantic Gateway project which is a body promoting various investment schemes linking the ports of Liverpool and Manchester. He continues with that work on a pro bono basis as chair of that project. For the second arrangement Mr Muirhead was paid an annual sum of £75,000. That arrangement terminated in January 2013 because his work with ACI, the North West Rail Campaign and the North West Business Leadership team had ended. None of the bodies were related to MAG's core business and none involved access to any information about MAG's core business. No contribution is made by MAG to the Atlantic Gateway project.

18. Mr Muirhead was one of six members of the Commission. Commissioners were not appointed as specific experts in their field; it was expected that they would be able to contribute broadly to discussions across a full range of issues under consideration. Whilst Mr Muirhead was the main Commissioner with significant aviation experience other Commissioners had some related experience.
19. On the 19th of November 2012 the Commissioners held their first formal meeting. Amongst other things they considered a draft guidance document which included a list of factors for assessing long term options.
20. On the 18th December 2012 the second Commission meeting was held at which a second draft of the factors to be contained within the draft guidance document was considered. Under the factor headed "Local Environmental Impact" it is noted that, "proposals may also wish to highlight any other local environmental impacts such as implications for heritage buildings and towns, protected sites, bio-diversity and flood protection."
21. In January 2013 Mr Muirhead received the final payment under the second part of his consultancy agreement.
22. On the 18th January 2013 MAG announced it had been successful in its bid to acquire Stansted Airport. The acquisition took effect on 28th February 2013.
23. On the 1st February 2013 the Commission published Guidance Document 01 which set out key dates for work on short, medium and long term measures. It explained how a key part of the work over the coming months would be to develop in more detail the specific criteria to be used in identifying those options which merit more

detailed consideration. More was to be said once the AC had had an opportunity to consider the Government's final Aviation Policy Framework. At that time the Commission identified "six broad categories of factors which we would encourage scheme promoters to consider in developing their (long term) proposals." Those factors were,

- i) economic factors;
 - ii) social factors;
 - iii) climate change impacts;
 - iv) local environmental factors;
 - v) accessibility;
 - vi) feasibility considerations.
24. The Commission invited responses to proposed sifting criteria by the 15th March 2013. Proposals for providing additional airport capacity in the longer term required confidential expressions of intent to be submitted to the Commission by 28th February 2013. Outline proposals were to be submitted to the Commission by the 19th July 2013.
25. On the 4th February 2013 in light of the announcement that MAG was to acquire Stansted Airport SSE wrote to Sir Howard Davies copying the same to the Secretary of State expressing SSE's concern about apparent bias in the light of Mr Muirhead's position and stating that it was unclear when Mr Muirhead ceased to be employed by MAG. By that time Mr Ross had discovered, through his examination of the MAG annual accounts, about the consultancy agreement between Mr Muirhead and MAG.
26. On the 5th February 2013 Mr Muirhead attended a Commission meeting and participated in the Commission's consideration of the sift criteria.
27. On the 20th February 2013 the claimants attended a briefing seminar with Mr Graham, head of the Commission's Secretariat. At the end of the seminar Mr Sanders raised with Mr Graham his concerns about Mr Muirhead and apparent bias. Mr Graham confirmed that the earlier letter had been received and defended Mr Muirhead's role on the Commission
28. On the 26th February 2013 the Commission received MAG's expression of intent. That was reported to the Commissioners on the 13th March 2013. The expression of

intent was vague but indicated that MAG intended to submit proposals on airport capacity needs and options to the Commission in accordance with its timetable. It recognised that, in the longer term, additional capacity will be required in the South East and looked forward to the Commission's view on long term demand for aviation. It intended to look closely at how its airports and, in particular, Manchester and Stansted could help to meet increasing aviation demand. MAG said it would be in a position by the second deadline date of the 19th July to make a more substantive submission to the Commission.

29. On the 13th March 2013 a Commission meeting was held which Mr Muirhead attended. Commissioners were informed of expressions of intent via a summary paper including a narrative and table. Four other confidential expressions of intent had been received for expansion of Stansted, two of which proposed that it be made into a four runway hub airport. The meeting also considered a paper on the sift criteria which had been expanded to include an additional factor entitled "Strategic Fit". The two criteria of climate change and local environmental impacts were amalgamated under one heading of "environment". It was agreed that the criteria would be considered further at the next meeting.
30. On the 14th March SSE wrote again to Sir Howard Davies reiterating its concerns about apparent bias, now heightened by the fact that MAG was the owner of Stansted Airport. It had not received a reply to its initial letter on the topic dated 4th February 2013. A reply was subsequently received by way of a letter dated the 25th February but posted on the 11th March.
31. On the 15th March 2013 SSE submitted a detailed consultation response on the criteria to be used by the AC for assessing long term options. The response dealt with the sifting process and indicated that the intention to narrow down all the options in one step to a short list by the end of 2013 was ambitious and challenging. The short listed options would then need to be subjected to a far more detailed assessment including a Sustainability Appraisal and Strategic Environmental Assessment before any final recommendations are made. On the criteria to be used it emphasised the importance of taking fully into account the landscape and cultural heritage impact of any airport development proposal. It stated also that an assessment of market demand at the different airport sites where major expansion was proposed was a logical starting point of the Commission's work.
32. On the 19th March 2013 SSE sent a further letter expressing its concern about apparent bias on the part of Mr Muirhead.
33. On the 25th March 2013 the Commission met to consider the sift criteria in light of the public responses that had been received. Eight draft sift criteria were proposed and approved (adding accessibility to the earlier seven criteria).
34. On the 17th April 2013 Sir Howard Davies met with the new chief executive of MAG, Charlie Cornish. The notes record that MAG was still reviewing its position but that it

expected to provide input on traffic growth, the role of regional airports, the views on second runway and hub options of Stansted and options for funding.

35. On the 30th April 2013 the Commission met. Although not minuted it is likely that Sir Howard Davies reported to the Commission on his meeting with Mr Cornish. There was no time to comment on the draft sift criteria document. Commissioners were, therefore, invited to provide comments by email subsequently. Mr Muirhead did not but Professor Ricky Burdett and Professor Julia King communicated further comments.

36. On the 3rd of May 2013 the Commission published its sift criteria with the eight criteria that had been approved. Environment was expressed to include air quality, noise, designated sites, climate change and other environmental impacts. Those were described as follows,

“Where proposals may have other significant environmental impacts beyond those outlined above, these should be identified and documented. This might include, for example, impacts on landscape and/or townscape, water availability and flooding, bio-diversity or historical and archaeological sites...”

37. On the same day the Commission issued a press release announcing a new expert panel to support the Commission in their assessment of options for expansion. They were appointed to bring a wide range of skills and experience and to ensure the Commission had access to a broad spectrum of quality scientific and technical expertise as the work progressed. Some 13 experts were listed. None were described as having expertise on matters of landscape, countryside or cultural heritage.

38. On the 8th May 2013 Sir Howard Davies wrote to SSE in response to their concerns about apparent bias on the part of Mr Muirhead indicating that there was nothing improper about Mr Muirhead’s involvement with the Commission.

39. On the 17th May 2013 SSE wrote again to the AC, copied to the Secretary of State as they had done before. The letter said,

“I am very surprised that Mr Muirhead was still employed by MAG until January this year. This is quite contrary to the impression given to Mr Ross on the 2nd November last year when he said he had retired from MAG two years ago.

I note your conviction that there is nothing improper about Mr Muirhead’s involvement with the Airports Commission. I beg to differ. In any court proceedings however the test would be not your view or mine, but what view a fair minded and informed observer would take.

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 the 28th February 2013 and outline proposals by the 19th 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 judgment on the question of apparent bias until the outline submissions are published. When we have 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.

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... 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 Sir Graham Eyre in the airports enquiry 1981-1983 (reporting 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. On the 29th May 2013 Sir Howard Davies replied to SSE. In relation to the sift criteria he said,

"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."

In relation to Mr Muirhead he repeated that there was no impropriety involved through Mr Muirhead's role with the Commission but advised that it was the Department for Transport which had selected and recruited Commissioners and if SSE wished to pursue the matter they should address their concerns directly to that Department.

41. On the 12th of June 2013 SSE wrote to Rosie Snashall, at the Department for Transport, who Sir Howard Davies had suggested they communicate with referring her to previous correspondence.

42. On the 4th July 2013 the Commission published a discussion paper on aviation noise. That included their own analysis and contained the information that almost 50 times more people were affected by aircraft noise at Heathrow per passenger than at Stansted.
43. On the 9th July 2013 at a Commission meeting a template was reviewed that was to be used to allow an equitable assessment against the sift criteria. The timetable proposed was for a first sift in September, a second sift in October and then agreement of the final list of options for the interim report in November.
44. By the 19th July more than 50 proposals for long term options for new airport capacity had been received by the Commission. One was from MAG entitled Capacity for Growth.
45. On the 26th July 2013 SSE wrote to the Secretary of State for Transport, copied to Sir Howard Davies, referring to the MAG submission saying that the apparent bias previously brought to the attention of both the Commission and the Secretary of State had clearly now had an operative effect. The letter continued,

“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 the 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 MAGs expansion policy and the construction of the second runway and terminal at Manchester Airport. In the light of MAGs submission to the Commission on the 19th 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 14 days, we will take further legal advice with a view to initiating legal proceedings to challenge Mr Muirhead’s role on the Commission.”
46. On the 7th August all of the long term options that had been received were published by the Commission with an invitation to the public to submit their views on them by the 27th September 2013. More than 250 responses were received by that date including one from SSE.
47. On the 19th August the claimants sent pre-action protocol letters to the Commission and the Secretary of State. The letters stated that Mr Muirhead’s continued presence on the Airports Commission fatally tainted its proceedings, as a matter of law, by reason of operative apparent bias. It sought;

“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 long term capacity options UK Airports” to require the Airports Commission to look afresh at the said sift criteria upon Mr Muirhead’s ceasing to be a member of the Airports Commission.

3. To require the Airports Commission’s “short list”, at present 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.”

48. On the 4th September 2013 the Commission met. The Chair updated the meeting on the threat of judicial review to the membership of the Commission. Mr Muirhead agreed to withdraw from those parts of the meeting which were to deal with the

i) Surface Access Investments;

ii) The fiscal incentives to redistribute services between airports.

This was because both of these, if implemented, could have specific benefits for Airports owned by MAG. The Secretariat and the Chair did not consider it was necessary for Mr Muirhead to withdraw from the meeting’s discussion of long term options for new runways and airports, as the agenda focused only on removing the least credible options from consideration. In addition, as with the short term options, any decisions taken would be provisional and would need to be re-confirmed following the end of the ongoing consultation period on 27th September.

49. The Commission provisionally agreed to sift out 23 proposals on the basis that they had significant flaws or were inconsistent with the Commission’s remit or there was another equivalent proposal which was more fully developed. It provisionally agreed to remove ten surface access proposals from further consideration and to develop templates for a do nothing option and a maximum use of existing capacity option as comparative to the aviation based options under consideration. The provisional conclusions were to be reviewed by the Commission at the October meeting in the light of any relevant submissions received through the ongoing consultation process on long term options.

50. On the 20th September 2013 the AC announced that Mr Muirhead had stepped down from the Commission by mutual consent with the Secretary of State. The press release continued,

“The members of the Airport Commission would like to thank Geoff Muirhead for his valuable and insightful contributions to

their work programme. Throughout his time at the Commission, he has consistently demonstrated his impartiality. However, while they regret that this decision has been necessary, they accept that in the changed circumstances following Manchester Airport Groups submission of its proposals for expanding Stansted Airport it has become appropriate for Geoff to stand down to safe guard against any perception that the integrity to the process may be compromised.”

51. On the same day the Commission responded to the pre-action protocol letter. That confirmed that Mr Muirhead had stepped down with immediate affect. The letter continued,

“Mr Muirhead and the Secretary of State for Transport have decided by mutual consent that on a precautionary basis, and without any acceptance whatsoever of any bias towards MAG’s proposals, the prudent course is for him not to continue as a Commissioner. ...we do not consider that there can have been any operative bias prior to Stansted Expansion Proposals being under consideration by the Commission and accordingly, there is no need for the Commission to take any retrospective action in respect of its process to date. Mr Muirhead had no involvement with MAG’s bidding process for Stansted Airport and was not aware of this until it was announced in the press. He did not seek advice regarding a conflict of interest at this time as far as the Commission were aware, and the Commission does not consider that there was any such conflict. Manchester Airport Group sent an expression of intent to submit to the Commission on the 27th September 2013, but this was not specific as to the expected content of its submission. 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 19th July 2013. ...the sift criteria were agreed by the Commission as a whole in the course of the Commission meetings. In this regard, it is to be noted that these are generic objective criteria. Moreover, “local environmental considerations” are one of the environmental criteria which the Commission will be using. The allegation is that these have somehow been “relegated” is not accepted; this criterion will be given appropriate weight in the decision making process according to its relevance in any given proposal... regarding the process of sifting the proposals received by the Airports Commission, the only discussion that has so far been undertaken by Commissioners in this regard was on Wednesday 4th September 2013. 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 the initial sift it was not considered that it was necessary for Mr Muirhead to withdraw even on a precautionary basis. No substantive discussion of MAGs proposals at Stansted Airport took place at that meeting. The provisional sift results from the September meeting will be reviewed by the Commission in due course in the light of any relevant evidence submitted through the Commission's current consultation process."

52. On the 26th September 2013 the Secretary of State for Transport sent his response to the claimants' letter before claim.
53. On the 27th September 2013 the time for responding on the long terms options expired. SSE provided a detailed response by reference to the sift criteria and including comments on market demand and commercial viability, landscape and heritage impacts and historical and listed buildings.
54. On the 7th October 2013 Sir Howard Davies gave a speech setting out the Commission's provisional conclusion that some net additional runway capacity will be needed in the south east of England in the coming decades.
55. On the 10th October 2013 the Commission met to consider the second provisional sift of long term proposals following the closure of public consultation.
56. On the 14th October 2013 the claimants commenced the current proceedings.

Legal framework

57. There is little dispute between the parties as to the correct legal approach.
58. The law on apparent bias has recently been summarised by the Court of Appeal in *BAA Limited v Competition Commission (2010) EWCA Civ 1097* where Maurice Kay LJ said:

"10. There is no dispute as to the relevant legal principles. In *Porter v Magill [2002]UKHL 67, [2002] 2AC 357*, Lord Hope expressed the objective test as follows (at paragraph 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] 1 WLR 2416*, Lord Hope returned to the attributes of the

fair-minded and informed observer. He said (at paragraphs 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 1 573* (at paragraph 50):

"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] 1 WLR 781*, per Lord Hope at paragraphs 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, 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."

59. Maurice Kay LJ then proceeded to consider the circumstances of the case by specific reference to different periods of time (at paragraph 15). He observed that "different considerations arise at different points along the temporal way" (at paragraph 16).

60. The judgment continues at paragraph 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..."

61. In *Locabail (UK) Limited v Bayfield Properties Limited* (2000) QB 431 it was stated, at paragraph 18:

"When applying the test of real danger or possibility (as opposed to the test of automatic disqualification under *Dimes* and *Pinochet* (No. 2) it will very often be appropriate to enquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled. As the Court of Appeal of New Zealand observed in *Auckland Casino Ltd v. Casino Control Authority* [1995] 1 NZLR 142 at 148, if the judge were ignorant of the allegedly disqualifying interest:"

62. The other case relied upon is that of *R v Secretary of State for the Environment and Another Ex Parte Kirkstall Valley Campaign Limited* (1996) 3 All ER 304 at page 328 (a) (b) where Sedley J said:

“Participation can manifestly be more than voting or discussion. A justice who, on retirement, tells his colleagues that it is his car which the defendant is charged with taking and wrecking, and who then sits with arms folded while the other justices reach a conclusion, might not be regarded by this court as having abstained from participation simply by having declared his or her interest and neither spoken nor voted.”

Submissions

63. The claimants submit that it is clear why Mr Muirhead was appointed to the Commission. They point to a letter from the Secretary of State for Transport dated 2nd September 2013 to the Right Honourable Sir Alan Haselhurst MP, whose constituency includes Stansted. It was in reply to one from the MP who had written expressing concerns about Mr Muirhead’s connection with the Manchester Airports Group. The Secretary of State said,

“I note your concerns. However the Department for Transport is satisfied with the way that the Airports Commission is conducting its assessment of all the options for maintaining the UK’s international connectivity. Geoff Muirhead, who is no longer an ambassador for MAG, is only one of six Commissioners, who were each selected to bring different perspective and areas of expertise. Mr Muirhead’s expertise in the Airport’s industry is the very reason he was appointed. We are content that he is well qualified to fulfil his role within a well balanced team of Commissioners.”

64. It is clear the claimants say that with his background Mr Muirhead was likely to exert a disproportionate influence over the selection of the sift criteria.
65. Any fair minded and informed observer, having considered the facts, would conclude that someone who had worked as a chief executive for 16 years and been involved at the highest level with a company for some 22 years could not cleanse his heart and mind both consciously and sub-consciously of all his loyalties to MAG especially when he had continued to act as a highly paid ambassador for them. That is not to cast aspersions on Mr Muirhead but it is what a fair minded observer would conclude. As such the Secretary of State, the Commission and Mr Muirhead were right to agree that he should step down from the Commission as his presence tainted the Commission’s proceedings in respect of its consideration of any potential expansion of Stansted Airport by apparent bias.
66. If that was the case in respect of any future decision making by the Commission then the claimants assert that it must equally be so in respect of any past decision making on the part of the Commission. That means that there would be an impact upon the Commission’s consideration of any potential airport expansion, including the sift

criteria adopted by the Commission to assist it as it progressed its work and appraised the various options including those for Stansted as submitted by MAG and others.

67. They do not suggest that Mr Muirhead had knowledge of the MAG proposals to purchase Stansted until it became public. It was no secret that MAG was interested in the purchase for some three months or so before Mr Muirhead joined the Commission. The Financial Times carried an article on the 3rd of August 2012 setting out that MAG had entered into an agreement with Industry Funds Management to enable it to raise funds to bid for Stansted. Mr Muirhead must have been aware, therefore, that there was a strong possibility that MAG would own Stansted.
68. The claimants accept, also, that Mr Muirhead had no inside knowledge of MAG's intent to develop Stansted once MAG had purchased it. However, whilst Mr Muirhead did not know precisely what was intended he knew enough to recognise that there was a strong possibility that MAG would submit proposals for additional runways at Stansted.
69. On the 13th March 2013 Mr Muirhead was informed, alongside other Commissioners, of the expression of intent by MAG which had been submitted on the 26th February. By then, if not before, he must have recognised that there was a likelihood that MAG would make a submission involving additional runways at Stansted.
70. By the 30th April 2013 Mr Muirhead received a brief report at the Commission meeting of an earlier meeting of the 17th April which had taken place between Sir Howard Davies, Charlie Cornish and Phil Graham. It must have been obvious by then that there was a strong possibility that MAG would submit proposals for more than one additional runway at Stansted.
71. On the 1st May 2013 the sift criteria were approved for publication. Mr Muirhead did not comment on them on or after the 30th April as some of his fellow Commissioners did but the fact that he remained silent was indicative of his consent to their formulation. They contained no criteria relating to market demand or historic and cultural interest. Mr Muirhead's silence was akin to a passive involvement as per *Kirkstall* (supra).
72. The sift criteria were published on 3rd of May 2013. They have an ongoing reach. Mr Muirhead has participated and played an active role in their determination. They set the direction of travel and have an enduring influence on aviation policy making.
73. Their importance is underlined by the contemporaneous appointment, on the 3rd May of an expert panel who were described by Sir Howard Davies as bringing,

"A wide range of skills and experience, and will ensure the Commission has access to a broad spectrum, of quality scientific and technical expertise as we progress our work."

74. The claimants point out that no member of the expert panel had any qualifications in landscape and cultural or historic heritage. Yet the criteria were to be specific and were designed to enable the Commission to discriminate between proposals. The slant of the sift criteria gives an impression that some environmental impacts were of lesser importance. Air quality and noise were the first items but listed and historic buildings were not present at all. They came in under a residual catch all under the heading of “other”.
75. The approach of the Commission is seen in its other publications and announcements. It had published discussion papers on climate change and noise indicating the importance it attached to those criteria. Within the latter document it had a new category of assessment, those persons who were affected by noise on a per passenger basis. That was bound to favour proposals for development at Stansted due to the lesser population around it. Sir Howard Davies in his speech on 7th October 2013 made repeated references to noise but no mention of landscape, countryside or cultural heritage impacts. It is not possible to dismiss the approach to the criteria on the basis that they were dealing with generic factors only; they set the direction of travel.
76. Indeed, the sift criteria have the strong appearance of having been designed to ensure that Stansted options would be favourably assessed. It is not right to say that Mr Muirhead’s involvement in the decision making process gave rise to no apparent bias of operative effect upon the basis that MAG did not commit to any specific proposal for the expansion on the 26th February 2013. First, that blurs the distinction between actual and apparent bias as was recognised in paragraph 31 of *BAA*. Second, Mr Muirhead was conflicted when he was appointed due to his ongoing relationship with MAG. Third, it is not tenable for the Commission to claim that Mr Muirhead had no knowledge at all of MAG’s plans for the expansion of Stansted when the sift criteria were formulated and adopted because,
- i) Whilst MAG’s expression of intent on the 26th February 2013 was not as specific as Commission Guidance Note 1 had requested it recognised that in the longer term additional capacity would be required in the south-east;
 - ii) The reference to additional capacity made it obvious that MAG was contemplating submitting outline proposals for additional runways and not simply proposals to increase the utilisation of the existing capacity;
 - iii) At the meeting on the 17th April the chief executive of MAG had told the Chairman of the Commission that MAG expected to submit views to the Commission on both second runway and hub options at Stansted. Mr Graham, in his witness statement, expected that the Commission members would have been informed of the content of the discussion with Mr Cornish at their meeting on the 30th April 2013. Mr Muirhead confirms in his witness statement that the matter was briefly mentioned;

- iv) It was, therefore, absolutely clear to the Commission by the very latest on the 30th April 2013 that steps were being taken that had the potential to benefit MAG. All of that was before the sift criteria were determined;
 - v) In view of that it is not credible for the Commission to say that it was caught by surprise by the proposals for additional runways at Stansted submitted by MAG on the 19th July 2013 as they do in their summary grounds of resistance. The information identified should have put them on notice as to the likelihood of such proposals. In those circumstances paragraph 18 of *Locabail* is not on point. There was sufficient knowledge of matters which appear to undermine the impartiality of Mr Muirhead.
77. Fourth, in any event all Commissioners had been made aware of expressions of intent by other parties which related to proposals for additional runways at Stansted as well as the fact that consideration was being given to the same by MAG.
78. Strikingly, even after submission of the specific proposals by MAG on the 19th July the Commission continued to defend Mr Muirhead's position. He failed to resign in response to the request that he do so by SSE in their letter dated 26th July. His departure came mainly in response to the pre-action protocol letter by which time there had been a sift of the proposals in which Mr Muirhead had participated. 33 of the submitted proposals were sifted out. All six for Stansted survived.
79. The claimants contend that it makes no sense for the Commission to assert that Mr Muirhead withdrew from one part of the discussion on 4th September 2013 precisely because the matters had the "potential" for direct impact on Stansted Airport. If Mr Muirhead's involvement in the decision making process may have given rise to a risk of apparent bias then his participation in the determination of the sift criteria equally had that potential.
80. From the speech made by Sir Howard Davies on the 7th October 2013 and his response to questions afterwards when he said that there was no useful purpose to be served by replacing Mr Muirhead at that stage it was clear that the Commission's thinking on its interim report was already at a "well advanced" stage. The interim report is expected to include the short list of options for long term airport expansion and the Commission's recommendations for immediate action to improve the use of existing runway capacity in the next five years. Stansted is likely to be affected by both. It is clear that the Commission's thinking reached the "well advanced stage" when Mr Muirhead was an active and influential member of the Commission. His retention until the 20th September was a striking defect in the decision making process.
81. I deal with the issue of delay as a separate topic below.

82. The first defendant submits that the critical question is what Mr Muirhead knew about MAG's proposals when the sift criteria were being formulated. It relies on paragraph 18 in *Locabail* (supra). In the circumstances here, the Commission submits:

i) At the time of appointment Mr Muirhead's witness statement makes it clear that his involvement with the core business at Manchester Airport ceased in October 2010. Thereafter, he was appointed on a consultancy basis but separate from the core business. At all times he had nothing to do with Stansted. That all goes to the question of remoteness.

ii) It is clear from Mr Muirhead's witness statement that he made a disclosure to the Department for Transport of his ongoing work with MAG. At that time he did not consider that there was any conflict of interest. Mr Muirhead's witness statement concludes,

“As I have made clear above, at the time sift criteria were being considered and adopted in May 2013 and prior to that, I was not aware of any proposal being made by MAG for expansion at Stansted Airport. I cannot therefore understand how it is said that there would have been appearance of bias in my involvement in the sift criteria at that time. Moreover, as Mr Graham has explained in detail in his evidence, the sift criteria are generic objective criteria which included local environmental factors in any event.”

iii) Elsewhere in his witness statement Mr Muirhead deals with his knowledge as follows,

“As I confirmed above, I had no knowledge of MAG's purchase of Stansted Airport prior to that which was in the public domain. Once it had been announced on the 18th January 2013 that the purchase would be completed by MAG on the 28th February 2013 I was privy to no information other than that provided to the Commission regarding MAG's intentions for Stansted as set out below.

... I did not become aware of the fact that these expressions of interest had been made until 13th March 2013 when a summary was presented to the Commission's meeting of that date. Mr Graham's evidence deals with the summary and the paper. The relevant section of the paper regarding Stansted stated,

“ *The responses for proposals for Stansted including one from the Airport management saying they would like to submit but have to wait for the new owners and one from the new owners mentioning that they have the intention of looking at options for all their airports, but particularly Stansted and Manchester...* ”

“I now understand that there was a further meeting between Sir Howard and Charlie Cornish, the MAG CEO, on the 17th April 2013 but I was not present at this meeting. My recollection is that this was briefly mentioned at the Commission meeting of the 30th April 2013, in line with Sir Howard Davies’ usual practice, which was to update us at the next Commission meeting as to any stakeholder meetings which he had attended in the interim (but I understand that the minutes of that meeting do not specifically record this). I do not recollect discussing the content of the meeting in detail, however I now understand that in fact Charlie Cornish’s’ position was MAG had not yet reached a corporate position regarding airport expansion at this stage at any event.

Subsequently MAG and others made their outline proposals by the deadline of the 19th July 2013. Stop Stansted Expansion have noted that this came as a “complete surprise” to them. As far as I was personally aware, the extent of the proposal by MAG for expansion at Stansted Airport was not a matter that I had anticipated either by reference to the summary of expressions of intent which we had been provided or otherwise.”

- iv) The MAG letter of the 26th February 2013 did not give an indication of what would be forthcoming. The reference to additional capacity did not necessarily equate to runways in the long term.
83. Mr Philip Graham is the senior civil servant working as the head of the Commission secretariat. He has filed witness statements in the proceedings which make it clear that when the expressions of intent were received by the secretariat they were summarised for the Commissioners in the table presented to their meeting on the 13th March.
84. Mr Graham in his witness statement deals with how the Commission are investigating the nature, scale and timing of any need the UK might have for additional airport capacity. It is being considered through a series of short thematic consultations with discussion papers published on aviation demand forecasting (published 1 February 2013), aviation connectivity and the economy (8 March 2013), aviation and climate change (5 April 2013) and airport operational models (16 May 2013). Although the papers show significant demand pressures in London and the south east a key proposal made by a number of stakeholders has been that one way to address that would be to make better use of regional airports. Indeed, the claimants’ view was to encourage the Commission to take a less London centric view. As a result he was of the view that it was entirely possible that MAG’s submission might have argued in favour of investment at Manchester Airport as an alternative to expansion in the south east.

85. By the time of the meeting of the Commission with MAG on the 17th April MAG were still reviewing their position. There was nothing tangible at that stage of the process. At the time of the publication of the sift criteria there was no further information from MAG.
86. The secretariat continued to have meetings with various stakeholders. On the 5th June 2013 they had a meeting with MAG. The notes of the meeting read,
- “TH (MAG) offered to talk in more detail about any aspects of their possible proposals but reiterated that the new owners were still deciding on their options. The purchase plan for Stansted did not rely on additional capacity but the airport was keen to play an active role in the future work of the Commission. Many options were possible at Stansted, both two and four runways were possible and depend somewhat on the decisions taken by the Commission with regards to whether or not the future relied on a hub or a dispersed model.”
87. On the 19th of June 2013 a further meeting was held between the secretariat and MAG. The meeting notes relate to MAG’s submission on short and medium term options. The meeting focused entirely upon Stansted and Manchester operations within their current capacity limits.
88. The critical moment, the defendant submits, is when MAG said that it was going to pursue an option of expansion. Here, that critical moment is the 19th July. In so far as BAA suggests that there should be concern when there was a real “possibility” that was in the context of a much closer relationship. Here, Mr Muirhead was too remote from MAG prior to the July date. It is not possible to attribute to Mr Muirhead a position which is ahead of that of the MAG management.
89. The MAG submission document is entitled Capacity for Growth. It points out that the maximum use capacity of Stansted's single runway is between 40 and 45 mppa. Based on current passenger throughput of about 17 mppa that means that Stansted has the potential to serve around 25 million more passengers every year than it does now. Stansted already has the necessary planning consents for most of the infrastructure needed to grow to 35 mppa. The Stansted options assessments were assessed against the criteria of strategic fit including maximum use of the existing runway, one new runway and a hub option. A section of the document dealt with cultural heritage including landscape, character and archaeological and historic buildings. Each of the possible options was appraised in terms of their likely effect upon the cultural heritage interest. Under “next steps” the document concluded,
- “In view of this we are not at this stage putting forward a single fixed option. Rather, we have concluded that Stansted can deliver additional capacity in a number of different ways, ranging from maximum use of its single runway through to development of an effective hub to replace Heathrow. We have

explained why, at this early stage, MAG does not itself have a preferred view. Much more needs to be done before that point it reached.”

90. Based on that document and earlier statements the first defendant submits that whilst there is a possibility of expansion at Stansted by MAG it was possible to achieve that within the existing physical infrastructure.
91. In so far as there were other expressions of interest in relation to expansion at Stansted in February 2013 Mr Muirhead was far too remote from the proponents of those proposals for them to have any effect.
92. On the sift criteria there were meetings on the 19th November and 18th December 2012. On the 1st February 2013 the Commission published a guidance document which set out how third parties could engage with the Commission’s work programme. It contained also a preliminary list of six factors for sifting of proposals. Submissions on those criteria were invited by the 15th March 2013.
93. A paper on the sift criteria was provided to the Commission for its meeting on 5th February 2013. A further meeting was held on the 13th March 2013 where it was suggested that an additional criterion be included. On the 25th March after the consultation, including a response from the claimants, a further criterion was identified. A final updated draft was then circulated and comments from Commissioners were requested. It is submitted that the process that was undertaken shows a gradual procedure whereby the criteria were settled after a consultation exercise and with secretariat input.
94. Against the background that Mr Muirhead did not know what MAG were going to do, the question is asked whether it was credible that he was going to go out of his way to influence proposals for sifting when he did not know what the MAG proposal was likely to be.
95. The claimants’ submission that the sift criteria were loading the dice in favour of Stansted was moving into the realms of fantasy. Local environmental effects were clearly relevant. It was a broad descriptive category to cover local environmental considerations. What weight was to be attached to them was for the decision maker. That might be different at different stages. When Sir Howard Davies responded to the letter from the claimants dated 17th May about Mr Muirhead’s membership of the Commission he had gone on to say,

“Thank you for your comments regarding the sift criteria for long term capacity at UK airports. 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.”

96. On the sift criteria there is nothing which indicated that there is any ranking between the various factors. On the expert panel a consortium of technical advisors had been retained by the Commission to advise generally including Jacobs UK Limited whose expertise, amongst other matters, included environmental assessment.
97. The White Paper, Aviation Policy Framework, was published in March 2013. It is clear that air quality and other local environmental impacts will be very much part of any consideration on future airport capacity. Having dealt with the prospect of the Commission's Interim Report the White Paper continues, at paragraph 3.55,
- “It is likely that any proposals for a new hub airport or nationally significant infrastructure would be taken forward through an Airport National Policy Statement (NPS). This would take a similar approach to existing NPSs and be consistent with the government's stated policies on sustainability and environmental protection. Loss of protected habitats, protected species, protected landscape and building heritage and significant impacts on water resources and eco-systems would only be advocated if there were no feasible alternatives and the benefits of proposals clearly outweighed those impacts. Any unavoidable impacts would be mitigated or compensated for. Our policy would be to ensure that there is full consideration of the environmental impacts of the most credible options for maintaining out international connectivity.”
98. On market demand Mr Graham's witness statement makes it evident that all proposals will be measured against an emerging assessment of demand. Demand therefore is very much on the agenda as is evident from Sir Howard Davies' speech on the 7th October 2013.
99. On the 4th September 2013 meeting Mr Graham's witness statement makes it clear that the Commission did not engage in detail in most of the submissions at this point as public consultation on the proposals was ongoing until the 27th September 2013. Any views were provisional. A further sift was then carried out on the 10th October which included a more detailed consideration of the proposals including an independent assessment of scheme costs and impacts which involved the production of maps showing potential local environmental impacts including unprotected sites and listed buildings.

Delay

100. The first defendant contends that the claim is a collateral attack on the sift criteria adopted by the Commission on the 3rd May 2013. The timing of the collateral attack is particularly problematic because the many stakeholders who have engaged in the Commission's process have done so by reference to the sift criteria.

101. That it is a collateral attack is evident from the limited complaint that was made by the claimants about the sift criteria on the 17th May 2013 which was responded to by Sir Howard Davies on the 19th May 2013. Thereafter, the claimants were inactive on the topic for over three months while all other participants in the Commission's process were treating the sift criteria as the relevant criteria against which any proposal made should be explained and as the framework for commenting on proposals made by others.
102. Although the claimants say that they now know that Mr Muirhead was actively involved in the determination of the sift criteria and did not know before asking questions it was self evident that all Commissioners would have been involved in the Commission's decision making process. The pause in activity from the 3rd May 2013 until the issue of proceedings is a delay which cannot be explained in a time critical process.
103. The claimants submit that they did not know that Mr Muirhead participated in the determination of the sift criteria until the Commission responded to its pre-action protocol letter on the 20th September 2013. If they had made an earlier application for judicial review that would have been too much like an "unduly sensitive or suspicious" observer, someone who had not adopted the balanced approach of the fair minded observer.
104. In anticipation that Mr Muirhead might have been involved in the sift criteria the claimants asked the Commission to look afresh at them if that was the case. Both the Commission and the Secretary of State refused to accede to that request. They have therefore acted promptly in the challenge.
105. If the court does find there is a risk that Mr Muirhead may have tainted the Commission's determination of the sift criteria with the potential to impact adversely millions of citizens it would be wrong for the court to exercise its discretion to refuse relief by reason of delay.
106. Alternatively, if the court considers the more appropriate target is to challenge the sift criteria then the time for bringing the claim should be extended as the claimants lacked the necessary knowledge to bring such a challenge until confirmation of the involvement of Mr Muirhead which was given in the response to the pre-action protocol letter of the 20th September.

Role of the Secretary of State for Transport

107. The Secretary of State adopts and endorses submissions made by the Airports Commission.

Discussion

Approach

108. Before examining the timeline of events I remind myself that I am in the role of the fair minded and informed observer who is neither unduly sensitive nor suspicious, exercising an objective approach to the relevant circumstances as they appear from material before me.
109. I am informed, in the sense described by Lord Hope in *Helow*. My exercise is to consider whether, as a fair minded and informed observer, in all the circumstances, there was a real possibility of bias on the part of Mr Muirhead in his position with the Airports Commission. In carrying out that exercise I bear in mind that different circumstances arise at different points along the temporal way as is made clear in *BAA*. I bear in mind also the words of Lord Bingham in *Locabail* 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.”
110. Further, influence can be exerted by silence; see *Kirkstall*.
111. In considering apparent bias appearances are not without importance. Once apparent bias has been established a claimant should not be put in the position of having to prove operative effect.
112. Given the changing circumstances over time from the establishment of the Commission I have set out the following section in different parts dealing with the relevant circumstances of each part whilst coming to a conclusion as the fair minded and informed observer.

Appointment of Mr Muirhead

113. In his witness statement Mr Muirhead says that he was approached by the Department for Transport regarding the possibility of becoming involved with the work of the Airports Commission on the 25th September 2012. By that time he had been retired from MAG for almost two years. He began his employment there in 1988 as Director of Development and Planning and then held the post as Chief Executive for 16 years from 1994. Before his retirement Mr Muirhead had made it clear within the company that he was not likely to bid for Stansted should the airport come up for sale. By the time BAA did announce its intention to sell Stansted in July 2012 Mr Muirhead had been retired for almost two years. Notwithstanding that, by the time of Mr Muirhead's retirement MAG owned Manchester Airport, Bournemouth and East Midlands

Airports and had a majority shareholding in Humberside International Airport. On any view a fair minded and informed observer would regard MAG as a sizeable and significant player in the UK aviation industry. Inevitably, it would have an interest in the development of UK aviation policy.

114. Upon Mr Muirhead's retirement on the 1st October 2010 he entered into two consultancy agreements with MAG. The first was for two years expiring in October 2012 for the payment of £75,000 per annum. The second was a role of being nominated by MAG to be a member of, or to provide advice to, a number of regional and industry bodies. Again, that was for the payment of £75,000 per annum. That was to be for a three year term until October 2013. Mr Muirhead's membership of the various bodies was not related to MAG's core business and did not involve access to any information about MAG's core business. His work, as he set out in his witness statement, involved attending meetings of the various bodies and participating in discussions and providing an industry view based on his previous experience. He had no involvement with, or access to, information on MAG's core business or long term plans. He did meet MAG's chief executive a few times after his retirement but on each of those occasions they had short discussions covering Mr Muirhead's involvement with external bodies and social events.
115. When approached by the Department for Transport in the autumn of 2012 Mr Muirhead informed them of his ongoing consultancy work with MAG. He did not consider that that constituted any conflict of interest which ought to preclude him from acting as a Commissioner.
116. Mr Philip Graham deals with the process of appointment in his first witness statement. He says that the consideration of candidates was organised around a range of fields that were considered relevant to the work of the Commission and in which knowledge and experience on the part of the Commissioners would be of value. Commissioners were not, however, appointed solely as experts in a given field. It was expected that they would be able to contribute broadly to discussions and decision making across the full range of issues under consideration.
117. In seeking candidates with experience of the aviation sector a challenge was to identify candidates who had neither recently worked for an organisation with a direct interest nor publically expressed clear views on the issues under consideration. Having retired in October 2010 Mr Muirhead was considered to be a credible candidate with in depth experience of airport operations and management and did not appear to present any issues in terms of prior involvement or public pre-disposition to any specific outcome. Further, he was able to bring a regional perspective which was thought to be of value to the Commission's deliberations. His continuing consulting relationship with Manchester Airports Group was not considered to be so significant as to constitute a conflict of interest.

118. When Mr Muirhead's appointment was announced on the 2nd November 2012 the Department for Transport published a short CV for Mr Muirhead which contained no reference to his consulting arrangements with MAG.
119. By the time Mr Muirhead was appointed his first consultancy with MAG, which had in any event not yielded any work, had concluded. The second consultancy involving representation for MAG on various boards was of a different nature and by way of providing advice to the regional and industry bodies based on Mr Muirhead's past experience. Knowing that and being cognisant of the fact that Mr Muirhead had no knowledge of MAG's ongoing core business, nor had he had since his retirement, a fair minded and informed observer, not being unduly suspicious or sensitive, would not have concluded that there was a real possibility of bias upon Mr Muirhead's appointment.
120. Undoubtedly it would have been better for the press release concerning Mr Muirhead's appointment to have been more transparent about Mr Muirhead's consultancy arrangements. Failure to be so was likely to engender suspicions on behalf of the claimants. Notwithstanding that, the failure to be as open as might be desirable, would not in the eyes of the fair minded and informed observer raise suspicions to the appropriate degree to support a finding of apparent bias. It is material that one consultancy arrangement had finished and the other was terminated in January 2013.
121. There was, by way of ongoing background, at the time of Mr Muirhead's appointment the prospect of a sale of Stansted Airport. It is said by the claimants, supported by newspaper articles, that MAG was the front runner as purchaser. That may well have been the case: by 18th January 2013 MAG made an announcement that they were to purchase Stansted Airport. In the autumn of 2012, however, whilst MAG may have had an interest in acquiring Stansted and taken steps to arrange for the funding of that purchase that interest was unrealised and it was uncertain whether it would be. Any purchase of Stansted was, in any event, taking the company in a different business direction to that which Mr Muirhead had indicated when he was chief executive when he had expressed clear views within MAG that he would not purchase Stansted. The fact that Mr Muirhead had been retired for almost two years and had been absent from MAG's core business and long term plans for what would be a lengthy period of time in a dynamic industry meant that he was too distant from a main bidder for Stansted for that factor not to play in any significant way in the mind of the fair minded and informed observer. It follows that the fair minded and informed observer would not regard the appointment and initial presence on the Commission of Mr Muirhead as giving rise to a real possibility of apparent bias.

From appointment until March 2013

122. Mr Graham's witness statement explains that the Commission's term of reference required three distinct work streams ahead of the interim report:

- i) assessment of need (does the UK need more airport capacity?),
- ii) a study of short and medium terms measures for making the best use of existing airport capacity,
- iii) a process for determining the most plausible options for adding new airport capacity in the longer term, should any be needed.

123. The first meeting of the Commission took place on the 19th November 2012. There was a discussion at that meeting of a draft guidance document which was due to be published in January 2013 setting out a timetable for the Commission's work, how third parties could engage with that work and the nature of that work. It was minuted as follows:

“There were suggestions that the document was not clear enough in its intent and that the timing for receipt of proposals needed to be clearer along with the fact that the thematic papers would allow for further submissions at a later date. Ricky Burdett suggested that as this would be the first paper of the Commission, it needed to be taken as an opportunity to demonstrate that the Commission would be looking at a range of issues and needed to open the door to taking a fresh look at the matrix of criteria used to evaluate proposals.”

124. The next Commission meeting was held on the 18th December 2012 when, again, there was discussion about the Commission's guidance document. It is minuted that key points discussed were that the proposed factors for consideration for long term options did not focus enough on the social impacts. No mention is made of any contribution from any particular Commissioner. There was an accompanying paper entitled “Long term options - factors for consideration”. Amongst the various factors was one entitled “local environmental impacts”. Included within the bullet points for consideration under that heading were the following,

- “Proposals may also wish to highlight any other local environmental impact, such as implications for heritage buildings and townscape, protected sites, bio-diversity and flood protections.”
- Detailed environmental assessment of short listed proposals will be required following publication of the interim report.”

125. As set out, on the 18th January 2013 MAG announced that they were to purchase Stansted Airport.

126. On the 1st February 2013 Guidance Document number one was published by the Commission. That set out the Commission's timetable. In terms of proposals for making the best use of existing capacity in the short and medium term submissions were sought by the 17th May 2013. For proposals providing additional airport capacity in the longer term expressions of intent were sought by the 28th February 2013 and outline proposals by the 19th July 2013. Those proposals were asked to give a view on the level of additional capacity that would be provided, along with some of the key economic, social and environmental considerations. The Commission indicated that it would be publishing details of their sifting criteria in the spring in time to inform the July submissions. For the time being the Commission had identified six broad categories of factors which they encouraged scheme promoters to consider in developing their proposals. Those were listed as economic factors, social factors, climate change impacts, local environmental factors, accessibility and feasibility considerations. The Commission welcomed suggestions for criteria that might be used to identify the most plausible options ahead of the interim report and asked that they be submitted by the 15th March 2013.
127. On the 4th February 2013 the claimants wrote to Sir Howard Davies about the position of Mr Muirhead and, assuming that completion of the purchase of Stansted Airport by MAG took place on the 28th February 2013, questioned whether it would be appropriate for him to continue as a member of the Commission in view of his long standing association with MAG.
128. On the 5th February 2013 the next Commission meeting was held. Under the heading "sift criteria" the minutes record that the Commission were taken through a suggested approach to the sift criteria by the secretariat which was consistent with established Government methodology. That meant that when recommendations were made, assurances could be given that the proposals had been considered within a broadly comparable assessment framework to that used by Government. It was suggested that, in order to balance the assessment framework appropriately, six criteria be used under which the relevant sections of the Department for Transport's analysis guidance could be applied. The criteria were; environment, economy, people, cost, value, delivery. Finally, the Commission felt it was important to consider the impact of proposals on other airports in the UK. Again, no Commissioner is recorded as making any particular input.
129. On the 26th February 2013 MAG expressed an interest as requested under Guidance Document one. At the time the letter was confidential but has been disclosed during the current proceedings. It included the following,
- "In responding to recent government consultations, MAG has consistently argued that a long term aviation policy should take account of the available airport capacity at key UK sites, thereby reducing pressure on congested London airports. However, we recognise that, in the long term, additional capacity will be required in the South-East and we look forward to the Commission's view of long term demand for aviation. Similar to other forward thinking in aviation bodies MAG is

supportive of the need to ensure all viable options are explored and tested against agreed criteria.

You will appreciate that our position is slightly unusual in that we will not own Stansted Airport until the end of February 2013. On completion of the acquisition process, we intend to look closely at how our airports, and in particular, Manchester and Stansted can help to meet increasing aviation demand. We expect to complete this work in the coming months and be in a position to make a more substantive submission to the Commission by the second deadline date of the 19th July 2013. In accordance with your guidelines, we will present outline proposals, highlighting additional capacity taking account of economic, social and environmental considerations. Our proposals will also consider surface access links.”

130. On the 27th February 2013 Stansted’s managing director wrote and said,

“The changes in ownership at the airport mean it will not be possible for us to respond to the notification of intention until MAG has had an appropriate opportunity to review its long term strategy of Stansted Airport. However, Stansted Airport remains committed to a full and active role in the Commissions work and we will endeavour to respond to the various calls for evidence in a timely and consistent manner. We will inform you of the airport’s intentions as soon as possible.”

131. On the 13th March 2013 the Commission held its next meeting. There was a summary paper including a narrative overview of the expressions of interest as well as an annex providing a fuller summary. The individual letters were not forwarded to the Commissioners. The position on Stansted was summarised to Commissioners as follows,

“The responses for proposals for Stansted included one from the airport management saying they would like to submit but have to wait for the new owners and one from the new owners mentioning that they have the intention of looking at options for all of their airports, but particularly Stansted and Manchester. We also received intent from MAKE, an architectural group and one from a private individual both of whom are looking at extending Stansted to a four runway hub. There was also a piece of correspondence from Transport for London (TFL) on behalf of the Mayor of London stating their intent is to submit a list of proposals, one of which may include Stansted. TFL have been clear they are doing a large piece of work on possible options for a South-East hub airport.”

132. On the 15th March 2013 the claimants sent in their response on the sift criteria. It was a detailed document which included a section on aspects which needed to be addressed and the assessment criteria. It made the point that the logical starting point was to consider the level of market demand at each site. Further, matters of landscape and heritage impacts were amongst those which needed express consideration.
133. On the 19th March 2013 the claimants wrote to the Commission with a copy to the Department for Transport querying the continued involvement of Mr Muirhead and questioning whether the date of his termination of consultancy with MAG as 2013 was, in fact, a typographical error.
134. At the next Commission meeting of the 25th March 2013 the sift criteria were the subject of discussion. Submissions of particular interest which had been received from the public were also considered. They were to be the subject of further thinking and analysis. The minutes for the meeting are heavily redacted but there is no reference to any Commissioner making any comment on the sift criteria.
135. By the end of March Mr Muirhead had attended five meetings of the Commission when the sift criteria had been on the agenda. Three of those meetings had been before the completion of the purchase of Stansted Airport by MAG although by the time of that on the 5th February the announcement had been made that the purchase was due to be completed by the end of that month. The minutes of the meetings do not show Mr Muirhead as having any role of particular influence in the discussion. Indeed, the only person whose comments were noted, Professor Ricky Burdett on the 19th of November 2012, points to Commissioners being open minded in terms of the matrix of criteria for evaluating the proposals.
136. The claimants concern prior to the purchase of Stansted by MAG was that Mr Muirhead, as a result of his aviation expertise, would exert an influence that was disproportionate and would secure a slanting of the criteria such that they would favour development proposals at Stansted.
137. For the meetings on the 19th November and the 18th December 2012 the fair minded and informed observer would see no basis for that concern. Mr Muirhead's previous professional links had been with MAG so that if he was going to do anything it would be to slant the criteria in favour of regional airport development. There is nothing to suggest, even remotely, that occurred. The fact that he had, within MAG, expressed views against the purchase of Stansted would predicate against slanting sift criteria in favour of its development. The noted comment by Professor Burdett is indicative of the fact that the Commissioners were not going to be unduly swayed by one of their number: he wanted a fresh look at the matrix of criteria to evaluate the proposals. A fair minded and informed observer would regard the Commissioners as of equal standing, with independent minds and a range of expertise to bring to the discussion in which they would participate with equal weight.

138. After the announcement on the 18th January 2013 that MAG was going to purchase Stansted there were three further meetings of the Commission at which the sift criteria were discussed. By the time of the last two the acquisition of Stansted had been completed. There is no record of Mr Muirhead in the minutes of those meetings making particular comments. Throughout, the claimants contend that Mr Muirhead's presence, even if silent and passive, would have a guiding role. The fair minded and informed observer would not be so persuaded. The other members of the Commission, namely Sir Howard Davies, Vivienne Cox, Professor Ricky Burdett, Professor Dame Julia King and Sir John Armitt were all selected for their particular expertise. However, there is nothing to suggest or to lead someone who is not unduly suspicious or sensitive to suspect that the other Commissioners gave undue deference to Mr Muirhead because of his experience in aviation operations. Again, a fair minded and informed observer would conclude that the Commissioners were a group of people of substance and experience who would regard each other as equals as opposed to regarding any one of their number with undue deference or having disproportionate influence.
139. The position is very different to that of Professor Moizer and the Greater Manchester Pension Fund considered in BAA. There, Professor Moizer had been a fee paid advisor to the fund since 1987 such that his advice and comments were frequently sought and would be sought on investment matters such as the purchase of Gatwick as a matter of course. "He was very well regarded by those who he advised at the fund, was trusted and highly influential, a wise man. His influence was such that he had virtually a power of veto over a proposed investment and his role was effectively at officer level in the fund." The silent presence of the chief constable who had instigated charges on a committee discussing the charges in *Cooper v Wilson* cited in *R v Secretary of State ex p Kirkstall Valley Campaign Limited* (supra) likewise is far removed from the position of Mr Muirhead. In both examples a proximity of relationship which was continuing existed which is wholly lacking as between Mr Muirhead and MAG from February 2013 in terms of closeness and continuity. Up until January 2013 a relationship was present but tenuous and diminishing, given the nature of Mr Muirhead's consultancy, where although he had a representational role it was one based upon his past experience and not upon any current or continuing knowledge of the core business of MAG and where the role was ended prematurely because the work was completed. By February 2013 Mr Muirhead was too distant from the MAG operation for any fair minded and informed observer to conclude that there was a cause for concern and prior to that time his links were such as not to raise concern either.
140. Mr Muirhead was undoubtedly well regarded, hence his appointment, but there is nothing to suggest that he was more or less regarded than any other Commissioner. There was certainly nothing to suggest that his role was effectively at officer level, as was the case with Professor Moizer, or anything like that or that he had disproportionate influence or that he was a person that his fellow Commissioners gave undue deference to. There is nothing here to suggest that the informed and fair minded observer would regard Mr Muirhead's mere presence at the Commission meetings when discussions about the sift criteria were ongoing as giving rise to any real possibility of bias.

141. That remained the case after, firstly, the announcement of and, secondly, the completion of the acquisition of Stansted. By the time the second of those events occurred Mr Muirhead, as set out, had no link with MAG in any capacity. The fact of the acquisition of Stansted, therefore, did not, in itself, mean to a fair minded and informed observer that Mr Muirhead's role with the Commission was compromised.
142. When the expressions of intent were submitted Mr Muirhead had no knowledge of them until informed at the Commissioners' meeting on the 13th March. At that time he became aware that MAG were going to be making a final submission in July and that it might include increased utilisation of the existing runway at Stansted as well as or instead of the provision of new runways there or elsewhere in the MAG business. His knowledge as to the content of that submission was, therefore, at a basic level.
143. Because of the recent completion of the purchase and the necessity to look at all expansion options across the MAG business a fair minded and informed observer could not conclude that Mr Muirhead knew that there was a real possibility of MAG submitting a final proposal in July which included new runways at Stansted. MAG might do, but it might not, and might instead include proposals for increased capacity at one of its regional airports or be content with maximising the existing unused capacity at Stansted without going so far as to promote a new runway at that airport. All options were open. A fair minded and informed observer in those circumstances would conclude that Mr Muirhead's knowledge was such that whilst he was aware of a likely further submission by MAG he did not know of any likely content of the submission and was not privy or able to be privy to any information that made enhanced knowledge likely about any submission to be made. Absent that knowledge a fair minded and informed observer would conclude that there was no real possibility of an appearance of bias. That is not to say that a fair minded and informed observer would think that Mr Muirhead needed to know the detail of any submission which was to be made by MAG before his position needed to be re-examined. Far from it, but his knowledge had to be at a higher level than it was; it had to be elevated from an awareness of a possibility that the subsequent submission could contain a new runway or new runways at Stansted to a knowledge of a real possibility that it would do so. That was not the position in March 2013.
144. Other expressions of intent which affected Stansted were made by private individuals, MAKE, a firm of architects and TFL. However, in relation to those Mr Muirhead had no links at all, whether former or present. A fair minded and informed observer could not conclude, therefore, that there was a real possibility of bias in that regard. Mr Muirhead was simply too remote from those parties.

April to July 2013

145. On the 17th April 2013 Sir Howard Davies and Phil Graham, from the Commission, met with Charlie Cornish, Chief Executive of MAG. The notes of the meeting record as part of the key areas of discussion, "ambitions for MAG Airports and potential submissions to Airports Commission:

- MAG still reviewing its position;
- Expects to provide input on traffic growth, role of regional airports, views on both second runway and hub options at Stansted, options for funding;
- MAG explained that they were not intending to align themselves with the work of Mayor of London on SE airport options.

At the next Commission meeting on the 30th April, although not minuted, Mr Graham says that it was highly likely that the meeting with MAG was reported to Commissioners and Mr Muirhead, in his witness statement, recalls that the meeting was briefly mentioned.

146. A fair minded and informed observer would not attach any greater significance to the report of the meeting other than to realise the situation was still under review so far as MAG was concerned. Although the meeting notes record that input could be expected from MAG with views on both second runway and hub options at Stansted it was entirely open as to the likely nature of those views. It is unclear how much of the meeting on the 17th April was reported to Commissioners at their meeting on the 30th April. Taking the notes at their highest against Mr Muirhead the opening point was that MAG was still reviewing its position. In those circumstances, a fair minded and informed observer would take the view that Mr Muirhead's knowledge was little changed in that the matter was still under review and he/she would be unlikely, in the absence of any other evidence, to conclude that there had been any material change from the position in March 2013. The MAG business is sizeable and a decision on one airport could impact on the business of another within MAG. It was reasonable, therefore, that strategic business decisions on the part of MAG would be properly researched and thought through before reaching a conclusion: that process would take some time. As Mr Muirhead has distanced himself from the core business of MAG for over two and a half years a fair minded and informed observer would not feel able to conclude that, as at the end of April 2013, Mr Muirhead had the requisite knowledge, namely, that there was a real possibility of a submission by MAG with a second runway and/or hub option at Stansted.
147. At the same Commission meeting various items, including the responses to the consultation on the demand forecasting paper, were discussed. A sift criteria document had been circulated to the Commissioners before the meeting but there was insufficient time to discuss it. That document incorporated a revised list of sift questions and had been updated in light of the points made at previous meetings and from the public comment. Commissioners were asked, therefore, to submit comments by email if they had any. Email comments were received from Professor Ricky Burdett and Professor Dame Julia King. The sift document was cleared for publication by Sir Howard Davies on the 1st May 2013 and was published on the 3rd May 2013. Under the environment section there is a heading "other" under the question "what other significant local environmental impacts should be taken into account?" The text beneath that reads,

“Where proposals may have other significant environmental impacts beyond those outlined above, these should be identified and documented. This might include, for example, impacts on landscape and/or townscape, water availability and flooding, bio-diversity or historical and archaeological sites. In considering potential environmental impacts, scheme developers may wish to have reference to the factors set out in DEFRA’s Sustainable Development Indicators.”

148. The claimants are concerned that the sift criteria set the direction of travel. Further, on the same day as the publication of the sift criteria membership of the expert panel to assist the Commission in its work was published. The claimants point to the absence of any member on that panel with environmental expertise as supportive of its submission that environmental factors are downplayed within the sift criteria.
149. In his letter, dated the 29th May 2013, in reply to the claimants raising concerns about Mr Muirhead’s continued membership of the Commission Sir Howard Davies assured the claimants that, as for all criteria in the decision making process, local environmental impacts will be given full consideration in the course of the Commission’s work.
150. With the absence of any comment from Mr Muirhead on the sift criteria after the 30th of April meeting a fair minded and informed observer would draw the inference that he was content with their content. However, that is far from saying that he had influenced the criteria so that they were biased in favour of development at Stansted. On proper scrutiny a fair minded and informed observer would not conclude that the sift criteria were slanted or engineered so that environmental impacts were regarded as material considerations to which less weight should be attached in the complete decision making process. The sift criteria were published in a high level document. The fair minded and informed observer would regard them as generic criteria that had been developed through an iterative process, including public consultation.
151. On the contemporaneous appointment of the expert panel on the 3rd May as the Commission had retained Jacobs and Company for their environmental expertise there was no need to appoint any further expert as part of the expert panel membership. That panel was to supplement the existing expertise which the Commission had retained. A fair minded and informed observer would not, as a consequence, look askance at the composition of the panel or draw any adverse conclusion from the date of its announcement
152. Meanwhile the Government had published its Aviation Policy Framework in March 2013. That states that air quality and other local environmental impacts remain of importance to the Government when appraising individual proposals. Within the White Paper the Government makes it clear that it will want to have a thorough understanding of the local environmental impacts of any airport development proposal.

153. The Paper refers (in paragraph 3.54) to the Airports Commission interim report and “that it will be informed by an initial high level assessment of the credible long term options which merit further detailed development. That will take into account local environmental factors which are one of the broad categories which the Commission has identified in its recently published guidance document that scheme promoters should consider. The Commission’s final report will include an environmental assessment for each option as well as consideration of their operational, commercial and technical viability.”
154. The White Paper goes on to make it clear that any proposals for nationally significant infrastructure would likely be taken forward through an Airports National Policy Statement (NPS). Development involving the loss of protected landscape and affecting built heritage would only be advocated if there were no feasible alternatives and the benefits of the proposal clearly outweighed those impacts. The policy is to ensure that there is full consideration of the environmental impacts of the most credible options for maintaining the international connectivity of the UK.
155. The Foreword to the Aviation Policy Framework makes it clear that the document sets out the principles which the Commission will take into account when working towards the recommendations it makes when it reports later in 2013 and in 2015. It continues that while the Government “believes that aviation needs to grow delivering the benefits essential for our economical wellbeing it has to respect the environment and protect the quality of life.”
156. Any fair minded and informed observer reading the Aviation Policy Framework and sift criteria would appreciate that there was an interrelationship between the two. When read together or, in the latter case separately, a fair minded and informed observer would not regard the sift criteria as slanted. He/she would bear in mind that they were both high level documents, it is true setting the direction of travel, but each setting out a general framework of balancing the various competing factors to be considered in any prospective development.
157. On the 17th May 2013 the claimants wrote to the Commission and the Secretary of State reserving their position on Mr Muirhead in case it was shown that his membership of the Commission had operative effect.
158. On the 5th June 2013 members of the secretariat met with MAG officials. The meeting notes record that the MAG official was content to talk in more detail about any aspect of their possible proposals but reiterated that the new owners were still deciding on their options. The purchase plan for Stansted did not rely on additional capacity but the airport was keen to play an active role in the future work of the Commission. Many options were possible at Stansted; increased use of the existing runway and both two and four runways were possible. A final decision would depend somewhat on the decisions taken by the Commission with regards to whether or not the future relied on a hub or a dispersal model.

159. A further meeting took place between officials of the secretariat and MAG on the 19th June 2013 on matters arising from MAG's submission on short and medium term options. Nothing further was mentioned with regard to the approach to proposals for the long term at Stansted.
160. On July 2nd the Commission published a discussion paper on aviation noise. The claimants contend that is illustrative of how the approach of the Commission is stacked towards development at Stansted, particularly as there is no comparable document published about environmental issues, and there is a possible new category for assessing noise on the basis of the size of population affected by aircraft noise at the UK's largest airports. Stansted tops the list as the airport affecting the least number of people by that criterion.
161. On the 19th of July 2013 MAG submitted their document entitled Capacity for Growth to the Commission contemplating two broad propositions. They were
- to support the growth of Manchester to the capacity of its two existing runways and a throughput of 55 mppa.
 - that Stansted's long term options provide flexible, affordable and deliverable capacity and merit inclusion on the Commission's short list for further study. Additional capacity there can be delivered in a number of different ways, ranging from maximum use of the single runway through to the development of an effective hub to replace Heathrow. The document continued that MAG "does not have a preferred view. Much more needs to be done before that point is reached."
162. On the 26th July 2013 the claimants wrote to Miss Snashall, at the Department for Transport, saying that they considered it unacceptable for Mr Muirhead to continue to serve on the Airports Commission and the longer he continued to serve the more the process risked being tainted. The letter explained that the delay had been to allow it to become clear whether or not any apparent bias could have an operative effect i.e. dependant or not on whether MAG submitted proposals to the Commission for a major long term expansion at Stansted Airport. They sought a response within 14 days failing which they were to take legal advice with a view to initiating legal proceedings.
163. With the submission of the proposal on the 19th of July MAG crystallised its position. What had been a possibility previously had become a reality. Whilst Mr Muirhead was aware that MAG may provide input on a second runway and hub options at Stansted, because it was reviewing its position, it was uncertain as to whether that would be promoting its own proposals, the nature of those proposals, if there were to be any, or whether that was to be comment on other suggestions for development at Stansted which had been made at the expressions of interest stage. A fair minded and informed observer would conclude that as Mr Muirhead had no contact and had had no contact with core business at MAG for two and three quarter years he would have had no advance knowledge of any such proposals.

164. Once the submissions were received, however, Mr Muirhead was then placed in the position of carrying out a quasi judicial function in terms of assessing the proposals against the sift criteria. One of those proposals was now from his longstanding former employer. The appearance of Mr Muirhead adjudicating upon that was a material change in circumstance from that which existed previously. In those circumstances a fair minded and informed observer would have expected Mr Muirhead to act out of an abundance of caution and step down from the Commission. That is not to cast any aspersions upon the conduct of Mr Muirhead but rather to reflect the fact that there had been a change of circumstances along the temporal way when MAG had crystallised their position. To avoid any allegation of apparent bias in the forthcoming process of assessing and judging the proposals a fair minded and informed observer would think it prudent for Mr Muirhead to take that defensive step.
165. In the circumstances it would have been reasonable for Mr Muirhead to have questioned his own position and taken advice upon it. That is what a fair minded and informed observer would have expected him to have done. Having allowed time for that a fair minded and informed observer who was neither unduly suspicious nor sensitive but mindful of appearances would have expected Mr Muirhead to have stepped down from the Commission.

August to October 2013

166. On the 4th of September the Commission met again. It was then aware of the threat of judicial review proceedings and they were reported to the Commission meeting. Mr Muirhead stood down from those sections of the meeting which dealt with surface access investments and fiscal incentives to redistribute services between airports because if implemented there could be specific benefits for airports owned by MAG. He was present when the meeting discussed long term options for new runways and airports as the agenda focussed on removing the least credible options from consideration. The purpose was to identify those proposals which were fundamentally flawed, duplicated other proposals or were not consistent with the Commission's remit. The meeting reached a provisional view only as the proposals received in July were still out for public consultation which continued until the 27th September.
167. The second meeting on the received proposals took place on the 10th of October. That was after Mr Muirhead had departed the Commission. It was that meeting which had the more detailed input from the Commission's consultants but even so the sifting decisions taken remained provisional and were to be revisited following completion of the analysis of responses from third parties. The decision making process has, therefore, not been affected by the position of Mr Muirhead.
168. A fair minded and informed observer would not have regarded the actions of Mr Muirhead in remaining as a Commissioner until the 20th of September or those of the Commission in retaining him until then as the most wise. However, a defensive strategy was adopted so that, although the conduct of both parties was less than ideal,

a fair minded and informed observer, considering all of the circumstances, including the fact of Mr Muirhead's absence from part of the meeting of September 4th and the fact that such decisions as were made then were provisional only would not have been satisfied that there was a real possibility of apparent bias.

169. Sir Howard Davies' speech on the 7th October 2013 outlined the Commission's emerging thinking on the need for additional aviation capacity but made it clear that the Commission had not yet reached a view on the best means of providing that. He invited interested parties to submit evidence in relation to the topics covered in his speech by 31 October. His answer in response to a question from a member of his audience that the Commission would not be replacing Mr Muirhead as a member of the Commission because thinking of the Commission was advanced has, therefore, to be seen in that light, namely, that although the thinking is advanced, it is not fixed and is open for amendment after further public responses. A fair minded and informed observer would not draw an adverse inference from the comment made by Sir Howard Davies when seen in its full context.

Other matters

Retrospective operative effect

170. It is apparent from what is set out above that a fair minded and informed observer would find that there was no real possibility of apparent bias on the part of Mr Muirhead until receipt of the submission on the 19th July from MAG. That is not to say that I accept the Commission's argument that to be satisfied of a real possibility something tangible, such as the submission of MAG in this case, needs to exist. Rather, applying the indicia in BAA along the temporal line the situation developed so that although Mr Muirhead was on notice after the submission of intent by MAG, at the end of February 2013, he had insufficient knowledge, namely, his understanding was that there was a possibility as opposed to a real possibility or likelihood that a proposal of the sort that was eventually received from MAG involving the prospect of additional runways at Stansted would be submitted. To attribute any other understanding to Mr Muirhead would, as the first defendant submitted, for a significant part of the time, be to place him in a position ahead of the MAG management. His position changed upon receipt of the submission from MAG. The fair minded and informed observer would conclude that, despite the two month period or so, between the submission by MAG and Mr Muirhead's stepping down there was no apparent bias during that latter period. The prospect of it arising was due to the appearance of Mr Muirhead participating in the determination through the autumn and winter of which submitted options should proceed to the short list. No absolute determination was made during the final months of Mr Muirhead remaining with the Commission. The fair minded and informed observer reviewing the events and chronology set out above would not conclude that there was a prospect of apparent bias having a role before that time.

171. By the 4th September the sift criteria had been adopted for four months. The iterative process that they had been through, their high level general nature, together with the fact that the consultation exercise that was carried out and in response to which changes were made was completed by May 3rd meaning that they were not affected by the position that Mr Muirhead found himself in some months later. The declaration and orders sought by the claimants are not justified.
172. That is not to say that in an appropriate case retrospective operative effect may not have a role to play but, in the circumstances of this case, for the reasons set out above that is not the position.
173. That means that strictly I do not have to consider the issue of delay. If I had to do so the claimants knew that the Commission was involved in a time critical process. Having said that the minutes and notes of the meetings of the Commission were not publically available. The claimants may have been able to deduce that Mr Muirhead was part of the decision making process but they did not know what that process was; they did not know about the iterative approach to the sift criteria, how they were developed over time and in response to public consultation including a response from themselves. They only became aware of the background with the disclosure of the documents through the prospect of these proceedings.
174. In the circumstances, if necessary, I would have extended time within which to bring this claim. As it is I grant permission to bring the claim for judicial review but dismiss the substantive action for the reasons I have set out above.
175. I express my gratitude to Counsel for their extremely efficient and expeditious submissions all made within the agreed timetable and to the parties generally for the preparation of the case within an expedited timetable.
176. I invite submissions as to the appropriate order and costs.