Neutral Citation Number: [2022] EWHC 3060 (Admin)

Case No: CO/4044/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Thursday 1st December 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of DONCASTER METROPOLITAN BOROUGH COUNCIL)	**Claimant**
- and -	
DONCASTER SHEFFIELD AIRPORT LIMITED	**Defendant**
-and-	
(1) PEEL L&P INVESTMENTS (INTERMEDIATE) LTD **(2) SOUTH YORKSHIRE MAYORAL COMBINED AUTHORITY**	**Interested Parties**

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James Maurici KC and **Jacqueline Lean** (instructed by DLA Piper UK LLP) for the **Claimant**
John Litton KC and **Nick Grant** (instructed by Squire Patton Boggs (UK) LLP)
for the **Defendant**
Heather Emmerson (instructed by South Yorkshire Mayoral Combined Authority)
for the **Second Interested Party**
The **First Interested Party** did not appear and was not represented

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Hearing date: 22/11/22

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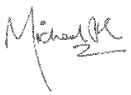
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a claim for judicial review whose purpose is to try and keep alive the prospect of continued aviation activities at Doncaster Sheffield Airport ("the Airport"), by securing that the Airport is placed in the hands of a new third party. That is in the context of an announcement on 26 September 2022 ("the September Announcement") by the Peel Group ("TPG") that the winding down of aviation services at the Airport would begin on the week of 31 October 2022. The Airport is owned and operated by TPG through its operational company, and wholly-owned subsidiary, the Defendant ("the Operator") who occupies the Airport under a 99 year lease dated March 2018. That lease is currently scheduled for termination with effect from 16 May 2023. The freehold owner is the First Interested Party ("the Freeholder"), another wholly owned subsidiary of TPG. The Claimant ("the Council") is supported by the Second Interested Party ("the Combined Council").

2. The claim for judicial review was issued on 2 November 2022. It was rightly issued in the North-East, as the region with which the claim is most closely connected. The Administrative Court in Leeds has shown that it can act speedily. On 14 November 2022, I made directions for a one-day oral hearing on 22 November 2022. The parties were jointly inviting a day's hearing for oral submissions on whether permission for judicial review should be granted and whether the court should grant interim relief. The parties and their lawyers worked tirelessly on getting some 3,000 pages of primary and secondary, legal and factual, material before the Court. The Operator's Grounds of Defence, and the Combined Authority's Grounds of Support were filed on 16 November 2022. Witness statement evidence was supplied from Damien Allen (the Council's chief executive officer) on 2 and 18 November 2022; from David Grant (the Operator's managing director) and Robert Hough (the Operator's chairman and a director) both dated 16 November 2022; and from Gareth Sutton (the Combined Authority's executive director of finance and investment) dated 18 November 2022. I granted permission for those witness statements requiring it, and (subject to any costs issues) for the Operator to rely on Grounds of Defence exceeding the 30-page limit (CPR PD54A §6.2(4)), none of which was opposed. Undertakings given by the Operator on 31 October 2022, and which would have lapsed at midnight on 22 November 2022 have been extended to the date of hand-down of this judgment (or if later midnight on 2 December 2022). A confidential embargoed draft of this judgment was provided to the parties at lunchtime on 24 November 2022. That draft judgment involved no decision, either way, on an aspect on which I had given a timetable for further evidence: the implications of the Council's draft order for interim relief extending beyond the scope of the undertakings. In the event, no further evidence was filed.

Sequence of Events

3. The sequence of events culminating in the September Announcement involved a lot of activity and communication. For now, it is sufficient to give a brief outline of some aspects of that sequence, as reference-points. On 12 July 2022 the Operator's Mr Hough wrote an email to the Council's Mr Allen describing a Strategic Review ("review of strategic options for the Airport") which the Board of the Operator had begun, as a "consultation and engagement programme with stakeholders". An announcement ("the

July announcement") of the Strategic Review was made the following day on 13 July 2022. Mr Hough and the Operator's Chief Executive Steven Underwood wrote letters about the Strategic Review: on 1 August 2022 to the Council's Mr Allen and the Combined Authority's Chief Executive Martin Swales, following a meeting; and on 22 August 2022 to the Combined Authority's Mayor Oliver Coppard. An announcement ("the August announcement") was made on 23 August 2022, giving "an extension to the consultation" to 16 September 2022. There was a meeting of the "Weekly Negotiating Group" – a group including Mr Allen, Mr Swales, Mr Hough, Mr Grant and others – on 25 August 2022. The Council and the Combined Authority (collectively "the CCA") wrote letters to Mr Underwood and Mr Hough: on 8 September 2022 (referring to "economic impact work" and requesting "a separate process"); on 12 September 2022 (asking for "a new and short process (90 days)"); and on 22 September 2022 (offering a £7m bridging grant to cover operational losses over a 13 month period). A principal theme of those three letters was that there was investor interest: 8 September 2022 (referring to "strong market interest" with "one group that we believe is an extremely serious proposition"); 12 September 2022 (referring to having "identified what is a highly desirable bidder with extensive aviation experience"); and 22 September 2022 (referring to "market testing" having "brought forward conversations with some 10 potential investors" including "interest from airlines, a global asset management business, a UK based new venture in the aviation sector, significant local aviation businesses interest and an international investment bank"). On 25 September 2022 Mr Underwood wrote a Decision Letter to CCA foreshadowing the September Announcement made the following day.

About the Airport

4. Among the themes emphasised to me and deployed in the arguments of CCA are points about the significance of the Airport and aviation operations there, and the significance and impacts of closure of the Airport. The following points are some reference-points from among the evidence before the Court. The Airport is integral to the Council's vision to build a green and inclusive economy. The Doncaster Local Plan 2015-2035 describes the Airport as the "Gateway to the City Region" and the sustainable growth of the Airport as a "key proposal", noting the "transformational effect it could have on the local and regional economy", and stating that: "the Airport is an economic priority both for Doncaster and for the Sheffield City Region as a whole. The airport corridor is recognised regionally as a catalyst for business development, inward investment and job creation with regard to logistics, engineering and associated aviation activities. The Doncaster Inclusive Growth Strategy continues to support airport growth including expanding the enterprise sectors and linking to regional growth corridors (such as the aforementioned Advanced Manufacturing Park). [The] Airport will play a key role in driving the local and regional economy forward." The Airport is a recognised growth corridor within the Sheffield City Region Local Enterprise Partnership and Integrated Infrastructure Plan, and is integral to the city region transport and economic strategies. The Integrated Infrastructure Plan says the Airport: "Provides an international gateway and attracts aero related employment and training" and "is recognised as a catalyst for business development, inward investment and job creation with regard to logistics, engineering and associated aviation activities", within an "area" which "includes an Enterprise Zone site and the iPort, a major strategic rail freight hub and employment site". The Airport is recognised as an important economic centre in Transport for the North's Strategic Transport Plan. The Airport is targeted in the Combined Authority's

Strategic Economic Plan for 2021-2041, as a focus area for economic growth; as one of three sites that "has unique strengths, outstanding connectivity and large land allocations for commercial and residential development" which "link to Doncaster's priority industries and provide a focus for economic development support." The Council considers that the Airport represents a national opportunity in terms of the UK Government's "levelling-up" agenda to deliver growth in economic output, productivity and exports in the North of England, particularly South Yorkshire, North Nottinghamshire and North Lincolnshire. The Airport is featured in Central Government's Flightpath to the Future Plan, which emphasises the importance of the regional airport network in unlocking local benefits and levelling up, by reference to "positive economic outcomes … for the whole of the UK" supporting "jobs, investment, trade and tourism".

5. In a March 2018 Draft Consultation Report on its Masterplan 2018-2037 TPG described the Airport's "unique potential … to deliver major international connectivity for Yorkshire, surrounding regions and the UK", to "drive significant job creation in Doncaster and the Sheffield City Region", as an international airport which "puts a region on the global map" and "acts as a magnet to draw people and investment to the region, driving economic activity and other industries such as tourism", and as a "unique opportunity to deliver a major international gateway for the country". The documents also describe the Airport as having consistently been named the "UK's Best Airport (under 10 million passengers)" by Which? Magazine. In a Strategic Update in June 2020 the "pre-Covid vision" was described by the Operator as follows: "The Airport and surrounding Gateway East development site is already crucial to the Region, supporting around 1,700 jobs and contributing circa £67m GVA (Gross Value Added) per annum. Over 100 businesses are operating across the wider site." The evidence, including that of Mr Allen, describes in graphic terms the harm that the closure of the Airport will do to the local and regional economy, resulting in the loss of jobs and opportunities for local people, negatively impacting economic prosperity in the South Yorkshire region and beyond, at a time where many are already struggling with the cost of living crisis.

Viability: some reference-points

6. Among the themes emphasised to me by the Operator is the position, presented from its perspective and that of TPG, as to the commercial viability of the Airport. I will give the flavour of that material. I record that CCA and some others strongly disagree: they maintain that aviation operations at the Airport are viable, at least in the hands of a third party. The September Announcement began with this:

> ***[1] Today the Peel Group announces that the Strategic Review at Doncaster Sheffield Airport (DSA) has ended. Regretfully, no tangible proposals have been received regarding the ownership of the airport or which address the fundamental lack of financial viability. The high fixed costs associated with running a safe, regulated airport, together with recent events materially reducing prospective future aviation income streams, mean that a break-even business plan cannot be identified for the foreseeable future. [2] As a result, DSA will begin winding down the provision of aviation services during the week commencing Monday, 31 October 2022. DSA will continue to work closely with airport customers and other users to explain the impact of this service reduction and work with them to minimise the disruption to their operations and customers. [3] Since the July 2022 announcement of the Strategic Review, Peel has been actively engaging on a weekly basis with local and national political stakeholders, including proactively engaging with working group meetings, primarily led by officers at Doncaster Council, South Yorkshire Mayoral Combined Authority (SYMCA) and***

> ***the Department for Transport (DfT). Throughout the consultation process up until today, Peel has also been in close contact with the airlines and other aviation users of the Airport. None of these discussions has delivered any tangible results that have changed the Board of DSA or Peel's clear view that the Airport is and will remain unviable…***

7. The Operator's evidence before me includes a lot of background about what has happened over the years. Among it were the following points. Since the Airport was acquired in 1999 the total investment, primarily through TPG, is over £250m. Up to the financial year 2021/22 the losses sustained exceeded £236m. After the Airport opened in 2005 it attracted a range of passenger flights operated by Thomson (which became TUI) and then attracted both Ryanair and EasyJet to operate a limited number of passenger flights from the Airport. The Operator's business plan was to attract one or more of Ryanair, EasyJet or Jet2 to establish an operational base from the Airport. Although that did not succeed the Operator was successful in attracting the new entrant WizzAir to operate from the Airport from 2006. The airline Flybe left the Airport in 2019 and entered administration in 2020. WizzAir operated from the Airport: it was not based there but agreed to base one aircraft there in August 2020. Attempts to attract Amazon and/or DHL to base airline services at the Airport did not succeed. A proposed £20m of equity investment, or alternatively lending, from the Combined Authority did not proceed. The two remaining operating passenger airlines were TUI and WizzAir. On 3 June 2022 WizzAir announced that it was withdrawing its aviation base from the Airport. The last passenger flights operated by WizzAir was on 29 October 2022. TUI's final flight was on 4 November 2022. There had been confirmation from within TPG of ongoing financial support for the Operator to 18 January 2023. But, after the Strategic Review, on 24 September 2022 TPG decided that the Operator's funding would be restricted to that required to effect an orderly winding-down of operations.

8. The Strategic Review, announced on 13 July 2022, had followed a report by PricewaterhouseCoopers LLP dated 4 July 2022 ("the PWC Report"), to the Boards of the Operator and of Peel Investments (DSA) Ltd ("Peel Investments"). The summary of the PWC Report concluded that "Options available to increase passenger numbers / revenue streams appear well explored and pursued by management but to no avail"; that "the airport sector faces a number of headwinds relating to changes in demand driven by Covid and net zero"; that in all four of the forecast scenarios generated by the Operator "at least £40m of cash support… will be required over the next six years"; that "in all scenarios, the [Net Present Value] of future cashflows is negative"; that "in the current circumstances, it is difficult to see the pathway to [the Operator] becoming profitable and cash generative"; and "in the absence of [TPG]'s desire to continue to fund the business, we do not believe a commercial alternative exists that would preserve [the Operator] as a commercial airport operating as a going concern".

The supervisory jurisdiction

9. Judicial review is a secondary, supervisory jurisdiction. It serves to hold public authorities – which includes bodies discharging a "public function" – accountable to and through the application of objective legal standards. Those legal standards include legal principles which delineate public law duties for public authorities to discharge and judicial review courts to enforce. They also include legal principles which govern the applicability and application of the supervisory jurisdiction itself. The Court's role is to identify the relevant principles and apply them. Nothing more, nothing less.

Beyond that, it is no part of the Court's function to reach or express views about the merits of the positions adopted by the parties.

Reviewability

10. Mr Litton KC (with Mr Grant) for the Operator submits that judicial review can have no application to the impugned decision in the Decision Letter of 25 September 2022 and the September Announcement to proceed to close the Airport. That is because the Operator is a private company who was at all times acting as a private entity and not discharging a public function. His argument, in essence as I saw it, was as follows. The relevant principles are those set out in R (Ames) v Lord Chancellor [2018] EWHC 2250 (Admin) at §55, namely (as relevant to this case): (i) the impugned decision must have a sufficient public law element to make it amenable to judicial review; (ii) there is no universal test of whether it does so and it is a question of degree; the Court has regard to the nature, context and consequences of the decision; (iv) the Court also has regard to the grounds on which the decision is challenged; (v) the paradigm reviewable function is that of a public body exercising a statutory power (but even that is not necessarily always conclusive); (vi) the question is whether the challenged decision is one involved in the performance of a public function, with a sufficient public law element. The central principle is that identified in R (Liberal Democrats) v ITV Broadcasting Ltd [2019] EWHC 3282 (Admin) [2020] 4 WLR 4 at §72(5), that functions of a public character are "essentially functions which are governmental in nature". The three negative truths identified in Liberal Democrats at §72(1)-(3), all of material assistance in the present case, are: (i) the provision of a service for the public benefit is not of itself a public function; (ii) the fact that a function has a public connection with a statutory duty of a public body does not of itself make that function a public function; and (iii) the fact that a public authority could have performed a function which is performed by a private body does not make that a public function. Like ITV in Liberal Democrats, this case involves the operations of a private body, having a private profit-making motivation: see §72(4). Here, as there (see Liberal Democrats at §85): the private body's activities are purely commercial notwithstanding that they are provided to the public at large; the source of the powers and duties derives from a memorandum and articles of association not from statute; the activities are not monopolistic; the function is not intrinsically governmental or quasi-governmental; there are obligations under a licence; this is a private commercial undertaking offering services to the public at large; but none of this means there is amenability to judicial review. True, there are a number of cases which have found (or assumed) that a private body who is an airport operator can in certain circumstances and for certain purposes be amenable to judicial review. But these are all in contexts and circumstances distinguishable from the present context. Although R (Beer) v Hampshire Farmers Market Ltd [2003] EWCA Civ 1056 [2004] 1 WLR 233 – relied on by the Council – illustrates that a private company can discharge a public function so as to be amenable to judicial review, there is no read-across to the present case. Beer was a case where the public function arose from particular circumstances: the local authority there had set up a private company to run a market; it did so on publicly owned land, to which the public had a right of access; it was set up using statutory powers; and it was stepping into the shoes of the local authority, performing the same function as the local authority had previously performed, and on a not-for-profit basis. As in the Liberal Democrats case (at §94), this Court can and should conclude with confidence at the permission stage that the decision under challenge is not amenable to judicial review.

11. This is a powerful line of argument. It may very well be correct. But I have been persuaded by Mr Maurici KC (with Ms Lean) for the Council, supported by Ms Emmerson for the Combined Authority, that it is arguable with a realistic prospect of success that the Operator is, in its decision-making regarding closure of the Airport, discharging a "public function" amenable to judicial review and attracting public law's basic standards of lawfulness, reasonableness and fairness. I am also persuaded that arguability is the appropriate threshold for the purposes of permission, at least in the present case, on this important issue. That means – on the premise that the Operator was discharging a public function – if there are viable grounds for judicial review and no discretionary bar, I would grant permission for judicial review in this case. That would allow all of the arguments, including reviewability, to be dealt with on full submissions, in greater detail, at a substantive hearing.

12. The starting point is that the case law supports the proposition that an airport operator – although a privately owned company – can in principle be discharging a public function so as to be amenable to judicial review, some of the time. That raises a question of where the line is to be drawn. The airport operator cases to which reference was made were, in date sequence, the following. R v Fairoaks Airport Ltd ex p Roads [1999] COD 168 (Dyson J, 3.11.98; transcript available on Lexis). In that case the High Court granted judicial review holding that, in choosing to establish a consultative committee, the private body operator of Fairoaks airport had breached a statutory duty (under the Civil Aviation Act 1982 section 35(2)), linked to Department of Transport Guidelines, to allow adequate facilities for consultation for a residents or action group (section 35(2)(c)). R (Scott) v Heathrow Airport Ltd [2005] EWHC 2669 (Admin) (Owen J, 1.12.05). In that case the High Court refused judicial review, holding that the private body operator of Heathrow – in enforcing byelaws that it was statutorily empowered to make (under the Airports Act 1986 section 63) – had issued a prohibition notice against a taxi driver which was neither unreasonable nor unfair. R (Takeley Parish Council) v Stansted Airport Ltd [2005] EWHC 3312 (Admin) (Lloyd Jones J, 14.12.05). In that case the High Court refused permission for judicial review, holding that the private body operator of Stansted's 'blight' schemes, viewed against a relevant White Paper and the Human Rights Act 1998, were not arguably unlawful. R (Birmingham and Solihull Taxi Association) v Birmingham International Airport Ltd [2009] EWHC 1913 (Admin) (Wyn Williams J, 27.7.09). In that case the High Court refused judicial review at a 'rolled up' hearing, holding that the private body operator of Birmingham Airport's decision to terminate a licence to a Taxi Association and grant a licence to a competitor association involved no procedural impropriety. R (Easybus Ltd) v Stansted Airport Ltd [2015] EWHC 3833 (Admin) (Warby J, 13.11.15). In that case the High Court refused permission for judicial review, holding that the private body operator of Stansted's decision terminating a licence and excluding a bus operator involved no arguable public law error.

13. The Operator has a Consultative Committee of the kind which featured in Roads. Indeed, that Committee met on 29 September 2022 for discussions with representatives of the Operator in light of the September Announcement. But Mr Maurici KC told me that he was not able to submit that the Airport had been "designated by order" for the purposes of section 35 of the 1982 Act, so as to fall directly within the statutory duty in play in the Roads case. Had it been otherwise, he might have been able to invoke an 'interweaving into statutory provisions' relevant to consultation with respect to matters concerning the 'management or administration' of an airport affecting the interests of

persons within the locality, as well as of interest to local authorities in whose area the airport is situated (section 35(2)(b)). There is, however, the 'regulatory' power conferred by Parliament in section 63 of the Airports Act 1986, whereby a designated airport is empowered to make byelaws for regulating the use and operation of the airport. I understand it to be accepted that 'interweaving" is applicable to the Operator. That would mean that, when making or enforcing byelaws restricting access to the airport there would – on the authorities – be a sufficient public function for the purposes of amenability to judicial review. That would be a direct parallel with the cases of Scott, Birmingham and Easybus. One answer, of course, is to draw the line in that place and no further, at least absent some further and directly relevant 'Governmental interweaving' as arose from the White Paper in Takeley. But another answer is that the recognised 'pockets' of reviewability in the previous cases are part of a larger garment, where accountability to public law standards is properly recognised as furthering the policy of the law. The logic that the private body operator of an airport is discharging a "public function" when making a decision regulating its airport area by reference to byelaws, including closing off access to the operational airport for taxis or buses or members of the public, but is discharging a function bereft of any sufficient public element when making a decision to close the airport down to everyone altogether, is striking. I bear in mind, as I have mentioned, that regard may properly be had to the "nature, context and consequences" of the decision. Easybus at §80 supports the propositions that: the Airport is land used in a relevant sense for "a public purpose"; the Operator is permitted to use the land as an airport "in the public interest"; and the Operator's function is carried out "in the national interest". Easybus at §80 also emphasises that the operation of an airport requires "forbearance" by others who might otherwise be able to object. That forbearance and inhibition is illustrated by a nuisance 'carve-out', prohibiting certain tort actions, found in the Civil Aviation Act 1982 ss.76-80. Birmingham at §63 supports the relevance of the fact that this is a decision "affecting substantial members of the public". Further strands in the rope, operating in combination, include the fact that the Operator is licensed (pursuant to Regulation 2018/1139); and that the Airport provides services for the police, coastguard and military as well as an emergency 'long landing strip'. There is famously no legal litmus test of amenability to judicial review. I have been persuaded by the combination of features that the reviewability issue is properly arguable. I would not have refused permission for judicial review on this ground.

Standing

14. Mr Litton KC maintains that permission for judicial review should be refused because the Claimant lacks the "sufficient interest" required by section 31(3) of the Senior Courts Act 1981. This is a bad point. The premise for testing the sufficiency of the Council's interest must, at least in the present case, be that this is a public function and there are arguable grounds for judicial review as advanced by the Council. Otherwise, permission for judicial review would be refused for independent reasons. The Airport is within the Council's administrative area. As has been seen, it is a key infrastructure asset interwoven into the Council's public and legally significant plans. The claim ranges far more broadly than the impact on the emergency police, military and coastguard services which the Operator argues would be better placed challengers. The Council has the capacity to prosecute these proceedings in the pursuit of what it judges appropriate in the promotion and protection of the interest of the inhabitants of its area: section 222 of the Local Government Act 1972. The interest – at the level of principle,

whether or not specifically designated – of a local authority in whose area an airport is situated is reflected in section 35(2)(b) of the Civil Aviation Act 1982, seen in the Roads case. The Council is heavily represented on the Operator's own Consultative Committee. When the Strategic Review was announced on 13 July 2022 prior notice was given the previous day to the Council by the email of 12 July 2022. When the ultimate decision was announced by the September Announcement, prior notice was given the previous day by the letter to CCA dated 25 September 2022. In each case that was because that the Council was recognised as "a key stakeholder" to the Airport, a phrase used expressly in the email of 12 July 2022. This decision was the outcome of a consultation with "stakeholders". It involved the rejection of suggestions, requests and offers put forward by CCA. Both the Decision Letter of 25 September 2022 and the September Statement dealt expressly with communications received from CCA. In the circumstances, I find it impossible to characterise the Council – supported as it is in this judicial review by the Combined Authority – as lacking a sufficient interest to bring this claim for judicial review.

Northumbrian Water

15. Mr Maurici KC and Mr Litton KC, at my invitation, addressed me on the possible implications for the arguments in the present case of the judgment of Collins J in R v Northumbrian Water ex p Newcastle and North Tyneside Health Authority [1999] Env LR 715. In that case the High Court refused judicial review of the decision of the defendant water company, declining the request of the claimant health authority to extend artificial fluoridation to water supplies. The decision was held to be amenable to judicial review, in circumstances where Parliament had conferred a statutory power on the water company to fluoridate a water supply. In his judgment, Collins J discussed the public law principle that public authorities are "essentially different" from private persons because a public authority is under a public law duty to act "upon lawful and relevant grounds of public interest" (see 724). Collins J went on to say (at 725) that a "commercial organisation" such as the defendant water company could not be said to "possess powers solely in order that it may use them for the public good", given its "commercial obligations to its shareholders". That meant the water company's public law duties were to comply with its statutory duties and exercise its statutory discretion within the scope of the statute conferring that discretion. In considering the reasonableness of the water company's refusal in that case, Collins J returned to the fact that the water company was "not a public body but a commercial undertaking", albeit amenable to judicial review and exercising a statutory power (see 729-730). Northumbrian Water is therefore a case where the private body was amenable to judicial review, but not duty bound to act in the public interest unless that was what an applicable statutory provision required of it. Neither Counsel supported Northumbrian Water as their primary position, but each would adopt it if necessary as a 'fallback' position. Mr Maurici KC reserved his position on whether Northumbrian Water is correctly decided. Mr Litton KC says the Operator is not amenable to judicial review. Mr Maurici KC says the Operator is amenable to judicial review and should at least take into account the public interest: I am satisfied that this is arguable.

Repurposing

16. Mr Maurici KC accepted that the Operator's "commercial interests" were not a "legal irrelevancy", and that the Operator was entitled to "have regard" to those commercial interests and give them "weight". He accepted that the same was true of TPG's plans

for the "repurposing" of the site of the Airport. On that point, he accepted that he could not maintain the following position taken in the Grounds for Judicial Review: that the "future aspirations which the Operator's parent companies might have to develop the Airport site for a non-airport use, for the purpose of maximising their financial return on the Airport" was "not a factor which should have been taken into account by the Operator when making a decision as to the future of the airport". That argument, alleging a "legal irrelevancy" was therefore abandoned. In my judgment, rightly so. The email of 12 July 2022 announcing the Strategic Review said that the Operator and TPG were initiating a consultation and engagement programme with stakeholders in light of the conclusion that "aviation activity may now no longer be the use for the site which delivers the maximum economic and environmental benefit to the region", and that the strategic review with stakeholders would be "on the future of the site and how best to maximise and capitalise on future economic growth opportunities for Doncaster and the wider Sheffield city region". The letter of 1 August 2022 emphasised that TPG's position was that "we have agreed to explore all options for the Airport and its site, including, but not exclusively, those which may retain aviation activity". In other words, options for the site which did not "retain aviation activity" were appropriate for consideration. The PWC report, itself issued to stakeholders in the context of the strategic review, had referred to Peel Investments' "initial conclusion to re-purpose the site" as appearing reasonable. The Decision Letter of 25 September 2022 refused the offer of the bridging grant, declining to agree "to a highly uncertain process with no indication that it will yield an outcome that it will be acceptable … or deliver a result that will be preferable to the alternative options for the airport site". The reference to "the alternative options for the airport site" is plainly a reference to the prospect of repurposing, which was part of the context and setting throughout.

Delay

17. I do not accept Mr Litton KC's argument that I should refuse permission for judicial review on the grounds of delay and a lack of promptness. This claim for judicial review was issued on 2 November 2022. The Council was notified of the decision on 25 September 2022. The claim was issued 5½ weeks after the grounds for judicial review arose, and were known to arise. In my judgment, the Council was skating on thin ice by waiting 5½ weeks to file the claim for judicial review. Claims for judicial review attract a contextually applicable promptness duty, with a three month long stop and the discretion to extend time. This was a decision about closing an airport, after a period of direct engagement and knowledge that closure was a possible outcome. It was obvious that steps would be taken, and third parties affected. A delay was requested, and the requests had been refused. The Decision Letter of 25 September 2022 stated in terms that the consequence of the decision was that the operator "will begin winding down the provision of aviation services commencing 31 October 2022". The claim for judicial review was not issued until after that date. Moreover, it was explained at the Consultative Committee on 29 September 2022 that staff consultation would take place on 5/6 October 2022 regarding a "45 day consultation period" to run until late November/early December 2022. When judicial review was commenced it was brought as an urgent claim. It was also brought as a claim where interim relief (absent undertakings) was put forward as necessary, to protect against steps said to undermine the prospect of viable aviation activities being recommenced by a new operator following a third party purchase. The judicial review Court will move speedily in urgent cases and find the time to resolve legal issues. If this claim had been brought more

promptly there is, in my judgment, every prospect that this Court could have been determining the substantive issues within the timeframe which in the event led to the one-day permission and interim relief hearing and this judgment.

18. The complaint of prejudicial delay is a serious and substantial one. But, in the end, I would not uphold it. The Council, a public authority, had been actively involved in the engagement leading to the decision and was proactive in the steps taken to attempt to rescue aviation activities at the Airport in light of the decision. That proactivity was known to the Operator. So was the strength of disagreement with the decision to close the Airport and to begin wind down operations. There is evidence from Mr Allen describing the steps taken, including the engagement with TPG, attempts to progress matters with a third party purchaser, the renewed offer of bridging grant funding to allow the Airport to remain open, all against the backcloth of the disastrous closure which CCA perceived and were seeking to avoid. Then, in the midst of all of that, there was a letter dated 13 October 2022 from CCA which said this: "whilst we are confident that options are available to Peel which should be commercially attractive, you should be aware that we are considering injunctive and public law remedies and setting in motion the necessary steps to be in a position to proceed with compulsory purchase without delay, should it be necessary to do so. We continue to hope that a more collaborative solution can be reached so that compulsory acquisition will not be required". That letter was written within 2½ weeks of the September Announcement. A further letter threatening proceedings including interim injunctive relief was written by the Council on 24 October 2022. A judicial review pre-action letter was sent by the Council's solicitors the following day. Mr Maurici KC reminds me of the 'six week' principle, at one time perceived by judicial review Courts in cases involving challenges by judicial review to planning developments, but not ultimately adopted by the Courts. His point is that there is no guideline six week rule but, even if there were, this claim would have been brought within that guideline time bracket. My view is that the Council to some extent 'ran the gauntlet' in this case and has placed itself on the outer limits of promptness in the present context. That is so notwithstanding the approach, which is understandable, of focusing resources on other solutions and turning to the lawyers to draft a claim only as a 'last resort'. I think there has been a delay of a nature capable of having consequences in relation to any question of interim relief. I will return to that. But, in my judgment, the Council did just enough. Assuming arguable reviewability, and if there were viable grounds put forward by the Council, in what is an important case, I would not reject the claim at the permission stage on grounds of a lack of promptness.

Triggering the Sedley Requirements

19. Having cleared the decks, I can turn to the grounds for judicial review. I start with a threshold question as to whether – on the premise that this was here a public function amenable to judicial review – it is arguable that embarking on the Strategic Review was action which of itself triggered the application of the Sedley Requirements of a lawful consultation. Those four basic requirements were endorsed by the Supreme Court in R (Moseley) v Haringey London Borough Council [2014] UKSC 56 [2014] 1 WLR 3947 at §25. Mr Litton KC accepted orally, in my judgment rightly, that the answer to this threshold question is yes. I proceed on the basis that the Sedley Requirements were arguably triggered. The email of 12 July 2022 said that the Operator and TPG were acting to "initiate a consultation and engagement programme with stakeholders". The

July announcement used the same phrase. The letter of 1 August 2022 described the Strategic Review process as "principally a consultation with our South Yorkshire partners", albeit "not a formal public consultation". There were several other references to "consultation".

A cluster of linked arguments

20. Next, I can turn to a number of aspects of the proposed grounds for judicial review which are closely interrelated. As I have explained, one ground for judicial review is that the Sedley Requirements of a legally adequate consultation were breached. One feature of that ground is the argument that this was a consultation which did not involve proposals "still at a formative stage" (Sedley Requirement 1). What is said is that there was an actual or apparent "predetermination", as to which see R (Electronic Collar Manufacturers Association) v SSEFRA [2019] EWHC 2813 at §§139-140. Another feature of that ground for judicial review is the argument that the product of consultation was not "conscientiously taken into account" (Sedley Requirement 4). A third feature is the argument that the "only option actually under consideration was closure", which is really a restatement of the first two features. A distinct ground for judicial review is breach of the public law duty to act reasonably, including by failing to "have regard" to legal relevancies, as to which see R (Friends of the Earth Ltd) v Secretary of State for Transport [2020] UKSC 52 [2021] PTSR 19 at §§116-121. The points said not to have been "conscientiously taken into account" (Sedley Requirement 4) are the same points said to have been legal relevancies to which no "regard" was had. There are four of these Points: (1) the serious market interest (third party prospective purchasers); (2) the offer of the £7m bridging grant to allow time to find a third party purchaser; (3) the economic impacts as assessed in an economic impact assessment report (dated 8 September 2022 by Steer Economic Development for CCA) and put forward by CCA in the letter of 8 September 2022; and (4) the other impacts of closure including for the public and local inhabitants and businesses, and in relation to the public services such as military, police and air rescue. Points (1) and (2) are linked: the offer of a bridging grant was intended to provide a cost-free period of time for a prospective third party buyer to make a concrete and tangible proposal which could succeed. As to Point (1), another linked way of putting the same criticism was Mr Maurici KC's oral submission that there was not a reasonably sufficient "enquiry" as to third-party prospective purchasers put forward by CCA: see R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin) [2015] 3 All ER 261 at §§99-100. I was shown a chorus of voices criticising the Operator and TPG. Mr Maurici KC and Ms Emmerson emphasise the absence of contemporaneous documents in the form of minutes, reports or notes or emails, which could serve to provide the appropriate reassurance on these aspects of the case. In my judgment, all of these aspects are closely interrelated and overlapping points about the Operator's state of mind and thinking process, albeit that the legal prisms by reference to which they are advanced are distinct. I will deal first with the arguments relating to the idea of a 'closed mind', then turn to the arguments relating to Points (1)-(4). I make clear that I accept that it is at least arguable that the four Points (1)-(4) were required to be "conscientiously considered", and "regard" needed to be had to them as obviously relevant considerations.

Closed mind

21. In my judgment, it is not arguable with any realistic prospect of success that the Strategic Review was approached with an actual or apparent "predetermined" position or "closed mind" or that the Operator was "not listening". The PWC Report had recorded that Peel Investments had been considering its future options in relation to its investment in the Operator, given its desire to stem the ongoing investment losses and ultimately recover shareholder value from the site in the future, with options ranging from operational improvement plans for the business to re-purpose in the site for other industrial purposes and winding down the Operator's operations. The Report describes an "initial conclusion", being to wind down aviation activities and repurpose the site. The email of 12 July 2022 then described the review of strategic options in light of a conclusion that aviation activity on the site "may" no longer be commercially viable. That was repeated in the July Announcement. Both of those contemporaneous documents referred to the scope of the exercise as being a consultation and engagement programme with stakeholders "on the future of the site and how best to maximise and capitalise on future economic growth opportunities for Doncaster and the wider Sheffield city region". That, moreover, was an exercise voluntarily embarked upon. It is no part of this claim for judicial review that there was a legal duty to conduct a consultation. The source of the triggering of the Sedley Requirements squarely rests on a voluntary act. That voluntary act of itself, embodied in contemporaneous documents, runs counter to the suggestion of predetermination. In the communications that followed, the position is reinforced. The letter of 1 August 2022 described TPG's position that it had "agreed to explore all options for the Airport and its site, including, but not exclusively, those which may retain aviation activity". The letter repeated: "we would be willing to consider all proposals regarding the Airport" and "we will also consider any proposals from our South Yorkshire partners and other third parties received during the strategic review period". Then the letter of 22 August 2022 said: "we remain open to receiving and will consider any credible proposals from both the public and private sector that address the fundamental problem of a lack of commercial viability, namely a lack of revenue to meet the high operating costs required to run a safe, regulated commercial airport". That letter went on to explain what would be needed of "any ownership proposal to be seriously considered". Next, was the decision announced in the August announcement that "despite the lack of any tangible proposal from public or private sector partners, we have agreed an extension to the consultation to 16 September to allow more time for key stakeholders to conclude their discussions".

22. Moreover, there was a transparency on the part of the Operator and TPG of an aspect on which they had a firm view. They were not afraid to say so and there was no concealment of that firmness of view, on that aspect. This is inconsistent with there being a predetermination on everything. The particular aspect was that it was repeatedly emphasised that there was no appetite for the Operator and TPG continuing with a non-viable and loss-making aviation operation supported by a loan. This was transparently stated in the letter of 1 August 2022, that whilst TPG were "willing to consider all proposals regarding the Airport," they "made it clear that we are not interested in proposals that inject loans to fund operational losses or equity partnerships to share losses based on a fundamentally unviable operating model – this is purely delaying the inevitable and impacting on the definition of the future potential for the site". The same point was made in the letter of 22 August 2022 and at the meeting of the Weekly Negotiating Group on 25 August 2022.

23. Then the Decision Letter of 25 September 2022 said: "Nothing has come forward during the period of the Strategic Review that has changed the Board's view of the fundamental lack of viability of the current and prospective aviation activities"; and "there have been no tangible proposals to consider, however early stage, regarding future alternative ownership or operation of the airport". As has been seen, the September Announcement explained:

> ***Since the July 2022 announcement of the strategic review, Peel has been actively engaging on a weekly basis with local and national political stakeholders, including proactively engaging with working group meetings, primarily led by officers at Doncaster Council, South Yorkshire Mayoral Combined Authority (SYMCA) and the Department for Transport (DfT). Throughout the consultation process up until today, Peel has also been in close contact with the airlines and other aviation users of the Airport. None of these discussions has delivered any tangible results that have changed the Board of [the Operator] or Peel's clear view that the airport is and will remain unviable.***

There had been at the outset a view as to viability of aviation activities at the Airport, informed by the PWC Report. The view was communicated. The PWC Report was made available. This was a Strategic Review and consultation with stakeholders which was set up, voluntarily. It was then extended. As Mr Litton KC submits, the entire course of dealing reflects a receptiveness and contraindicates predetermination. Finally, the Court has a witness statement from Mr Hough which describes the engagement with CCA, prospective bidders and other stakeholders throughout the strategic review process, the outcome of which was that there were no realistic proposals to ensure the future viability of the airport and as to third parties no details and no offers received.

Serious market interest (third party purchasers)

24. So far as this Point (1) is concerned, it is clear from contemporaneous documents that conscientious consideration and regard were had to this. When extension to the strategic review and consultation period was announced it was explained that at that point there was a "lack of any tangible proposals from public or private sector partners" but that extension was being allowed to 16 September 2022 "to allow more time for key stakeholders to conclude their discussions". What was clearly directly in play was whether or not tangible proposals would be forthcoming. Moreover, the CCA letter of 8 September 2022 said this under the heading "investor interest": "you have been very clear about the criteria you would expect to see met by any potential investor, purchaser or operator of [the Airport] in order to enter into serious discussion". In other words, what was being acknowledged was that during the Strategic Review engagement the Operator and TPG had identified "criteria" for the serious market interest (Third Party purchasers) to me. That was plainly because this was being treated as relevant for consideration. The problem was as the Decision Letter of 25 September 2022 made plain that "there have been no tangible proposals to consider, however early stage, regarding future alternative ownership or operation of the airport". That was directly referring to the topic of serious market interest (Third Party purchasers). Similarly, the September Announcement referred to the engagement and discussions and explained that none of these had "delivered any tangible results"; there were "the absence of any actual proposals to address the lack of viability of [the Airport], even those at an early stage of development, or any identified potential acquirers or operators of [the Airport]".

Offer of the bridging grant

25. So far as this Point (2) is concerned, it is equally clear that conscientious consideration and regard was had to that. The Decision Letter of 25 September 2022 was directly responding to that "proposal" received "on Friday morning". The letter recorded that the proposal had been "carefully considered", alongside the findings regarding future viability of the airport aviation activities. The letter gave reasons why "we cannot agree" to the process that was being suggested, with further time funded by the offer of "public money to support the ongoing operation of the airport". The September Announcement also contained a paragraph which dealt specifically with the offer of the £7m bridging grant. It said this:

> ***On Friday, 23 September, Peel received a further letter from SYMCA and Doncaster Council, which was supported by the Mayor of South Yorkshire and the Mayor of Doncaster, along with the Leaders of Barnsley and Rotherham, which included a proposal to provide public money to DSA to fund its operating losses until 31 October 2023. The grant was described as providing DSA with free cashflow to sustain losses that may occur over thirteen months while the Peel Group and South Yorkshire partners jointly explore the future potential of DSA and the GatewayEast site. In the absence of any actual proposals to address the lack of viability of DSA, even those at an early stage of development, or any identified potential acquirers or operators of DSA, Peel's Board has concluded that it cannot responsibly accept public money for this highly uncertain process against the backdrop of an unviable, loss-making operating business.***

There was a reasoned decision for rejecting the offer, which had been conscientiously considered and to which regard had been had. I will return to the question of whether it was arguably unreasonable. But that is a distinct ground for judicial review.

Economic impact

26. I turn to Point (3). The report by Steer Economic Development dated 8 September 2022 was a 23 page report commissioned by CCA to assess the current economic value of the Airport and the "likely impact that closure would have upon the local and regional economy". It said it was designed to inform discussions with TPG, assist decision-making relating to the future of the Airport and provide evidence to support public statements that may be required. The Report identified the economic impacts of the Airport, including for the 23 businesses operating at the Airport that were dependent on it including the 758 employees spanning seven different sectors, the user benefits, the indirect and induced impact and the catalytic impact. There was also a section setting out the in-depth qualitative insight into facets of the airport level of importance to surrounding local businesses drawn from 13 key stakeholders. The Report set out information to provide a clear sense of the importance of the Airport for the communities and businesses that directly and indirectly relied on its connectivity, facilities and passengers. The Report was put forward by CCA with the letter of 8 September 2022 and summarised in that letter as follows:

> ***We have a report that assesses the current economic value of DSA and the likely impacts that closure would have upon the local and regional economy. It is estimated that [the Airport] supports 2,713 jobs in the economy, contributes an annual net GVA of £108.4 million, and creates an annual welfare gain of approximately £49.5 million. Closure of [the Airport] would have an immediate effect on employment and GVA in Doncaster and South Yorkshire at a time when our economy is beset by challenges on inflation, energy costs and business/consumer confidence post the COVID-19 pandemic. It is for these reasons that public and private stakeholders, with cross-party support from our political leaders, have asked [the Operator] and [TPG] to reconsider its position on the airport's future.***

27. In my judgment, it is unarguable that this was not conscientiously considered, or that regard was not had to it. The September Announcement itself referred to the letter and the Steer Report. It said:

> ***Peel received a letter from the Mayor of South Yorkshire and Mayor of Doncaster on Thursday, 8 September, stating that they had completed an economic impact study of [the Airport] which identified its economic benefit to the region but provided no solution to its lack of financial viability.***

The letter and Report had been considered. It was not being denied that there was a very significant economic impact of the Airport being in operation, and of the Airport closing. This links to other impacts arising by reference to Point (4). There was a reasoned response. The problem was that it had been assessed that the Airport was not commercially viable going forward, in the context of £250,000,000 of investment in a business which had never made a profit, where – as Mr Litton KC emphasised – no consultants' report had been put forward to counter the PWC Report assessment of viability, and where no tangible proposal had surfaced. In those circumstances, the decision was to proceed to closure.

Other impacts

28. The same is true of Point (4) and other impacts. They were all known and understood. They are all significant. They were not set out as a discrete part of the Decision Letter or the September Statement. But nor, beyond argument, did they need to be. It is not unfair to observe that – unlike Points (2) and (3) – I was not shown any specific key passage in CCA's letters which can be said to have called for any specific response. The Offer of the bridging grant and the Steer Report were new and each received a specific reasoned response in the decision documents. The impact and implications for the public and on public services, and the impact and implications for employment and local businesses, were very much the setting for the consideration of whether there was any viable way forward. The Operator was not an outsider. I was shown documents emanating from the Operator and TPG, some of which I referenced at the start of this judgment, reflecting a knowledge of what is involved and at stake. The benefits which the Airport brought and was intended and envisaged to bring, and conversely the impact of its closure, were the context in which TPG had "invested the significant sums in Doncaster" by actions "to develop and operate the Airport as well as enhancing the public infrastructure in the area", all of which was referenced in the Decision Letter of 25 September 2022. The references at the end of the Decision Letter to the "creation of jobs and opportunities at the location" was against the backdrop of knowing and understanding what would be lost by the closure of the Airport. The reference in the September Announcement to the "active engagement on a weekly basis with local and national political stakeholders" and the "proactive engagement with working group meetings", were references to the process through which concerns about the implications of closure had been raised and heard. The references to "close contact with airlines and aviation users of the airport" reflected the importance of users. The September Announcement referred, in terms, to TPG's track record as a regeneration company "delivering jobs and investment for towns and cities across the North" and specific reference was made to the employees and the adverse implications of the announcement "for the Doncaster and wider South Yorkshire communities in which we have worked and invested for over two decades". There was no arguable failure of conscientious consideration, or regard, in relation to this aspect.

Other consultation points

29. There are two further arguments alleging breaches of the Sedley Requirements. The first is that there was no consultation with "the public" or "businesses beyond those hosted by the Airport". But none of the Sedley Requirements entails a consultation having to be with the public as a whole. Drawing defensible lines in a consultation exercise is a familiar feature. I was referred to no principle which requires that consultation is a binary, 'all or nothing' on/off switch, with "full public consultation" or "legally inadequate consultation", and nothing in between. Mr Maurici KC showed me as an example the earlier Masterplan consultation undertaken by the Operator, which was described as a "public consultation". But he accepts that that was a distinct exercise, which I was told was required (apparently of all airport operators) pursuant to relevant Guidance. It is no part of the Council's case that any "legitimate expectation" arose from any "practice" or "promise" of a "public" consultation, as to which see Plantagenet at §98(1). The voluntary consultation and engagement programme which was undertaken was, deliberately, an engagement "with stakeholders", as described in the email of 12 July 2022 and the July Announcement. Asked about the exercise, the letter of 1 August 2022 made very clear that this was not a "formal public consultation". It is not arguable with any realistic prospect of success that, through the voluntary act of a consultation with stakeholders, the Operator – who is not said otherwise to have had any duty to consult the public – thereby came under a duty, to do something which was beyond the deliberate and clearly expressed scope of the voluntary act.

30. The second argument is that insufficient time was provided to respond to the consultation, in breach of Sedley Requirement 3 (that "adequate time" must be given for "consideration and response"). Here the argument is that the time was manifestly insufficient for crystallised third party proposals to be identified and put forward. I was shown a chorus of voices criticising the lack of time. I weave in at this stage in the analysis that a related, but more ambitious point, is made by reference to reasonableness, namely that there was a duty of reasonably sufficient enquiry (Plantagenet at §§99-100) which required the Operator itself to "actively seeking out prospective investors to acquire or take over operation of the Airport". In my judgment, neither of these public law criticisms is arguable with a realistic prospect of success. The nature of the consultation exercise was designed to allow stakeholders to put forward options for consideration. The Operator and TPG had undertaken, alongside and informed by the PWC Report, consideration of viability. It understood that stakeholders may wish to put forward options for it to consider. The scope of the exercise, as described, made clear that these could include options for a purchase by a third party. The period of the Strategic Review was extended. Ultimately there was a period of 11 weeks. The Operator and TPG emphasised the importance of seeing something "tangible". Stakeholders requested further time. The Operator and TPG assessed an absence of any "tangible proposals" at "however … early [a] stage". At the time of the extension of the consultation on 23 August 2022 to 16 September 2022 the clear marker had been put down that there was a lack of "any tangible proposals from public or private sector partners". The time periods which were put forward were substantial: 90 days in the letter of 12 September 2022 and 13 months in the letter of 22 September 2022. These are not really extensions to a consultation period, for "consideration and response", but rather requests for a deferral of a substantive decision, with a new and further process. The letter of 12 September 2022 recognised that it was asking for a "new and short process (90 days) that enables the parties to

undertake due diligence in negotiations with the organisation". Subject to the application of the legal standard of reasonableness, to which I will come shortly, there is in my judgment no arguable claim as to the refusal to accept those further exercises being a breach of public law obligations, whether Sedley Requirement 3, or a failure to undertake a reasonably sufficient enquiry.

Reasonableness

31. In my judgment, this is really the high watermark of the legal challenge. As pleaded in the grounds for judicial review, the refusal to accept the offer of the £7m bridging grant was framed in two ways: first, as a breach of Sedley Requirement 3 (a manifestly insufficient period for consultation responses); secondly, as failing to have "regard" to Point (1) (serious market interest from prospective investors) in circumstances where the Operator would be financially protected under the terms of the offer. In his submissions for and at the hearing, Mr Maurici KC put this aspect of the case more directly and straightforwardly. Mr Litton KC made no complaint, and responded to the new formulation head on. Mr Maurici KC's submission was that the decision to reject the offer of the capital grant of ("up to") £7m to allow a 13 month period for a proposal to purchase the Airport to be achieved was, at least arguably, substantively unreasonable in a public law sense. I have set out in discussing Point (2) what the September Announcement said. The Decision Letter of 25 September 2022 said this:

> ***The Board has carefully considered the proposal, alongside the findings of the Board of DSA regarding the future viability of the airport's aviation activities, the supporting independent report by PWC and the findings from the Strategic Review carried out over the last ten weeks. Regretfully, the Board has concluded that it cannot responsibly accept public money to support the ongoing operation of the airport for what is a highly uncertain process against the backdrop of an unviable, loss-making business…***
>
> ***Nothing has come forward during the period of the Strategic Review that has changed the Board's view of the fundamental lack of viability of the current and prospective aviation activities. In addition, there have been no tangible proposals to consider, however early stage, regarding future alternative ownership or operation of the airport. As such we cannot agree to a highly uncertain process with no indication that it will yield an outcome that will be acceptable to Peel or deliver a result that will be preferable to the alternative options for the airport site.***

32. Mr Maurici KC criticises that reasoning as unreasonable in a public law sense. He emphasises two points. First, that the whole point of the offer of the bridging grant was to address the position of dealing with an Airport which in the Operator's hands was uneconomic and losing money. Secondly, that the whole point of the period of time for which the offer was intended to cover the Operator's operational costs was to allow a crystallised viable third party purchase to be identifiable. Given all of that, it was unreasonable and illogical to respond to the offer and reject it by giving as reasons that the Airport was uneconomic and losing money and that there was not yet a crystallised viable third party purchase identifiable. These were the two 'givens' at the heart of the rationale for the offer. They were reasons for the offer. They could not be reasons for rejecting it. Restating a 'dual vice' could not logically and reasonably be a reasonable basis for rejecting a solution designed to address that very same 'dual vice'.

33. This new argument was attractively presented. It has the unmistakeable virtue of striking directly at the heart of the decision sought to be impugned. But I cannot accept

that there is a realistic prospect that it would succeed at a substantive hearing. I will explain why.

i) The logic of the argument would have to be that an airport operator facing these circumstances could not reasonably do other than accept the offer in the letter of 22 September 2022. That response alone, would be "the" reasonable response, and non-acceptance of the offer would be outside the band of judgment with its decision-making latitude, afforded to the primary decision-maker.

ii) The context and circumstances are important. The Operator had adopted a provisional position that it could not see a viable way in which aviation activities could be undertaken on an ongoing basis at the Airport. That position was supported by the PWC Report which had been shared. No report had been forthcoming which sought to counter that analysis and provided any evidenced basis for concluding that aviation activities could be operated in an economically viable way from the Airport. An external report had been sought and provided in the form of the Steer Report but that was concerned to identify economic impact not viability, as the Operator emphasised in responding to that report (see in the discussion of Point (3) above). Having allowed a period for options to be put forward, and having extended that period – putting down the clear marker that no tangible proposal had come forward from public or private sector partners – the Operator was being told that there was strong market interest in one group believed to be an extremely serious proposition (the letter of 8 September 2022); a highly desirable bidder with extensive aviation experience (the letter of 12 September 2022); and conversations with 10 potential investors including interest from airlines, a global asset management business, a UK-based new venture in the aviation sector, significant local aviation businesses and an international investment bank (the letter of 22 September 2022). But the fact was that there were no "tangible proposals" to consider, not even tangible proposals at an "early stage".

iii) It is true that the offer of "up to £7m" would have served to discharge part of the £8½m in repayable capital loans which the Combined Authority had made to the Operator for capital expenditure projects, through a conversion of most of that loan money into a grant with no further interest payable. That was a way of providing £7m against ongoing operating costs, intended to be sufficient to cover them. But it remains the position that the offer would involve taking up to £7m of public money. It would involve committing to a 13 month process. During that time the Operator would be proceeding with a business which had been assessed not to be economically viable, for a 13 month period. It would also incur ongoing interest on the £1½m remaining loan. This called for a decision, as an exercise of judgment. Part of that was that accepting public money does raise a question as to whether it is a responsible course by the recipient in all the circumstances.

iv) Taking that step would have been to engage in a process whose prospects and prognosis were matters which could properly be considered and characterised. The description given in the Decision Letter of a "highly uncertain process with no indication that it will yield an outcome that will be acceptable" must, beyond argument, have been reasonably open to the Operator. The circumstances, the

process and prognosis also needed to be put alongside "alternative options for the airport site". The Operator had made clear from the start that these would be within the scope of the "review of strategic options" in describing (in the letter of 1 August 2022) exploring all options "including, but not exclusively, those which may retain aviation activity". That was a point emphasised in the Decision Letter, in rejecting the offer, in referring to "the alternative options for the airport site", within this conclusion: "we cannot agree to a highly uncertain process with no indication that it will yield an outcome that will be acceptable to Peel or deliver a result that will be preferable to the alternative options for the airport site". As I explained earlier, the prospect of repurposing is recognised by Mr Maurici KC as a relevant consideration to which the Operator was entitled to have regard and attribute weight.

Viewed overall, and in the context of that combination of features, the reasoned response to the offer read as a whole – and reflected in the contemporaneous documents – cannot be said with a realistic prospect of success to have been beyond the bounds of public law reasonableness.

Delegation/fetter

34. The final ground for judicial review is unlawful delegation. Expressed another way, it invokes the public law principles that a decision-maker with a public function must not fetter that function or abdicate it by surrendering its judgment to another decision-maker. This ground for judicial review arose out of what was said to be a lack of clarity in the decision documents as to whether the 'decision to close the airport' had been taken by TPG or by the Operator. Ultimately, reliance is placed on Mr Hough's evidence of attending a meeting on 23 September 2022 with John Whittaker, Chairman and Director of TPG, Steven Underwood as Director of the Operator and Stephen Wild as Director of the Freeholder where "[t]he purpose of the meeting was to discuss the outcome of the Strategic Review and enable Mr Whittaker to make an informed decision as to the future funding of DSAL by the Peel Group and ultimately the decision to close the Airport". Reading the evidence fairly and as a whole it is clear that there were two decisions. The first was a decision by TPG no longer to continue the ongoing funding for aviation activities at the Airport but rather to fund only an orderly winding down. The second was a decision of the Operator to proceed to close the Airport. Mr Hough's witness statement tells me that after the decision was taken in principle by TPG to restrict future financing of the Operator to the solvent winding down he had a conversation with Mr Underwood "in our capacity as directors of [the Operator] together with David Grant managing director of [the Operator] and we agreed that having regard to the decision taken by [TPG] to limit funding to [the Operator] we were left with no other choice than to make the decision to proceed with the process for the managed closure of the Airport". He describes that decision as taken, by the Operator, on 25 September 2022. It reflected the reality that, without financial resources to maintain aviation services, they were no longer viable. He also says that during those discussions there was consideration of what "options" were available to the Operator, including "immediate" closure of the Airport. It was stated in the September Announcement that "the board "of "DSA" as well as of "Peel" had addressed their minds to whether the product of the strategic review had delivered any tangible results. It must also be remembered that by this stage it had been decided – as Mr Hough also explains – that the offer of the bridging grant had been rejected as communicated in the

Decision Letter of 25 September 2022, with whose reasonableness I have dealt. I can see no realistic prospect that this Court at a substantive hearing would conclude that no "decision" had been taken by the Operator or that the Operator's decision involved an unlawful delegation or unlawful fetter.

Arguability

35. It follows, for the reasons which I have given, that I can find in this case no viable ground for judicial review crossing the threshold of arguability with a realistic prospect of success. That is the position considering the proposed grounds for judicial review on their objective legal merits, independently of all other obstacles which the claim is said to face. A consequence is to eliminate the prospect that a viable legal argument based on basic principles of reasonableness or fairness is being shut out by reference to some other gateway being closed to the Council and Combined Authority.

HL:NSD/Utility

36. In those circumstances, no question arises as to whether permission for judicial review should be refused – notwithstanding some arguable public law error – by reference to section 31(3C)(3D): 'highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred'. I remind myself that the materiality of a public law flaw is always a component, at common law, of the ground for relief. At common law, if inevitably the decision would have been the same, the ground for granting relief on judicial review is conventionally regarded as not being made out in the first place. Had there been in this case some viable ground for judicial review, I would not have found in favour of the Operator on HL:NSD. To do so would immediately, in my judgment, have been to trespass – and at the permission stage – on the merits of a decision which in principle would fall to be taken afresh by the primary decision-maker. Indeed, if Mr Maurici KC's reasonableness argument were right, its logic would be that the only reasonable course open to the Operator had been to accept the offer of the bridging grant. That would constitute a public law duty to reverse the decision, subject to points about changes in circumstances. On the related argument advanced by Mr Litton KC, namely that events subsequent to the impugned decision necessarily now render any judicial review proceedings "academic" and lacking in "utility". I do not agree that, if there were a public law wrong in this case, the Court would necessarily be unable or unwilling to fashion a suitable and appropriate remedy.

Interim relief

37. That leaves the Council's application for interim relief. Mr Maurici KC accepted that, if permission for judicial review were refused, he could only properly ask this Court for a very short period of interim relief to 'hold the ring' while an urgent application was made to the Court of Appeal, if the Council wished to take that route. He also accepted the 'uphill' battle that he would face in this Court, in those circumstances, in seeking to obtain even that Order. That acceptance was realistic. I am not prepared in the circumstances to make an order for interim relief, in a case in which I have refused permission on grounds of unarguability. There is a pragmatic course. The period between the circulation of this judgment as a confidential embargoed draft and the formal hand-down can enable the Council's lawyers – suitably forearmed as to possible outcome – to, if they wish, progress the preparation of a draft application to the Court

of Appeal. It may also be that the Operator will again take the sensible course of extending the existing undertakings for a further short period. But, in my judgment, it would not be right or in the interests of justice in the present case for me to make any order for interim relief, given the conclusions which I have reached. How the Court of Appeal would wish to deal with this case if pursued – as to expedition and any interim relief – is squarely a matter for that Court, which will be able to see the contours of the case from this reserved judgment. In the event, the Council confirmed, promptly, on receipt of this judgment in draft that it would not be seeking permission to appeal.

38. I will set out what I would have made of the arguments on interim relief, had I been persuaded to grant permission for judicial review. I leave aside any issue relating to the extended scope of the Council's late draft order when compared with the undertakings, on which I said I would allow time for further evidence to be filed. Subject to that, this is what I would have made of the question of interim relief. First, in light of the practical concerns on both sides, I would have been looking for a way forward to enable a substantive hearing to be dealt with deploying a high degree of expedition on the part of the Court. One practical option which is sometimes seen in judicial review, and is more frequent in judicial review cases outside London, is for a single judge who has done no more than recognise the arguability of the claim to be deployed to hear the substantive application. A wealth of evidence is already before the court in this case. I can see that a further modest period may have been appropriate for the parties to ensure that there is nothing more they wanted to say or show. I can also see that issues of disclosure might arise. But I would have been actively considering whether in effect this case should continue, in effect, 'part-heard' so as to secure and expeditious substantive resolution in this Court. Alternatively, there could have been an expedited hearing before another Judge. Expedition is frequently a way of tempering the injustice on either side which can arise where interim relief is granted or refused, given what may otherwise be a substantial lead-time up to the substantive hearing. I would have wanted to reduce that time to a minimum.

39. I would have granted a limited, tightly restricted Order for interim relief in this case, had I been granting permission for judicial review, with suitable expedition. In doing so, I would have required the cross-undertaking in damages offered by the Council. My Order would have been strictly limited to two things. The first thing would be an interim prohibition on the sale of assets, at least absent specific evidence as to a pressing present need why a sale should proceed. This would address the following position described in the first witness statement of Mr Allen about it being "open to Peel … to remove key items required for operations (eg. fire engines, ground handling machinery, etc)" and to "offer or pre-sell fire engines and other equipment to other airports, and [remove] certain navigation lights /beacons relating to Air Traffic Control". The second thing would be an interim prohibition on the surrender of any licence or certificate, again at least absent specific evidence as to a pressing present need why such a surrender should proceed. This would deal with the situation described in the Operator's solicitors' letter of 27 October 2022 describing the CAA licence of the Airport as not currently to be "surrendered" until 18 November 2022. This Order would have needed careful design. It would have needed engagement by the parties. I would have allowed a very short period of time for the Operator to provide any evidence containing any clear explanation as to whether, and if so why, it was being said that assets needed to be sold or a licence surrendered; and identifying any ongoing operational cost attributable to either of these two topics. From the Council, I would have allowed a very short period

of time to respond and to explain whether there was agreement from the Council to underwrite any operational cost. The cross-undertaking proffered by the Council would not have been sufficient since an undertaking in damages does not address present cashflow. Had I been granting interim relief, I would have been amenable to a short further stage for the parties to submit focused written evidence, so that my ruling on interim relief could then be embodied in the design of a final apt, reasoned and clear Order. In the event, none of that arises.

40. I would not have made any further or wider order for interim relief in this case. I am satisfied that the limited order identified is necessary, but also sufficient, in the interests of justice and applying the balance of convenience and justice. I am satisfied that anything more intrusive would be unjustified and unduly prejudicial, in all the circumstances. So far as the public interest is concerned, I would bear in mind that I would not have definitively found the Operator to be discharging a public function. One of the relevant features of this case which would have weighed against any more extensive or intrusive order is the timing of the claim. Although the claim for judicial review has not and would not have been refused permission for a lack of promptness, Mr Maurici KC rightly accepts that the timing of the challenge can nevertheless impact on interim relief. In my judgment by waiting 5½ weeks, given the known and foreseeable practical implications on the ground, the Council has brought upon itself some of the difficulties relating to interim relief. Put another way, if the Council had really expected to be able to bring everything to a halt, it needed to act far more speedily in bringing its claim. Had it done so, I anticipate that the undertakings which in the event have been given would have been amply sufficient to take this case through to a heavily expedited substantive hearing by the time of this judgment, and that would have solved all of the problems.

41. In arriving at this position on interim relief, I have not – and would not have – resolved every question which has arisen. (1) I cannot find facts, but can only seek to evaluate apparent risks, as to the implications for prospective buyers of the Airport of steps being taken. (2) I am conscious that there are ambiguities in the evidence relating to air traffic control and the Civil Aviation Authority. Mr Grant's evidence speaks of the Airport as being operable by a new owner in very little time providing that "the airspace" remains in place; a 'statement of intent' notice from the Civil Aviation Authority dated 4 November 2022 speaks of the removal of the Airport's airspace for designation elsewhere in terms suggestive of a need for safe continuing of monitoring of the nation's skies. But whether there are competing airports with interests in being allocated valuable airspace, or whether there is a regulator concerned with safety, I would not have made any order for interim relief which would have cut across any such interests or concerns. (3) I am conscious that the Operator's decision to repay the Combined Authority the loans (on 31 October 2022) means there is now no extant capital loan for the bridging grant (of up to £7m) to replace. The Operator says it repaid the loans for benign and legitimate reasons. The Council characterises that as an action to promote irreversibility of the impugned decision. (4) There is a dispute about the Freeholder's decision to serve the break notice for the purposes of the lease on 14 November 2022. Again, this is characterised by the Operator as benign and proper. Again, it is characterised by the Council as an act to promote irreversibility. (5) I do not need to rule on the rights and wrongs of these points and I would not have done so for the purposes of my decision on interim relief. (6) I have recorded that Mr Litton KC wished an opportunity to file evidence on aspects of Mr Maurici KC's draft order which

extended beyond the existing undertakings, to which Mr Maurici KC could reply. I have not touched on that and would be willing to consider further material of that kind if so invited. In the event, no further evidence was filed.

Conclusion

42. For the reasons I have given, the applications for permission for judicial review, and for interim relief, are refused. Having circulated this judgment as a confidential embargoed draft, I am able to deal here with consequential matters. The agreed parts of the order, to give effect to the judgment of the Court, are: (1) permission is granted for DSAL to rely on summary grounds of resistance in excess of the 30 page limit provided for by CPR PD54A §6.2; (2) permission is granted to the Council to rely on the second witness statement of Damian Allen and to the Combined Authority to rely on the witness statement of Gareth Sutton; (3) permission for judicial review is refused; (4) the Council's application for interim relief is refused; (5) no order as to costs between DSAL and the Combined Authority; (6) the judgment may be cited in future in accordance with Practice Direction [2001] 1 WLR 1001 §6.1.

Costs

43. The position on costs was contentious. The Council resists any order for costs, or alternatively a full order for costs: of the Acknowledgment of Service (AOS) and accompanying summary grounds of resistance (SGR), in circumstances where the 52-page grounds of resistance exceeded the 30-page limit; of the application for permission for judicial review, relying on the general principles and the absence of exceptional circumstances (see the Administrative Court JR Guide 2022 at §25.4.5); and of the application for interim relief, relying on the fact that this was parasitic on permission. DSAL, on the other hand, seeks an order for costs in full (with an interim payment): of the AOS and grounds; of resisting permission; and of resisting interim relief. As to the assessment of any costs, DSAL seeks a direction for detailed assessment; the Claimant seeks a summary assessment. In support of these positions, a raft of points are made on both sides. In my judgment, the appropriate order for costs is this: (i) the Council shall pay 75% of DSAL's costs of the AOS/SGR; (ii) the Council shall pay 50% of DSAL's further costs of the proceedings; (iii) the costs shall be on the standard basis and shall be the subject of detailed assessment if not agreed; (iv) the Council shall within 14 days of the Order pay £50,000 to DSAL as a payment on account of costs.

44. My reasons for making that costs order are as follows. (1) The Council has failed on permission and on interim relief. It did so, failing on the arguability of the grounds for judicial review. But all of DSAL's other supposedly knock-out arguments – which occupied a substantial portion of the materials and of the hearing – failed. That means the Council was the loser at the hearing; but it lost on arguability of the grounds for judicial review; it would have prevailed on the other issues raised by DSAL. (2) The SGR were, in my judgment for no good reason of substance, 52 pages (43 pages in 12 font) against the 30-page limit, which it is also appropriate to reflect in a discount from the costs of the AOS/SGR. (3) This was a hearing involving permission and interim relief. Interim relief was front and central, from the pre-action letter onwards. It was urgent. It was the reason why this case required an expedited oral hearing. It would, moreover, have restrained airport closure activities. The arguability of the claim was, moreover, a central and necessary feature of interim relief. It was entirely foreseeable that the interim relief (and integral arguability issue) would be fully contested at an oral

hearing. There was a very clear costs risk. The Council put DSAL to the costs of resisting and did so with eyes wide open. It was acting on the outer edges of promptness. It was then insisting on urgency. It is artificial, at least in the present case, for the Council to claim a protection for a hearing into permission for judicial review, and then characterise interim relief as secondary (a "small part") and parasitic. Insofar as an exceptional circumstance is needed (and I do not think it is), for a partial but global costs order in respect of a combined permission and interim relief hearing, then I find that the circumstances in the present case were sufficiently exceptional. R (Al-Ali) v Brent LBC [2018] EWHC 3634 (Admin) – an individualised housing case where there were independent exceptional circumstances for a costs order relating to the oral hearing – is a case on its facts and circumstances. That case does not (Al-Ali §17), as claimed by the Council, articulate a principle that "where interim relief is sought that does not change the general position that costs of the hearing of any permission application are generally irrecoverable save in exceptional circumstances". (4) The costs order I have made is, in my judgment, necessary, appropriate and proportionate in the interests of justice, in all the circumstances of this particular case. I have, as the appropriate and best-placed Court, identified the appropriate costs orders in clear percentage terms; and the standard basis of costs. But, especially given the scale of DSAL's costs (£260,535.78), and after a reserved judgment, I am not prepared in the circumstances of this case to undertake an assessment summarily. Absent agreement, the costs should be the subject of a detailed assessment to address issues of reasonableness and proportionality. (5) The payment on account is appropriate and proportionate in all the circumstances. (6) I should I think record that I was not persuaded by the Council's argument that the costs order should be influenced by its status as a public authority acting in difficult economic times.