

Monday, 9 February 2026

(10.30 am)

Preliminary Discussion

THE CHAIRMAN: Good morning, everybody. Just before we start,
Mr West, I need to read the live stream warning.

(Warning given)

Thank you.

Mr West.

MR WEST: Thank you, sir, Members of the Tribunal. I appear on
behalf of Bristol Airport Limited. We are the appellants in
this appeal.

My learned friends Mr George Peretz KC and
Mr William Perry appear on behalf of the Welsh Ministers, who
are the respondents in this appeal.

THE CHAIRMAN: Mr Gillow as well, I think.

MR WEST: I am terribly sorry, and Mr Harry Gillow.

If I can just check first that we have the right bundles.
You should have a main bundle which is divided into bundles A
to G in hard copy. I will be using electronic versions
myself, but I will tell you, if it is helpful, what the tab
is for the hard-copy bundle for those of you using ...

(Pause).

THE CHAIRMAN: Thank you. We have -- I think we have been using
electronic and -- we have been using electronic to prepare,
but of course with only one screen we are somewhat limited as

1 to how we can manage it. I think we probably will all be
2 using hard copy.

3 MR WEST: Thank you, sir. You can bring three screens, you see,
4 (inaudible).

5 THE CHAIRMAN: Yes, well, we just did not quite have the luggage
6 space, but anyway ...

7 MR WEST: We also have a supplemental bundle and an updated
8 bundle of authorities.

9 THE CHAIRMAN: Yes.

10 MR WEST: There are some other documents which, in fact, I will
11 be taking the Tribunal to. There is the agreed statement
12 of facts --

13 THE CHAIRMAN: Yes.

14 MR WEST: -- there is a chronology, there is an agreed list of
15 issues and there is agreed recommended pre-reading.

16 THE CHAIRMAN: Yes, thank you, and they were all very helpful.
17 Thank you. We have seen those.

18 MR WEST: Thank you very much.

19 Some preliminary matters. By way of a letter of
20 6 February, the Tribunal has indicated concerns as to
21 assertions of confidentiality and how that will be handled in
22 the hearing in a manner that can be consistent with the
23 requirements of open justice.

24 We have set out our view in our skeleton argument and
25 I assume the Tribunal will want to deal with this issue

1 first.

2 THE CHAIRMAN: Well, I think it is more of a practical point and
3 what I do not want to do is to have a big fight about what
4 should be confidential and what should not, because I am not
5 sure that that is a productive use of time. If we have got
6 this far and we do not know the answer to that, it is
7 probably not the time to resolve it.

8 What I am concerned about is how we are actually going to
9 run the hearing given that, particularly in relation to your
10 grounds 1 and 2, a lot of the material which is said to be
11 confidential is really central to the discussion and it just
12 strikes me as being quite a practically difficult thing to
13 do.

14 MR WEST: Yes.

15 THE CHAIRMAN: So really the point of the letter was to throw
16 back to you the problem and ask you whether you had any ideas
17 about how to manage that.

18 MR WEST: Well, I was going to ask Mr Kadri to address you on
19 confidentiality briefly, because it is a matter we are
20 concerned about, and I can then say something about the
21 practical arrangements, unless you wish me to go straight to
22 the practical.

23 THE CHAIRMAN: Well, I just do not think that anything is going
24 to be gained by having a -- we are not going to be in the
25 position, I think, to sensibly determine the confidentiality

1 without spending time and making a ruling, and we have not
2 got the luxury of a lot of time. So, frankly, in this if you
3 feel you need to, even by way of voicing the complaint, then
4 I am not going to stop you, but I am not really in the business
5 of resolving confidentiality issues in this hearing. That is
6 not really the point of the letter.

7 MR WEST: Okay, let Mr Kadri just address you briefly and then I
8 will --

9 THE CHAIRMAN: Yes, of course. Mr Kadri.

10 MR KADRI: Thank you, sir. I appreciate the indulgence.

11 So, of course we appreciate the Tribunal does not want to
12 have to resolve matters of confidentiality. I think
13 Mr West's concern is going to be, as the Tribunal has raised,
14 that there are some very key documents that we want to go to.
15 One of the issues we face is there is a degree of
16 inconsistency in how confidentiality has been claimed and
17 whilst it is quite simple not to go to a number that is in
18 the spreadsheets, there are some conclusions contained in the
19 ministerial advice that align well with the publicly stated
20 arguments that we have made but are perhaps more detailed,
21 and the Tribunal has already recognised the public interest.
22 It is not difficult to see, from the Tribunal's viewpoint,
23 that manifesting itself in this room here.

24 So it may be possible to do things as we go along and
25 perhaps we will get to the point where it becomes intolerable

1 and the Tribunal decides to clear the courtroom. We do say
2 that every effort has to be made to make sure that we conduct
3 matters in open court and the principle is very clear, I have
4 got authority -- the Tribunal does not want to hear that,
5 I recognise that, but if I can say one matter of principle,
6 which is that the public interest trumps confidentiality in
7 almost every case and the Tribunal has made rulings to that
8 effect, and we say that should be the guiding principle.

9 So beyond that I think I will sit down and not take any
10 more of the Tribunal's time.

11 THE CHAIRMAN: Thank you.

12 MR WEST: I mean, if I could just say, just to echo that, I have
13 absolutely no problem at all in not referring to figures and
14 pointing to documents, not reading out passages and asking
15 the Tribunal to read them, that obviously has an implication
16 for what people behind me can hear, for those who are seeing
17 it on live stream, what they can hear, but the Tribunal can
18 actually see what I am talking about. The difficulty,
19 perhaps, comes in making submissions, when there is a point
20 which will be hard to make an effective submission
21 potentially without having to say something confidential.
22 I am trying to avoid doing that as much as I can, but in
23 a sense it may be -- also, of course, Tribunal questions may
24 raise matters it is very hard for me to address.

25 What we are very anxious to avoid on this side of the

1 Tribunal is going into closed session or doing the whole of
2 the ground in closed session. That seems to us completely
3 inappropriate and actually unnecessary.

4 It is a clearly pleaded ground that we say that
5 Cardiff Airport was ailing or insolvent. We have put their
6 financial performance very firmly in issue, so it is not as
7 though we are saying something which is going to come like a
8 bolt from the blue. Much of the detail, as I say, can be
9 done by pointing to documents, but there may be occasions
10 when I have to see just how far I can get without trespassing
11 over the boundary. To some extent, sir, I am going to be
12 dependent on what my learned friends on the other side of the
13 room say.

14 THE CHAIRMAN: Mr Peretz, what is your position on this?

15 MR PERETZ: Yes. I had a very helpful email exchange with
16 Mr West over the weekend where we set out our positions.
17 I mean, my learned friend is presenting his case. If he
18 feels that he can present his case effectively in open, then
19 that is absolutely fine. What I said to him over the weekend
20 and say to the Tribunal now is that if my learned
21 friend feels that he is being constrained in the points that
22 he can make or, of course, if the Tribunal wishes to get into
23 details that involve information that is redacted on the
24 grounds of confidentiality, we are perfectly prepared to go
25 into closed.

1 We note that because there is going to be a public
2 transcript of the hearing released in a few days' time, if we
3 go, as it were, into closed unnecessarily and a whole lot of
4 things are said in closed that could have been said in open,
5 they will come out in the transcript anyway, because we can
6 get a draft of the transcript, we can go through them, we can
7 have arguments, if necessary, about whether anything needs to
8 be redacted, and a pretty full, possibly even complete,
9 transcript of the closed hearing will be made public.

10 So we think that there is not an enormous amount of
11 damage, obviously some, to the principle of open justice if
12 we go into closed, as it were, in order to allow the
13 advocates room to operate without having to worry about
14 confidentiality. But, as I said over the weekend, I am
15 entirely in my learned friend's hands, it is his case. The
16 greater the extent -- we are respondents, I am going to be
17 responding, if he does not go into huge amounts of detail and
18 refers you to documents instead of reading through them, I am
19 likely to take a very similar approach because I am
20 responding to what he says.

21 THE CHAIRMAN: Yes. I suppose part of the difficulty is
22 practical as well, obviously there is the principle point and
23 I take your point about the transcript, but there is
24 a practical point which is every time we do this we have to
25 empty the courtroom --

1 MR PERETZ: Indeed.

2 THE CHAIRMAN: -- switch off the live stream and then reverse
3 that, and it just takes up time and inconveniences a lot of
4 people who have come and have an interest in the hearing.

5 So, quite apart from the point of principle, it is really
6 a bit clumsy, and part of the problem here is that it is not
7 like it is a bit of a case where we all know there is some
8 confidential financial information, whatever it is, that we
9 can compartmentalise and deal with before lunch or after
10 lunch, it is actually at the heart of -- well, certainly a
11 big chunk of Mr West's case.

12 Now, I suppose that also causes some difficulty because
13 I am not -- I think there is something in the point that
14 there is a degree -- not necessarily a degree of
15 inconsistency, but it is not entirely clear to me what we are
16 allowed to talk about and what we are not, and I do not know
17 whether you have got a rule of thumb which you think we can
18 work on but I am quite anxious about finding myself in
19 a discussion which is on the wrong side of the line, because,
20 of course, clearly the marked material signals we should not
21 be talking about it, but if we are talking in submissions, as
22 Mr West says, his freely available pleading is ailing or
23 insolvent, so we know that is the subject matter, at what
24 stage do we get into difficulty or should we be thinking we
25 are getting into difficulty by getting into more specific

1 information? That is the bit that I am concerned about.

2 MR PERETZ: Yes, I mean there are a number of issues around it,
3 but the heart of it is the financial situation of
4 Cardiff Airport as it stood in the period '23/'24 and going
5 into '25, and the details of the particular situation that it
6 was in raised the problem that if my learned friend -- this
7 is the point we made at paragraph 10 of our skeleton
8 argument; it is all very well saying that those problems have
9 now disappeared because of the subsidy decision that has been
10 taken, but of course what my learned friend wants is for the
11 subsidy decision to be quashed, so that the airport will in
12 a sense be back to square one, at which point the position
13 that it was in absent the subsidy no longer becomes historic,
14 it becomes very real again.

15 THE CHAIRMAN: Yes.

16 MR PERETZ: At that stage, decisions will have to be made by the
17 airport and by the Welsh Government as to what to do next,
18 and those decisions will be complicated and made more
19 difficult the greater the extent to which information is
20 available about the precise situation that Cardiff Airport
21 was in.

22 THE CHAIRMAN: Yes, so the point --

23 MR PERETZ: I mean, there are other confidentiality issues lying
24 around that you will have seen, for example in relation to
25 some of the routes, the issue about the route incentive

1 scheme, there is some redactions in terms of what sorts of
2 routes might be looked at, and so there are other bits and
3 pieces, but the heart of the confidentiality issue and the
4 reason why it may cause my learned friend some difficulty,
5 particularly in relation to ground 1, is this issue about the
6 financial position.

7 THE CHAIRMAN: Yes.

8 MR PERETZ: That is why -- I mean, I suggested -- I entirely take
9 the point that one does not want to be constantly running in
10 and out of court and opening and closing the doors, and that
11 is why we suggested, and I can entirely see why the Tribunal
12 may be reluctant to do this, that it might just be easier for
13 my learned friend, as he is starting this, if we just went
14 into closed for ground 1. That is, in a sense, a sort of
15 offer, if you felt it easier, to the Tribunal. That may be
16 the most straightforward way of doing it.

17 THE CHAIRMAN: Yes.

18 MR PERETZ: We are perfectly happy for my learned friend to
19 proceed in open if he feels he can effectively do that.

20 THE CHAIRMAN: Yes. So I think the point -- just to make sure
21 I am clear about what you are saying, I think the point that
22 you are -- the particular point of sensitivity is, if you
23 like, the assessment and the projections that were made of
24 the financial position in that period by reference to --

25 MR PERETZ: Yes.

1 THE CHAIRMAN: Because obviously the -- to some extent the
2 financial position is apparent from the accounts, presumably.

3 MR PERETZ: Indeed, and, you know --

4 THE CHAIRMAN: Yes, so it is not what as a matter of fact the
5 position was, it is what the assessment was of the
6 consequence of those facts, (inaudible).

7 MR PERETZ: Indeed.

8 THE CHAIRMAN: Yes, that is helpful. Hopefully that is helpful.

9 Just one other point, and I raise it really not because
10 you can answer the point, because of course it all rather
11 depends, but in writing our judgment it is going to be quite
12 difficult to avoid some discussion of the financial position
13 because that is what this case is about, and I do not think
14 at that stage it is going to be really tenable to say that we
15 should not be providing information which is material to our
16 decision about the financial -- providing information about
17 the financial condition that is material. It may be that it
18 is not material to the decision, but I just put a marker down
19 that what goes today does not necessary go (inaudible), and
20 you know that, I know.

21 MR PERETZ: If I may say, Sir, I picked up that marker in
22 advance, and indeed one of the other things I said to my
23 learned friend over the weekend is that in terms of writing
24 the judgment it seemed to us that the appropriate thing for
25 the Tribunal to do was simply to write the judgment without

1 worrying about confidentiality and putting in the judgment
2 what it thought was important. I assume the judgment will be
3 circulated in draft.

4 THE CHAIRMAN: Yes.

5 MR PERETZ: If at that stage there are confidentiality issues
6 that we need to pick up, we will do so, bearing in mind
7 absolutely that, at that stage, if it is a key part of the
8 Tribunal's reasoning, we are not perhaps likely -- we will
9 take a shrewd view. If it is a key part of the Tribunal's
10 reasoning, we will understand that we are not likely to get
11 very far.

12 THE CHAIRMAN: Well, we can have that discussion.

13 MR PERETZ: On the other hand, if it is a footnote point, then we
14 might want to pick it up.

15 THE CHAIRMAN: Yes.

16 MR PERETZ: That seems to be the way of handling it and we
17 certainly would not suggest that the Tribunal should feel
18 constrained in any way at all in writing its judgment by the
19 confidentiality redactions.

20 THE CHAIRMAN: Thank you. That is helpful.

21 MR KADRI: Can I beg the Tribunal's indulgence --

22 THE CHAIRMAN: Yes, of course, Mr Kadri.

23 MR KADRI: -- because there are some points of substance that
24 were raised there that I would like to respond to them.

25 THE CHAIRMAN: Yes.

1 MR KADRI: Firstly, to allay the Tribunal's concerns in respect
2 of ground 3, ground 3 is where competitively sensitive --
3 potentially competitively sensitive information vis-à-vis
4 Bristol Airport arises. Mr Peretz was talking about there
5 are breakdowns of route development allocation,
6 Bristol Airport has no interest in hearing about any of that
7 and we think it can be avoided, referenced to numbers.

8 So we do not think that is an issue. The issue is
9 ground 1 and I am afraid we do not accept that it is good
10 enough for a judgment to be made public in due course. There
11 are journalists in this room, sir, who want to hear the
12 argument. This case is being reported today.

13 I think we agree that the specific point is about the
14 position that Cardiff was in at around the time the extended
15 SCF was put in place, but it is the Welsh Government's
16 appreciation of that position that is of relevance, and I can
17 take the Tribunal to some documents now if you wish, it will
18 not take long --

19 THE CHAIRMAN: Mr Kadri, I just do not -- I mean, we have spent
20 15 minutes on this and I am reluctant to spend any more on
21 it. If it was going to be an issue that was going to be
22 resolved, it needed to be done before today. I am not
23 blaming anyone for that, we are where we are, and I think we
24 need to get on with the substantive hearing.

25 I think the point of the letter and I think the point of

1 the discussion we have just had is that it is a bit
2 difficult, it is going to be difficult and we are going to
3 have to be quite careful about it, but I think it is possible
4 for most of this to happen in open court. That is obviously
5 our objective and I hope yours as well.

6 So I think that is where we are. I do not want to stop
7 you making submissions if you have got things to say --

8 MR KADRI: No, I do not wish to take up everyone's valuable time
9 either, sir.

10 THE CHAIRMAN: We are not going to be resolving this issue now.
11 It is too late to deal with that now.

12 MR KADRI: Well, sir, I appreciate that. What I will say is that
13 during the course of Mr West's submissions there will
14 probably be one or two points where a paragraph --
15 the Tribunal is asked to read a paragraph and at that point
16 I would ask the Tribunal to have in mind whether that is
17 really confidential or not specifically for the purpose of
18 dealing with the judgment, because we say they are not.
19 I will leave it there.

20 THE CHAIRMAN: Yes, thank you. Thank you very much.

21 So, Mr West, we will just work on the basis that we will
22 do our best, but if you feel in any way constrained in your
23 submissions obviously we can go into closed, if you feel we
24 need to do that. I know it is not your preference, it is not
25 our preference, but I think that is where we are, and

1 obviously you will use all the mechanisms available to you to
2 point things to us that do not have to be read out and so on,
3 but at the point which you need to do that, then obviously we
4 will do that.

5 MR WEST: If I do have to, I think what I will try to do is
6 simply to arrange it so that we have a short closed session
7 at the end of an open session. I do not want to do darting
8 to and fro because it takes some time.

9 THE CHAIRMAN: Well, that would be helpful, and just before or
10 after a break is often the easiest way to do it.

11 MR WEST: Along the subject of timing, my Lord, what I have
12 agreed with Mr Peretz is that basically I will take probably
13 the whole of today with my submissions.

14 THE CHAIRMAN: Yes.

15 MR WEST: He will then have tomorrow and I have time for reply,
16 45 minutes or so, at the end. Inevitably I am going to take
17 a bit longer in opening because I'm going to show you
18 documents (inaudible) need to go back to.

19 Also, I understand the transcribers would appreciate
20 having a break.

21 THE CHAIRMAN: Yes.

22 MR WEST: So I will arrange that at a suitable juncture.

23 THE CHAIRMAN: Good, thank you. That is kind. Just before you
24 launch in, there is one other preliminary point which has
25 caused us some concern, and that is the question of the

1 change of the description of package 2 and the change from
2 subsidy to subsidy scheme.

3 MR WEST: Yes.

4 THE CHAIRMAN: So, before you launch in, I think it would be
5 quite helpful to have an understanding of where we are with
6 that, because I am not entirely sure what the basis is on
7 which we are going to hear your ground 3 arguments. I do not
8 know whether you are, but I would like to be really clear
9 about what it is that is going on here and what it is we are
10 actually hearing argument about.

11 I do not know whether you have had -- I mean, Mr Peretz,
12 I am sure, can enlighten us, but I do not know whether you
13 have anything you want to say about that.

14 MR WEST: I was going to come to that in due course, but if
15 Mr Peretz wants to say something in advance to assist
16 the Tribunal --

17 THE CHAIRMAN: Well, the reason for dealing with it in advance is
18 it seems to me, and you may tell me I am completely wrong
19 about this, but it seems to me that there is a bit of a fork
20 in the road in relation to your ground 3, and indeed your
21 ground 4, because if we have a decision in front of us which
22 can be characterised as a scheme and you are prepared to
23 continue with this hearing on the basis that that is, if you
24 like, the lens through which we are looking at your
25 arguments, then I am fine with that, and so long as we agree

1 that is what we are doing, then obviously that is something
2 that we are prepared to do and proceed with. However, if you
3 are not prepared to do that because you take the position
4 that the subsidy scheme is not something which is, if you
5 like, before us, then clearly there is a real question as to
6 what you do with ground 3 and 4.

7 I am not entirely -- I am really trying to flush out your
8 position on this as much as anything else and I think I would
9 like to explore with Mr Peretz exactly where he is and what
10 the status of his decision is, but as far as you are
11 concerned I think there is a choice as to whether you are
12 advancing grounds 3 and 4 on the basis that we are entitled
13 to look at the decision as if it were a subsidy scheme.

14 MR WEST: My answer to that, very simply, sir, is, no, you cannot
15 look at it on that basis. There is a real jurisdictional
16 problem here. What was put forward to Welsh Ministers was
17 a subsidy, not a subsidy scheme, and I will show that in due
18 course.

19 THE CHAIRMAN: So you say it is a different decision?

20 MR WEST: It was a different decision insofar as --

21 THE CHAIRMAN: Is that all of the decision or is it just --

22 (overspeaking) --

23 MR WEST: Well, insofar as the route development is concerned,
24 certainly.

25 THE CHAIRMAN: Well, just to be clear about that then, are you

1 saying that we cannot deal with the subsidy scheme arguments
2 today?

3 MR WEST: Yes.

4 THE CHAIRMAN: That is the simple point. We are not getting into
5 any of your arguments about principles. I think it probably
6 does not -- principle A, I think, is not a subsidy scheme
7 point, principle A is a broader point, but the rest of them,
8 I think, unless I am wrong, are all about package 2, are they
9 not?

10 MR WEST: Yes.

11 THE CHAIRMAN: Substantially -- substantially -- or let me put it
12 another way round. You are not going to be seeking to argue
13 that principles B to G do not apply to package 2 because you
14 are saying that is all in relation to the subsidy, everything
15 you have said is in relation to the subsidy and is now
16 a different decision.

17 MR WEST: Yes, well, I think I cannot really be simpler than to
18 say that you cannot recharacterise -- just recharacterise --

19 THE CHAIRMAN: Yes, I know -- sorry to interrupt you,
20 I understand the premise you are putting forward. I just
21 want to be really clear about the consequences because I want
22 to know what you are going to address us on. Are you going
23 to simply say to us that we cannot deal with package 2
24 because it is a decision that has been remade or are you
25 going to run us through all these arguments about principles

1 B and G in relation to (inaudible), because I do not think
2 the two are compatible. I mean, it is one or the other, is
3 it not?

4 MR WEST: Well, it is one or the other in the sense that it
5 depends on what view the Tribunal takes on whether it can
6 actually consider the (inaudible).

7 THE CHAIRMAN: Yes, I see.

8 MR WEST: So therefore I am prepared to address them because
9 I have to assume at the moment that, contrary to my
10 prevailing submission, which is that this subsidy scheme does
11 not get off the ground and should not be entertained by the
12 Tribunal, unless the Tribunal tells me now that it agrees
13 with me, I have to assume that you may be against me and
14 therefore work on the principle that those same issues would
15 arise.

16 THE CHAIRMAN: No, I understand.

17 MR WEST: So that is what I was planning to address --

18 THE CHAIRMAN: No, that is helpful. I understand. Just tell
19 me -- I am anticipating a little bit of what Mr Peretz is
20 going to say, I suspect he is going to stand up and say,
21 "Look, that is really very much form over substance because
22 really the whole thing is the same, what is the difference,
23 and why do we have to all go away and come back again if you
24 decide to challenge the scheme on the same basis as he has
25 put forward the subsidy, when nothing is going to change, why

1 are we wasting everybody's time and money on doing that?"

2 MR WEST: Well, this is where -- I mean, I will be completely
3 candid. I was waiting, in fact -- one of the points I was
4 going to make when we got to 3 and 4 was, on the subsidy
5 scheme, I actually wanted to hear what Mr Peretz had to say
6 first and will deal with it mostly in reply, because I do not
7 understand the position as it is advanced, which is part of
8 our problem. We do not understand how you can suddenly segue
9 from a subsidy to a subsidy scheme, which is a totally
10 different route, where, of course, as the Tribunal is aware,
11 in fact you have to challenge the subsidy scheme; you cannot
12 challenge the individual subsidies under it, and yet that
13 seems to be precisely what was being suggested we should be
14 doing in the future. To us it makes no sense. It makes no
15 sense at all, and that is one of the reasons why I wanted to
16 hear from Mr Peretz first before addressing the Tribunal.

17 THE CHAIRMAN: Yes, well I hope you will forgive me for pushing
18 it up the agenda, but I think we are in the same position in
19 a slightly different sense, maybe, which is that it is not
20 entirely clear to us what we are actually hearing today.

21 (Pause for technical matter)

22 Well, look, shall we hear what Mr Peretz has to say? It may
23 be that we cannot resolve it as a point upfront, but it
24 certainly would be, I think, useful to have a better idea of
25 the landscape, because I am not entirely sure where we are

1 either. Why do we not hear from Mr Peretz?

2 MR PERETZ: You have correctly anticipated the essence of the
3 position taken by the Welsh Government. This is entirely
4 a question of form as opposed to substance. The substance of
5 the decision is what the Tribunal is looking at. The
6 substance of the decision is not controversial, it is clear
7 from the documents. The decision in relation to what we have
8 been calling package 2, that is the route incentive element
9 of the scheme, is that there is a schedule, a schedule 1 in
10 the grant funding agreement, that controls what happens.

11 So the position in essence is that the decision that was
12 taken was that a certain sum of money is earmarked to the
13 route incentive scheme. That money is not given to Cardiff
14 Airport, Cardiff Airport has, under schedule 1 of the grant
15 funding agreement, to apply for each individual route
16 incentive that it wishes to give pursuant to the scheme.
17 A decision is then taken, including in particular great
18 attention being paid to whether the proposed agreement with
19 the airline will be on CMO terms in relation to that airline,
20 and that will be analysed and a decision taken.

21 So that is, in very broad outline, the situation and
22 there is no disagreement between us as to how it works
23 because it is clear from schedule 1 of the grant funding
24 agreement that that is how it works.

25 The question is what label you attach to that. As you

1 know there is a certain amount of dispute and lack of clarity
2 about exactly what a subsidy scheme is under the Act.

3 The Tribunal gave a judgment on a slightly different aspect
4 of this in Durham which has been fairly widely criticised,
5 I have to say in a private capacity by me, but also by other
6 commentators.

7 So there is some doubt about what a --

8 THE CHAIRMAN: This is the point about whether the scheme has to
9 be completely allocated or dedicated?

10 MR PERETZ: That is right, what the Tribunal said, and it is
11 obiter, in Durham is essentially that a subsidy scheme has to
12 involve a commitment, it has to bind the authority, and the
13 point I make is that cannot be right, in particular when you
14 look at a streamlined subsidy scheme or a subsidy scheme made
15 by, for example, the Welsh Government which covers local
16 authorities, it cannot possibly be -- which is clearly
17 contemplated by the Act -- a requirement of that scheme that
18 the local authorities be bound to do that because the
19 Welsh Government has no power to bind them to do that.

20 But that is not the issue -- the particular issue we are
21 grappling with here, but I was making a broader point that
22 there is some uncertainty as to precisely what a subsidy
23 scheme covers. It is certainly not the same thing
24 necessarily as an aid scheme under State aid law because the
25 institutional context is different.

1 So it simply struck us that it was certainly
2 a possibility, and we thought probably right, looking at what
3 we had done under the grant funding agreement, that what we
4 actually had was a subsidy scheme. It seemed to us right to
5 put that possibility to the Tribunal.

6 It is in the end a question of form, not substance,
7 because the decision taken is the decision and the Tribunal
8 will decide whether, whether it is a subsidy scheme or
9 a subsidy, it does or does not comply with the subsidy
10 control principles or does or does not raise issues under
11 section 28 of the Subsidy Control Act, which is the provision
12 which deals with route subsidies to airlines.

13 THE CHAIRMAN: When you say the decision is the decision,
14 I understand the point about form and substance, and
15 obviously I have made that myself to Mr West, but technically
16 it is a different route under the Act, is it not? I mean,
17 can you say it is the same decision if you are relying on
18 a different legal basis to do it?

19 MR PERETZ: It is a different legal label attached to the
20 decision that has been taken. I mean, there would -- I mean,
21 it is also obviously the case that the decision was
22 registered as a subsidy and not as a subsidy scheme, so if we
23 are right, we got that wrong. I think we would say that that
24 is something that if the Tribunal agrees with us we will
25 simply seek to correct, but if the Tribunal agrees with the

1 rest of our case and also agrees that it is a subsidy scheme,
2 we will simply sort it out and correct it, and it is not
3 something that then results in any consequences.

4 Where there may be consequences is when -- and my learned
5 friend alluded to this and I clarify what our position is, is
6 the question of what then happens if a -- because the essence
7 of our point about this, as you will have gathered, is
8 because that is the structure of the decision, my learned
9 friend's complaint that there will be route subsidies to
10 airlines in breach of section 28 is premature. We certainly
11 accept that in principle there could be because we could get
12 the CMO assessment wrong in a way that is reviewable by
13 a tribunal outside the range of reasonable CMO assessments,
14 and if we get that wrong then there will end up being
15 a subsidy to the airline, which is not what -- which is
16 outside what we have contemplated. So the decision that we
17 have taken is that there should not be subsidy to the
18 airlines, so that any deal between Cardiff Airport and the
19 airline should be on CMO terms.

20 That means that if a subsidy does end up being given to
21 an airline, or in fact is given to Cardiff Airport -- or if
22 either a subsidy is given or, just using neutral -- money is
23 allocated -- if Cardiff applies for a funding package for
24 a particular route and money is allocated, and we get it
25 wrong, it is not on CMO terms, what then happens if we are

1 right that that is a subsidy under a subsidy scheme is that
2 my learned friend's clients can then challenge that. It is,
3 of course, right that you cannot challenge a subsidy that is
4 granted under a subsidy scheme, but the basis of this
5 challenge would be this subsidy is not under a subsidy scheme
6 because you have not complied with the CMO condition.

7 THE CHAIRMAN: Well, I mean, to make it even easier, just they
8 have not complied with the rules of the scheme.

9 MR PERETZ: Exactly.

10 THE CHAIRMAN: I mean, it is not because it is a CMO
11 -- (overspeaking) -- it is just that the scheme has rules and
12 if you have fallen outside it, therefore it is no longer
13 a subsidy under the scheme.

14 MR PERETZ: That is right, and in those circumstances you bring
15 a challenge to this Tribunal, and the issue will be, if the
16 respondent does not accept that, as to whether under
17 section 70(2) it is a subsidy under the scheme, but that
18 boils down to the question in this case of: is it CMO or not?

19 THE CHAIRMAN: Yes, and so --

20 MR PERETZ: So the matter will be in front of the Tribunal. If
21 the Tribunal then says, "No, Welsh Government, you have got
22 it wrong, this was not CMO, you could not rationally have
23 concluded that it was CMO", then if we are right on the
24 subsidy scheme analysis, this will then be a separate --
25 the Tribunal will find that as a separate subsidy, and

1 because the proper process will not have been gone through in
2 relation to that subsidy it will fall.

3 So that is the route of challenge that Bristol Airport
4 has.

5 THE CHAIRMAN: Can I just be clear, you are saying that that
6 problem would arise at the point of allocation of the funds
7 from --

8 MR PERETZ: Yes, because that would be the point at which subsidy
9 was given under the Act.

10 THE CHAIRMAN: Yes, you're not -- so it is not necessarily about
11 the payment was made by the airport to the route carriers.

12 MR PERETZ: Yes.

13 THE CHAIRMAN: It is actually before that, the anterior step.

14 MR PERETZ: Yes, because if our subsidy scheme analysis was
15 right, then the point at which an individual subsidy is given
16 to Cardiff Airport is the point where it applies for the
17 money and we say, "Yes, you can have it".

18 THE CHAIRMAN: Yes, I understand, yes. That is helpful, thank
19 you.

20 MR PERETZ: That, of course, is the standard apparatus of a
21 scheme. I mean, the authority will say that money is
22 available to operators to do this sort of thing, these are
23 the conditions and then a decision will be taken at each
24 point when an application is made as to whether the
25 conditions are satisfied, and if the authority gets that

1 wrong in a way that involves a reviewable error, then that
2 decision can be -- despite the general protection to subsidy
3 terms under a scheme, the point at that point -- the key
4 point at that stage is that the subsidy is actually not under
5 the terms of the scheme and therefore can be challenged.

6 THE CHAIRMAN: Can I just come back to this question about the
7 decision. I think you are saying it is not a different
8 decision. Is that what you are --

9 MR PERETZ: It is entirely a question of labelling. The
10 substance of the decision is what it is. The decision was to
11 enter into the grant funding agreement.

12 THE CHAIRMAN: So you say not a different decision?

13 MR PERETZ: It's not a different decision, it's --

14 THE CHAIRMAN: Yes, and the fact there is going to be
15 an amendment to the database you are saying is effectively
16 correcting an error.

17 MR PERETZ: If the Tribunal agrees with us, yes.

18 THE CHAIRMAN: Well --

19 MR PERETZ: We say it will be correcting an error, yes.

20 THE CHAIRMAN: The fact that there would then be -- presumably
21 people would then have fresh challenge rights that ran from
22 the time of that, would they?

23 MR PERETZ: I think I would have to think about that because the
24 time runs from the placing of the register, but whether that
25 amounted to a placing on the register for subsidy control

1 purposes I would have to think. That I think would be
2 a question that might have been decided by the Tribunal if it
3 arose.

4 THE CHAIRMAN: What I am now doing that I probably should not be
5 doing is getting into the heart of the argument.

6 MR PERETZ: Yes.

7 THE CHAIRMAN: It is probably -- the landscape, I think, is
8 pretty clear. So you are saying it is not a different
9 decision and it is really a labelling point. Mr West is
10 going to argue, I think, that it is a different decision and
11 that we do not have jurisdiction. I think we have to
12 probably let that play out, that is where the fault lines
13 are.

14 MR PERETZ: Yes, I mean it seems to us actually that in terms of
15 remedies available to Bristol Airport, if we, as it were, get
16 an allocation decision to Cardiff Airport wrong, because it
17 is not in fact CMO, we just make a mistake about that, we
18 think Bristol's position is actually clearer and stronger on
19 the subsidy scheme analysis than it is on the subsidy
20 analysis.

21 THE CHAIRMAN: Yes, we (inaudible) and we understand that, and no
22 doubt you will get a chance --

23 MR PERETZ: We can come back to that.

24 THE CHAIRMAN: Yes. Thank you, Mr Peretz.

25 So, Mr West, that is where we are. I am afraid I have

1 used up another 20 minutes of your time by exploring it, but
2 I hope that has been helpful rather than unhelpful. I mean,
3 I was rather hoping there might be some clarity about what
4 the answer is, but there is not. So we are going to have to
5 (inaudible) and hear your argument.

6 MR WEST: I think you have accurately summarised the gist of the
7 argument that I will be making to you in due course.

8 THE CHAIRMAN: Yes. Well, we will look forward to that.

9 MR WEST: This clearly is a different decision.

10 THE CHAIRMAN: Yes, good, thank you, and we will look forward to
11 those submissions.

12 Just one last point, and I am sorry we keep holding you
13 up, you want to get going, are you going to deal with
14 ground 1 before ground 2, because I have to say it did seem
15 to us to be quite attractive to deal with ground 2 before
16 ground 1? I am not going to force you to do it if that is
17 not what you wanted to do, but --

18 MR WEST: That is what I was going to do, follow the grounds
19 seriatim. If the Tribunal really wishes me to do it the
20 other way around, I am perfectly happy to do it that way.

21 THE CHAIRMAN: Well, I suppose the point is that it just
22 conceptually seems a bit easier to understand whether the
23 respondents' approach to ailing or insolvent was right or
24 wrong -- I am just using that term in a general sense,
25 obviously in a JR context -- it is easier to work out the

1 answer to that if we all are -- at least we understand the
2 arguments about what it means, about what the requirements of
3 section 19 and 20 are, because if you are right and
4 section 19 and 20 -- as I understand your argument,
5 sections 19 and 20 are more or less an exclusive regime for
6 ailing or insolvent companies, then obviously that has quite
7 a significant impact on the ground 1 argument because, as
8 I understand it, Bristol have not -- sorry, the respondent
9 has not approached the matter on that basis and your argument
10 would be quite different, I would have thought, than if it
11 was not an exclusive ...

12 So I don't know whether you are -- I mean, maybe you are
13 going to deal with both possibilities in your ground 1.

14 MR WEST: Yes, I am just wondering which is the best way to do
15 this.

16 THE CHAIRMAN: Well, I do not want to take you out of your way.

17 If you have prepared on the basis that ground 1 --

18 MR WEST: I think I would prefer to do ground 1 first --

19 THE CHAIRMAN: Yes. Well, you do it the way you have prepared.

20 MR WEST: -- in part because of going to the relevant documents.

21 THE CHAIRMAN: Yes, of course. No, I understand. Well, let us
22 do it that way.

23 Submissions by MR WEST

24 MR WEST: Thank you.

25 So, sir, Members of the Tribunal, this is an important

1 appeal because there have been, of course, two judgments of
2 the Tribunal arising out of challenges to the award of
3 an alleged subsidy, and the judgment is awaited on the third,
4 but this is the first appeal to come before the Tribunal
5 under the Subsidy Control Act where a public authority has
6 freely accepted that it has in fact granted a subsidy. So
7 the issue, therefore, is not whether a subsidy has been
8 granted at all, which is the focus of the previous appeals,
9 but whether a subsidy that has been publicly announced has
10 been granted in accordance with the provisions of the Act.
11 So the Tribunal's deliberations and ultimate conclusions will
12 obviously be keenly watched.

13 Of course, I would also like just to record that we are
14 grateful to the Tribunal for listing this appeal very
15 speedily. That is much appreciated.

16 The subsidy in this case is, of course, one granted by
17 the Welsh Ministers to Cardiff International Airport. Any
18 subsidy to an airport is likely to affect its geographical
19 neighbours, so it might be thought unsurprising that
20 Cardiff's nearest geographical neighbour, Bristol Airport,
21 should have brought an appeal under section 70, but it is
22 important to emphasise, we have made this point at
23 paragraph 6 of our skeleton argument, that Bristol Airport
24 has drawn this appeal with some reluctance.

25 Before turning to the background to the appeal and the

1 grounds of challenge, I therefore wish to say a little more
2 about Bristol Airport's position. Just to make clear, in the
3 course of this hearing, unless I say otherwise, when I talk
4 about Bristol, I mean Bristol Airport, and when I talk about
5 Cardiff, I mean Cardiff Airport. It seems easier than an
6 acronym or saying the full title and will save a few minutes
7 at least.

8 As we have stated in our skeleton, Bristol is entirely
9 supportive of the development of the Welsh economy. Bristol
10 has previously worked closely with the Welsh Government, with
11 Cardiff Council, with local stakeholders and with Cardiff to
12 assist Wales in hosting major events, and these include
13 events such as the Ryder Cup, the Champions League Final, the
14 Rugby World Cup and a NATO conference. All of these, and
15 similar events, support the Welsh economy and Bristol has
16 been proud to collaborate over the delivery of such high
17 profile and important events and it looks forward to
18 continuing to do so in the future.

19 It should also be noted that some 11% of people working
20 at Bristol Airport are from South Wales, that is based on the
21 postcodes of passes that are issued to employees, I am told,
22 and to that number obviously we have to add the many other
23 individuals employed by businesses located in South Wales
24 which comprise the supply and support chain for Bristol.
25 Furthermore, Bristol serves 2 million passengers based in

1 South Wales each year, which, as the Tribunal will doubtless
2 be aware, is greater than the total number of passengers
3 served each year by Cardiff. So, in short, there is
4 an important economic link between Bristol and Wales which
5 Bristol highly values and respects and which, indeed, it
6 would to seek to grow and seek to continue to flourish.

7 So it must also be emphasised, again, as we put in our
8 skeleton, that in bringing the appeal Bristol is not seeking
9 to drive Cardiff from the market or to fetter
10 its ability to develop going forward. Bristol relishes
11 competition, not least because of the benefits it delivers to
12 consumers. However, such competition must be fair and
13 lawful, and the essence of Bristol's case is that it cannot
14 be so in circumstances where Cardiff is granted a subsidy of
15 over 200 million in the manner proposed and within that
16 figure there is a sum of 100 million specifically for route
17 development.

18 Given the geographical proximity between Cardiff and
19 Bristol, the potential for harm in the arena of route
20 development is particularly high and, as we will explore
21 later, it is evident that in assessing the subsidy we say
22 Welsh Ministers have failed to appreciate and seriously
23 underestimate the harm that will accrue to Bristol if the
24 subsidy is allowed to go ahead. That is why Bristol has felt
25 compelled to act.

1 Against that background, I would just like to set out the
2 structure of my submissions, if I may. You already have both
3 the amended notice of appeal and the lengthy skeleton
4 argument, and obviously I cannot repeat all of that in oral
5 submissions, but for the record we continue to rely on the
6 amended notice of appeal and the skeleton. Also, the fact
7 that any specific point is not mentioned does not mean we
8 resile from it. Similarly, the fact that I don't cover any
9 particular point in the respondent's skeleton does not mean
10 that that is accepted. I am obviously having, as I am sure
11 my learned friend will be doing, to trim our cloth in the
12 circumstances.

13 So I propose to begin my submissions by doing a short
14 factual summary and showing you some key documents, and
15 I will then deal fairly briefly with the legal framework,
16 because I do not actually think there is much there that is
17 in contention, and I will also deal with some case law when
18 looking at the grounds, and then I will deal with the grounds
19 in turn and deal with relief. But in headline terms our
20 position is as follows, which is that, firstly, given its
21 financial position, Cardiff should have been classified as
22 being ailing or insolvent within the meaning of section 24 of
23 the Act at the point when the subsidy was granted.

24 The effect of that classification is that Cardiff could
25 only have received rescue aid under section 19 or

1 restructuring aid under section 20. The subsidy did not
2 comply with either of those sections, so it was therefore
3 unlawful, and we say if you agree with that analysis, then
4 that is the end of the case. If you disagree, then
5 the Tribunal will need to consider the subsidy control
6 principles.

7 Our position is that the subsidy did not comply with
8 them. Insofar as the Welsh Ministers now seek to argue the
9 100 million allocated for route development should be
10 considered a subsidy scheme, we say that is not the basis on
11 which the subsidy decision was taken and was not the basis on
12 which the proposed subsidy was referred to the CMA, and we
13 say that the Tribunal does not have jurisdiction to rule on
14 the lawfulness of a purported subsidy scheme which has been
15 developed, with the greatest respect, on the hoof in response
16 to our amended notice of appeal.

17 Furthermore, whether the route development funding is
18 treated as a subsidy scheme or simple subsidy it invariably
19 involves, we say, subsidies to airlines where there are rules
20 under section 28. So we say the subsidy should be declared
21 unlawful accordingly. That in essence, sir, Members of the
22 Tribunal, is our case and I will address you on that in
23 series.

24 So turning to the factual background, the Tribunal has
25 a statement of agreed facts which gives much of the essential

1 background, and there is also a chronology. If I can ask
2 the Tribunal, please, to take up the statement of agreed
3 facts.

4 THE CHAIRMAN: I have got it separately. Can we have a reference
5 for it?

6 MR WEST: It is a separate document. They were provided.

7 THE CHAIRMAN: We said we have them, I have got it in front of
8 me, but I think it might just take a minute for my colleagues
9 to locate it. It is not in the bundle?

10 MR WEST: Not in the bundle, no, because it came in at the end,
11 after last week. (Pause).

12 I am terribly sorry.

13 THE CHAIRMAN: Don't worry, it is fine.

14 MR WEST: You can see there we have the early history of Cardiff
15 Airport set out in paragraphs 1 to 3. I do not think I need
16 to read that. The important point is it began as a military
17 airfield, privatised in 1995 then taken back into ownership
18 by the Welsh Ministers for 52 million in March 2013.

19 So I want to start with that point, the point at which
20 the airport was taken back into public ownership, and you can
21 see at paragraph 4 of the statement of facts how Cardiff has
22 been supported between 2014 and 2020 and loans that were
23 issued which totalled 69.8 million.

24 Then we have, at paragraph 5, the impact of the COVID-19
25 pandemic and you see what is said there, that the passenger

1 numbers had increased to 1.65 million a year as
2 at March 2020, passenger terminal closed, operational hours
3 reduced, travel restrictions in place when it reopened, and
4 so by August 2021 passenger numbers are 90.7% lower than they
5 were before the pandemic.

6 Then you can see what subsequently happens in
7 paragraphs 6 and 7, there are losses of approximately
8 6.5 million, a State aid notification is made.

9 Then you see what happens in paragraph 7,
10 in February 2021 there is a loan write-off of 42.6 million
11 based on the provision of a 42.6 million grant, and you see
12 it records there that the Welsh Government's position is that
13 the 42.6 million loan write-off was provided on CMO terms.

14 I will not turn to the chronology because I am dealing
15 with the points anyway now, but if you look at the
16 chronology, if we start from that point, there are four
17 further lots of support given to Cardiff and I wanted to go
18 through those one by one because those effectively set the
19 background for the appeal.

20 It is possible that these -- essentially I am taking you
21 to a series of ministerial advices which you -- I think some
22 were indicated in the pre-reading. Obviously I can only do
23 some what is effectively island hopping in the documents in
24 submissions. I do recommend, if the Tribunal has time,
25 reading them in their entirety because they do give a lot of

1 background and context.

2 The very first one of these is -- so we have had the
3 rescue and restructuring package, we are now in October 2023,
4 and the first thing we have is something for -- you need go
5 to the ministerial advice, this is 18 September 2023 and
6 I am at page 210 of the main bundle.

7 THE CHAIRMAN: I am afraid you are going to have to give us
8 volume --

9 MR WEST: I am terribly sorry, that is volume A.

10 THE CHAIRMAN: Volume A, page 210.

11 MR WEST: I am terribly sorry. It is A and it is tab 26.

12 THE CHAIRMAN: Yes, thank you.

13 MR WEST: So this is headed "Cardiff Airport Next Generation
14 Security ... Scanners" and there is a summary of 100 words:
15 "UK Government aviation security regulations require
16 Cardiff International Airport Limited ... to install NGS 3-D
17 baggage scanners by 2024."

18 There is then a sentence, obviously which is
19 confidential, which I can't read out.

20 "This advice presents Ministers with a route to provide
21 additional financial support for the acquisition and
22 installation of the scanners by CIAL alongside alternative
23 options. The pathway entails a commitment to provide longer
24 term operating aid to CIAL."

25 You will see there, just in passing, there has been

1 a redaction for privilege. Now, you will have seen from our
2 skeleton that we do query the basis of some of these
3 privileged redactions, so I can't do more than -- as I go
4 through, I will indicate where there are points we do have
5 concerns. We have been assured in the skeleton argument that
6 they are properly applied. It is not quite clear there, for
7 example, how those three words would be privileged, but
8 I have to accept what my learned friends say in that regard,
9 but it does sometimes make, both for us and for the Tribunal,
10 some of these documents hard to follow.

11 If you go down to the next page, which is page 211, there
12 are four bullet points and you will see the fourth one down,
13 the recommendation:

14 "The ministers are asked to:

15 "...

16 "Confirm their intention to pursue a policy of ongoing
17 scalable financial support to CIAL (in the order of 10
18 years)."

19 Then if we can go to paragraph 5, please, where the same
20 point is made, this is on page 212:

21 "It is important to note that this decision needs to be
22 made in parallel with a confirmation of Ministers' intention
23 to adopt a policy of further long-term financial support for
24 CIAL. Indeed, the only basis on which a commercial no-aid
25 decision could be made in relation to the NGS scanners is on

1 the basis that a commercial investor would be sufficiently
2 convinced that the [Welsh Government] will provide, on a
3 lawful and sustainable basis, long-term financial support,
4 that it would make the scanner investment now in order to
5 keep CIAL open, pending that further support. The
6 information in this advice provides an outline of what that
7 policy will look like, with the details to be provided in
8 subsequent advice."

9 Then paragraph 12, please, that is on page 214. If you
10 could just read the passage that is marked as confidential.
11 Then, while you are also reading, please, if you could look
12 at paragraphs 15 to 17. (Pause).

13 Again, most of that is confidential, so I cannot read it
14 out, but I do draw attention to what I can read out, the
15 first two sentences of paragraph 17:

16 "CIAL's board is required to show that the business can
17 remain a going concern. The board is seeking a resolution as
18 early as possible in September 2023 to satisfy its audit
19 timeline and fiduciary responsibilities."

20 THE CHAIRMAN: Yes.

21 MR WEST: Just finally to note paragraph 51 on page 222, first
22 sentence:

23 "Should Ministers agree to Option 1 in this advice,
24 officials will develop specific details of a new longer-term
25 support package."

1 So the point to note there is, first of all, of course,
2 the financial position. That is largely confidential. You
3 have seen -- and also the fact that at this point there is
4 discussion of a new longer term support package, so we are
5 here in autumn 2023.

6 So that is the first package of support. The second
7 package of support comes two months later, which is the first
8 credit facility. I am again in bundle A, please, tab 27 at
9 page 272.

10 THE CHAIRMAN: Yes.

11 MR WEST: This is another ministerial advice. Here, I am afraid,
12 the whole of the summary is confidential and I cannot read it
13 out, but the Tribunal is invited to do so.

14 THE CHAIRMAN: This is, yes, the 100-word summary?

15 MR WEST: The 100-word summary, yes. But you can see what the
16 issue is there.

17 THE CHAIRMAN: Yes.

18 MR WEST: Then if you go to the recommendation, again, I suggest
19 reading that, so:

20 "... provision of a loan credit facility of up to £15m to
21 ... be drawn down for specified purposes which will be
22 designed and drafted to allow access to funds to ..."

23 Then you will see there are some confidential words.

24 Then you note the final bullet point:

25 "Note the letter also states explicitly Ministers' policy

1 in relation to long-term support."

2 So, again, the reference, you have got the financial
3 position and the long-term support.

4 I would now invite, please, the Tribunal -- well, let me
5 read out what I can read out. Paragraph 1:

6 "CIAL's FY22-23 accounts are currently being audited
7 prior to being filed in December 2023. To avoid these
8 accounts being qualified, CIAL needs to demonstrate that it
9 will remain a going concern in FY24-25 and into FY25-26."

10 Then there is a large passage which is confidential which
11 I'd invite the Tribunal to read.

12 (Pause).

13 I do not need to gloss that, but you can see what the
14 position was.

15 THE CHAIRMAN: Yes.

16 MR WEST: Then if I could draw attention to the beginning of
17 paragraph 5:

18 "Following Ministers' decision to commit to longer term
19 financial support ..., [the Welsh Government] is aiming to
20 notify the Competition and Markets Authority ... in April
21 2024 of its intent to subsidise [Cardiff] by way of further
22 financial support. The outcome of this process will not be
23 known until late Summer 2024 ..."

24 You will see what the implications of that are in
25 relation to the matters you have previously read that were

1 confidential.

2 Then you see, if I could draw your attention, please, to
3 paragraph 15:

4 "However, it would be intended that such a facility would
5 only be used in the event that [the Welsh Government] is
6 unable to provide longer term financial support to [Cardiff]
7 in sufficient time to cover the costs of the runway works.
8 Given [Cardiff's] current cash balance, it is anticipated
9 that the facility would not need to be drawn upon until ..."

10 Then there is a date given which is confidential. This
11 is important:

12 "The facility would be withdrawn and cancelled once
13 subsidy payments to [Cardiff] begin. The facility would be
14 limited in use to capital expenditure necessary for safety,
15 security or to maintain regulatory compliance. It is
16 currently anticipated that the reconditioning of the runway
17 would be the major and sole use of the facility. However,
18 the use of the facility funding for preventative maintenance
19 to avoid more expensive infrastructure failures at a later
20 date may also be considered."

21 Then I would invite we have paragraph 17:

22 "[Cardiff] has significant cash reserves but needs the
23 confidence to deploy them ..."

24 Then we have got something redacted for privilege.

25 "If the subsidy application is challenged, the credit

1 facility would provide a potential route to finance [Cardiff]
2 in the short term while Ministers determined an alternative
3 course of action. The cash reserves are specially ringfenced
4 for committed operational costs and capital investment which
5 were pre-agreed as part of their restructuring aid plan with
6 the [Welsh Government]."

7 Then:

8 "Should the subsidy fail or be delayed, the Board will
9 need to be able to demonstrate that it was reasonable for
10 them to have spent their reserves because an additional
11 source of funds (the credit facility) was available."

12 It is then said at paragraph 18:

13 "The facility would need to be offered on a 'no subsidy'
14 basis ..."

15 And then we have paragraph 21:

16 "This credit facility is a route to giving effect to
17 Ministers' policy of long-term support as it provides the
18 time and space necessary to produce a subsidy application and
19 determine its success."

20 Then finally, just so you can see, paragraph 40, which is
21 confidential but which you should see. I think what
22 I probably can say in open is that that sets out the terms of
23 the facility. I do not think that that can be confidential,
24 it is what the facility actually is that is confidential.

25 (Pause).

1 So far so good. If we go to the next package of support,
2 which is what we have referred to as the extended SCF. This
3 is in the advice, the ministerial advice dated 12 July 2024.
4 That is same bundle, tab 28, page 290.

5 Again, the 100-word summary is largely confidential, so
6 I have to ask the Tribunal just to read that. (Pause).

7 THE CHAIRMAN: Yes.

8 MR WEST: Then if we go to the advice itself, there is reference
9 first in paragraph 1 to the original facility, and then in
10 paragraph 3:

11 "When the facility was agreed it was anticipated it would
12 not need to be drawn if the subsidy referral process were
13 successful. The current timeline for the CMA process
14 envisages that the legal challenge window will close before
15 1 November 2024, so the expectation remains that the facility
16 will not be used. However, if there is any delay to the CMA
17 process, there is the possibility that the facility may need
18 to be drawn to a limited extent, to be repaid and cancelled
19 upon confirmation that the subsidy programme can begin. The
20 existence of the facility has not been put into the public
21 domain yet but would be made known when CIAL need to account
22 for the funding when they file their accounts made up to
23 31 March 2025 due by 31 December 2025."

24 Then if I could invite the Tribunal, please -- well,
25 I will read the beginning of paragraph 4:

1 "With [Cardiff's] FY23-24 accounts in mind, the Board has
2 looked at the business' wider financial prospects for the
3 next two Years. Its auditors will look at the viability of
4 the business from the date of signing the accounts and it is
5 an audit discretion as to what period is needed, but
6 18 months is normal practice."

7 If you could then, please, read the passage that has been
8 marked as confidential for the remainder of paragraph 4 and
9 paragraph 5.

10 (Pause).

11 There is then discussion going forward in paragraph 11 of
12 various options.

13 Then we have paragraph 12:

14 "The preferred option is the increased credit facility.
15 Officials have not conducted any further detailed analysis on
16 this option as the fundamental circumstances have not changed
17 since the original advice was drafted -- the only differences
18 are the need for a wider funding envelope and an expansion of
19 the remit of the facility to allow expenditure on activities
20 other than runway repairs."

21 Again, I suggest -- sorry, let us just look at
22 paragraph 21. This is on page 296:

23 "The facility would only be drawn in the event that [the
24 Welsh Government] is unable to demonstrate that it will be
25 able to provide longer term financial support to [Cardiff]

1 via any other means for the next two years, covering
2 essential operational costs."

3 Then at paragraph 24, again this is all confidential.
4 I think what I can say, as previously, is that sets out the
5 terms of the credit facility, but obviously the terms
6 themselves are confidential.

7 THE CHAIRMAN: Yes.

8 MR WEST: So, as I say, I do invite the Tribunal to read those
9 ministerial advices after the hearing in full because
10 obviously I can only take you to the most relevant parts.

11 Then, finally, we get to the subsidy itself. I can deal
12 with this fairly quickly. Just so that you see -- I do not
13 need to show you the documents, but first there is
14 an advice -- a ministerial advice of 9 August 2024 and that
15 is the one that seeks permission to refer the proposal to the
16 CMA. Just for your note, that is bundle A, tab 29, is that
17 ministerial advice.

18 Then there is an assessment of compliance as at
19 13 August 2024. I do not need to look at that because there
20 is a revised assessment that we will come to. So the
21 assessment of compliance, the first assessment of compliance,
22 is bundle B, tab 30.

23 Then we get the CMA Subsidy Unit report in October 2024.
24 If we could go, please, to bundle D, tab 45, 1165.

25 Sorry, sir, are you using electronic --

1 MR ALTY: Yes.

2 MR WEST: So that is in October 2024. The summary starts on
3 page 1171 and it makes various recommendations
4 at paragraph -- I draw attention in particular to
5 paragraph 2.4, which the Tribunal may want to read.

6 THE CHAIRMAN: Yes.

7 MR WEST: The headlines of that in particular at (d):

8 "More systematically set out and evidence potential
9 competition and investment impacts, drawing on the relevant
10 parts of the Statutory Guidance ..."

11 You will see there are then recommendations about
12 assessing the product and geographical markets most likely to
13 be affected, considering how the subsidy could impact
14 competition, which are important.

15 THE CHAIRMAN: Yes.

16 MR WEST: While we are here, if I could just take you to
17 paragraph 3.43(b). That is on page 1181.

18 THE CHAIRMAN: Yes.

19 MR WEST: I just take you to this now because it is a point on
20 proportionality. It says there:

21 "Consider the size of the Subsidy relative to the size
22 and the costs of the beneficiary, and/or the value of the
23 relevant markets. Whilst the Assessment provides some
24 evidence of private investment in other UK airports and two
25 examples of subsidies for airports in other countries, it

1 does not explain how or why this evidence is relevant to the
2 proportionality of this subsidy and the objectives it seeks
3 to achieve, which makes the comparisons less meaningful."

4 So that is what then happens. We have the CMA Subsidy
5 Unit report. We then have a revised assessment of
6 compliance. Here I am back in bundle B, tab 31, page 411.
7 Now, I am just showing you this document, I do not intend to
8 go to it now, but I raise various points as I go through in
9 relation to it. So this is tab 31.

10 THE CHAIRMAN: Yes.

11 MR WEST: It is a lengthy document. One point I would just
12 simply wish to point to though, and this is not intended as
13 a jury point but I just make it on passing, if you look at
14 412, "Table of Contents", if you look towards the bottom,
15 page 412, you will see:

16 "5.1. Change in Economic Behaviour ..."

17 You will see what it says there:

18 "N.B. The investment is not a scheme therefore
19 additionality for schemes does not apply."

20 I just make this point because clearly this is
21 the revised assessment of compliance and it's stated very
22 clearly that this is not a scheme. This is the revised
23 assessment of compliance that was taken into account at the
24 time that the subsidy decision was made.

25 Then we have another ministerial advice. This is the

1 advice of 28 March 2025, staying in bundle B, tab 32,
2 page 533. I can read out the 100-word summary there:

3 "In late 2023, Ministers confirmed their intent to pursue
4 a policy of ongoing, scalable financial support to Cardiff
5 ... to enable its economic growth potential and agreed that
6 officials should complete work on the details of a long-term
7 subsidy. A case was referred to the [CMA] for a Welsh
8 Government subsidy package of up to £205.2 million, to be
9 provided to the Airport on a phased basis over ten-years.
10 This advice sets out the options available to Ministers to
11 achieve the economic outcomes sought for the Airport via the
12 proposed subsidy."

13 You then see the recommendation, and the background is
14 set out in paragraphs 1 to 5, which is on page 535. A phrase
15 you have seen, it starts:

16 "In late 2023, Ministers confirmed their intent to pursue
17 a policy of ongoing scalable financial support to the Airport
18 and agreed that officials should complete work on the details
19 of a long-term subsidy approach ..."

20 Then if you then just turn, please, to page 538:

21 "Proceeding with the Subsidy is the only option which
22 offers the opportunity of being able to give the Airport
23 ten years of stable growth ..."

24 THE CHAIRMAN: Sorry, 24 is it?

25 MR WEST: Sorry?

1 THE CHAIRMAN: Paragraph 24, is it?

2 MR WEST: Paragraph 24, yes:

3 "Proceeding with the Subsidy is the only option which
4 offers the opportunity of being able to give the Airport
5 ten years of stable growth potential, focused on maximising
6 the Airport's positive impact on the economy of South Wales.
7 Furthermore, the Subsidy is the only option which allows the
8 Welsh Government to control delivery of the long-term growth
9 potential of the Airport and therefore realise the extent of
10 the net economic benefits -- as noted above, seeking a
11 private sector investor of the Airport might sustain the
12 business, but it is very likely to involve a loss of the
13 Welsh Ministers' control over the Airport's strategic
14 direction. Backing away from the Subsidy may send adverse
15 signals to the Airport's most important stakeholders, such as
16 airlines, on-site businesses and its employees."

17 Now, there is within that obviously a lot of detail.
18 Again, all I can do is invite the Tribunal to read it. I do,
19 though, make, of course, the obvious point: there is no
20 reference there to a subsidy scheme because that is not what
21 was being considered at the time.

22 But this is the document which leads to the subsidy. It
23 is annex 4. If you go to page 562, you see the -- sorry, it
24 is 561. You see a summary description of the subsidy for
25 publication on the transparency database. You have seen that

1 text of that decision in various places. It is in our
2 amended notice of appeal, for example, but that is where it
3 started from.

4 So that is, if you like, the key documents.

5 THE CHAIRMAN: Yes.

6 MR WEST: Taking you through this. We will come back to some of
7 them in the course of submissions.

8 Now, the legal framework. I think I can deal with this
9 fairly briefly. We have set out the statutory framework at
10 paragraphs 29 to 39 of the amended notice of appeal and if we
11 look at the amended defence and my learned friend's skeleton
12 I do not think there is actually much dispute about the
13 statutory provisions. There are really two points, and two
14 points alone.

15 The first is if Cardiff Airport were ailing and insolvent
16 within the meaning of section 24, then as a matter of law is
17 any subsidy restricted to being offered in accordance with
18 section 19 and/or section 20 or could a different kind of
19 subsidy be offered? That is really the first point of
20 contention between us.

21 THE CHAIRMAN: Yes.

22 MR WEST: The second is to the extent there is subsidy to
23 carriers for route development, is it necessary to meet the
24 requirements of section 28?

25 Now, we will come back to some of the statutory

1 provisions as we go, but in terms of the approach
2 the Tribunal should adopt in determining the appeal,
3 section 70(5) of the Act provides that you have to apply the
4 same principles as would be applied in determining
5 proceedings on judicial review. That is the Tribunal
6 exercising a supervisory jurisdiction, not a full merits
7 review, and we accept that, and we have set out in our
8 amended notice of appeal how we put the case by reference to
9 various judicial review principles.

10 I will come back to that as necessary as I go, but
11 I first want to make some points -- address some points made
12 in my learned friend's skeleton argument in relation to case
13 law.

14 My learned friend deals with this at paragraphs 24 to 30,
15 which he refers to as the "rationality review". The starting
16 point for that analysis is what is said in the Weis case, the
17 subsidy case, a decision of the Tribunal, and that draws
18 heavily on the Dye & Durham case and Dye & Durham in turn
19 refers back to other cases, all of which are here. Those are
20 under different legislation but it is the same principle of
21 the Tribunal; this Tribunal is seeking to apply judicial
22 review principles when determining a statutory appeal.

23 Now, I am not going to suggest that by enacting
24 section 75 Parliament intended that there should be some
25 different approach in relation to appeals under this Act. We

1 are not suggesting, as seems to be proposed, that the
2 Tribunal should substitute its views for those of the
3 decision-maker.

4 The points from Dye v Durham which are emphasised at 25
5 are matters of principle but they cannot provide more than
6 guidance as to how the Tribunal should proceed in this case.
7 So 25(1), you will see there is a reference to the
8 Office of Fair Trading v IBA Health case and it talks about:

9 "... a 'low intensity' of review ... involving issues
10 'depending essentially on political judgment' ..."

11 Well, we say properly considered there is no policy or
12 political judgment here, save perhaps in relation to
13 principle A of the principles. Whether an entity is ailing
14 or insolvent is not a matter of policy or political judgment
15 and you cannot dress up the entire application of the Act as
16 being a matter of policy and political judgment, because if
17 that were the case the protections it offers would be
18 denuded, and those protections not just to enterprises but
19 also to the people who interface with the enterprises, the
20 consumers.

21 THE CHAIRMAN: But let us just assume for present purposes you
22 are wrong about your ground 2, so we are in ground 1 but you
23 are wrong about ground 2, and so it is open to the respondent
24 to make a subsidy that is not a rescue or restructuring
25 package. You are then saying, I think, that there is

1 a rationality challenge to the failure by them to take
2 account of the financial situation of the airport; that is
3 right, is it not?

4 MR WEST: Yes, because that would also play into what would
5 happen in a world where you were not just going under rescue.
6 I mean, it is a relevant fact and will be relevant to the
7 rationality of any decision that was taken, yes.

8 THE CHAIRMAN: I think we are then, are we not, in matters, at
9 least in some part -- well, I think probably more than some
10 part -- in matters of political judgment, are we not? I
11 mean, at that stage, surely, if you are wrong about ground 2
12 then there is a whole range of different things that the
13 respondent is taking into account, which are many of them
14 essentially political, and the financial condition of the
15 airport is just one of them.

16 MR WEST: Yes, and also all of the issues under the principles
17 involve a rationality standard and that will involve looking
18 at all the relevant circumstances that factor into that.

19 THE CHAIRMAN: Well, just before you get to the principles,
20 though, because I think your ground 1 does not depend on the
21 principles, does it?

22 MR WEST: No.

23 THE CHAIRMAN: I suppose the reason for intervening and making
24 the point is I am still slightly unsure about what your
25 argument is under ground 1 if you are wrong under ground 2.

1 It seems to me that at this point that you are actually
2 advancing a very different argument under ground 1 if you are
3 wrong under ground 2 than you would be if you are right under
4 ground 2.

5 MR WEST: Yes, well, I mean if I can help, to be clear, if you
6 are going to place any reliance on whether an entity is
7 ailing or insolvent, you have to go through the exercise
8 which we set out effectively under ground 1. So you ask
9 yourself the question, and obviously we say that is
10 a question that should have been asked and should have been
11 investigated and it was not properly, that is the substance
12 of our ground 1. The Tribunal will have to decide ultimately
13 whether or not we are right on ground 1 in terms of whether
14 Cardiff was ailing or insolvent. Once it has done that, and
15 obviously for ground 2 we say if you have reached that
16 conclusion on ground 1, on ground 2 you are into either
17 rescue aid or restructuring aid, and we say there is no other
18 option at that point. There is no suggestion that has been
19 made that section 19 or section 20 have been complied with,
20 so we say that is effectively an end of the matter. If we
21 are wrong on ground 2 -- well, if the Tribunal decides
22 against us on ground 1, then ground 2 does not really arise.
23 If the Tribunal is with us on ground 1 but against us on
24 ground 2, then your conclusion on ground 1 would simply be
25 part of the factual matrix which would then be relevant to

1 assessing the rationality of the application of the
2 principles that the subsidy -- (overspeaking) --

3 THE CHAIRMAN: Well, that is helpful, I think. That really is
4 what I was driving at because I absolutely understand your
5 point about ground 2, and obviously if you are right about
6 that then it seems -- I am sure Mr Peretz will have -- I do
7 not know whether he has got anything to say about it, but his
8 challenge at that stage is that he has got a piece of
9 litigation which on your analysis, if you are right, requires
10 him not only to consider whether they are ailing or insolvent
11 but, if he reaches that conclusion, then to apply sections 19
12 and 20.

13 MR WEST: Absolutely.

14 THE CHAIRMAN: That is your argument and that sort of form of
15 challenge, you know, looking at the decision here, is pretty
16 easy, is it not, if you are right?

17 MR WEST: Yes, yes.

18 THE CHAIRMAN: Because on your case there is not just an
19 important but an absolutely central -- the central question
20 they have to ask themselves is whether it is ailing or
21 insolvent, and if it is not then obviously they can ignore
22 sections 19 and 20, but if it is then on your case they have
23 to apply it. If they have not even thought about that, or
24 they have thought about it only in a way that does not
25 recognise the importance of the point, then you are a long

1 way home on ground 1. I can see that.

2 MR WEST: Yes.

3 THE CHAIRMAN: But -- and obviously subject to anything Mr Peretz
4 says and I do not want to indicate any view on that -- but if
5 you are wrong on ground 2, then you are really placing this
6 question of ailing and insolvent as just being a thing that
7 the respondent was supposed to think about, and then are you
8 not really very much into this sort of territory where -- and
9 I am not saying you are on the wrong side of the line, but we
10 are asking ourselves the question of: is this something that
11 was really just inherent in the broad discretion that the --
12 or (inaudible) -- but is it something that is inherent in the
13 discretion of the respondent in making a decision,
14 a multifactorial decision? The financial position I do not
15 think is irrelevant, but just for example I think the
16 guidance says somewhere that you want to think about, if you
17 are giving money to something that is ailing or insolvent,
18 whether it is good value for money.

19 MR WEST: Exactly, yes.

20 THE CHAIRMAN: I am certainly not suggesting it is irrelevant,
21 but it is relevant in quite a different way if you are right
22 on ground 2, is it not?

23 MR WEST: Yes, I would accept that. I mean, obviously there is
24 a discretion. We cannot deny there is the application of
25 a multifactorial test with a discretion. The question is:

1 This is -- I think the way we can just summarise this -- if
2 I can just summarise this, there is an issue here -- of
3 course the political judgment that is being prayed in aid is
4 on behalf of the Welsh Ministers and the Senedd. The cases
5 referred to by my learned friend are of course different in
6 the sense that this is looking at allocations within the
7 entirety of the United Kingdom, and where it is accepted in
8 those cases you are looking at what the UK government as
9 a whole can do, and we say the position -- we made the point
10 in our amended notice of appeal and in our skeleton, the
11 position is different because the Welsh Ministers may well
12 have a margin in terms of political judgment, as it involves
13 the jurisdiction of which they are responsible. There is
14 a question, which I think actually has not been -- nobody has
15 ever had to consider is what happens when that judgment is
16 exercised in a way that goes beyond the jurisdiction and
17 affects somebody else, in this case Bristol, which obviously
18 is not within the jurisdiction. That is a question of what
19 it means, I think, to have a discretion because of political
20 judgment.

21 THE CHAIRMAN: It is with a sinking heart I hear that no one has
22 decided --

23 MR WEST: Not to my knowledge.

24 THE CHAIRMAN: You seem to be suggesting that we are going to
25 have to, but I was not entirely sure I really understood the

1 point. I mean, are you saying that there is some extra
2 obligation to take account of things outside of the territory
3 or are you saying there is a limitation on how far the
4 political judgment gets you if it affects other things?

5 MR WEST: Yes, I think there is a limitation on -- the political
6 judgment can only be those things for which you are
7 politically responsible, I suppose is what I am saying.

8 THE CHAIRMAN: But if their responsibility is to look after the
9 economy and the social equality in Wales, then are you saying
10 that they -- you are not saying they should do anything
11 different, are you? You are not suggesting they should view
12 that in a different way? I mean, they have clearly gone
13 through the exercise here of thinking about competitors,
14 including Bristol, who are not based in Wales, and so they
15 have not ignored the geographical point. So that is not the
16 point, is it?

17 MR WEST: No, I mean, I think the difference is in, you know,
18 trying to balance an interest which lies outside your
19 jurisdiction, which is the difficulty -- or the feature, not
20 the difficulty, the feature which arises here.

21 THE CHAIRMAN: But does it really arise here, because if they
22 have made their decision -- if they have taken account of
23 things, and I am sure you have -- I know you have lots of
24 criticisms about how they have done that, but at least if it
25 is, just for argument's sake, just dealing with this point,

1 they have not ignored the position outside of Wales, and if
2 they had you might well have had something to say about that,
3 but they have not, so they have then gone through the process
4 of weighing up all the benefits that come from the subsidy
5 against the detriment, without as far as I can tell any
6 weighting based on geography -- I mean, it may be I am wrong
7 about that but I have not seen that -- and so in those
8 circumstances why is it any different from any other
9 decision? That is the point I am not sure about.

10 MR WEST: I think it just goes to the width of the discretion,
11 ultimately.

12 THE CHAIRMAN: But why is their discretion altered? Are you
13 saying it is altered because -- but if they have taken an
14 account of extraterritorial points, put it that way, then how
15 does it affect the discretion?

16 MR WEST: Well, I mean, the simple point is that it is
17 conceptually a different situation to those cases on which
18 reliance is placed by the respondent, because those are cases
19 where the court is looking -- I mean, in the Rotherham case
20 the court is looking at how the UK as a whole is carved up.
21 Parliament has responsibility for the whole of the UK, it is
22 just a different situation.

23 THE CHAIRMAN: Yes, but I thought you had made a point that
24 Mr Peretz was responding too. It may be I have misunderstood
25 that, but I thought you had started this by saying that there

1 was some feature here that because of the cross-border, if
2 you like --

3 MR WEST: Maybe I should just go to the --

4 THE CHAIRMAN: Look at your notice of --

5 MR WEST: Maybe we should just look at what is said in the
6 amended defence. This is bundle A, tab 2. It is
7 paragraph 72. It is on page 86, sorry, I gave you the wrong
8 page reference. It is page 86. What we have said in
9 response to that is it does go to -- I mean, if you look at
10 what we say at paragraph 153 and 154 of our skeleton.

11 THE CHAIRMAN: Yes.

12 MR WEST: Shall we address that?

13 THE CHAIRMAN: So they say it is a multifactorial judgment, which
14 is political and policy-related, where they are accountable
15 to the Senedd and the electorate.

16 MR WEST: Yes.

17 THE CHAIRMAN: That is what they say.

18 MR WEST: Yes.

19 THE CHAIRMAN: So there is no sense there of there being an issue
20 about territoriality, they have not advanced that.

21 You have then come back and said that it is different in
22 154 because you are not in the same jurisdiction; is that
23 right?

24 MR WEST: Yes.

25 THE CHAIRMAN: I am not quite sure why it is different.

1 MR WEST: Well, it is the point about being accountable to the
2 senate and to the electorate, which suggests a very specific
3 focus which is in Wales and we are outside Wales. I mean,
4 you know, I do not think I could develop the point more than
5 is in our skeleton --

6 THE CHAIRMAN: Yes.

7 MR WEST: -- but that is the essence of it. It is the reliance
8 on accountability to an electorate, which is not
9 an electorate that directly engages us --

10 THE CHAIRMAN: Yes, okay.

11 MR WEST: -- which is different to the -- when the pronouncements
12 are made in cases like the Rotherham case, what is trying to
13 happen is that the court is trying not to usurp the position
14 of the elected body, essentially, but that is in the context
15 where everything falls under a UK-wide umbrella. Maybe
16 the Tribunal thinks it makes no difference, but there is
17 a distinction here, because --

18 THE CHAIRMAN: Well, I think I am interested in what the -- I am
19 still not sure whether you are encouraging us to do something
20 other than what we would normally do. Well, firstly I am not
21 sure whether you are saying they should have done something
22 they have not done or should not have done something they
23 have done, and secondly I am not sure what it is you are then
24 asking us to do in relation to it.

25 MR WEST: Well, I think it is the final paragraph, the last

1 sentences of paragraph 154, it is when you are looking at the
2 negative effects, to the extent that that may have led to
3 a downplaying of the negative effects on people who are
4 outside of the area for which they are accountable, that
5 would be the issue.

6 THE CHAIRMAN: So, what, you are saying we should be alive to the
7 possibility they might have not fully considered the --
8 (overspeaking) --

9 MR WEST: Exactly, it is no more than that.

10 THE CHAIRMAN: -- because they are not accountable for the
11 consequences.

12 MR WEST: Yes.

13 THE CHAIRMAN: I see.

14 MR WEST: That is the point, yes.

15 THE CHAIRMAN: But that is a -- well, that may be a legal point
16 as well, but it is really a factual point, is it not? I
17 mean, you will have to make good on the facts on the papers
18 if you are going to advance it.

19 MR WEST: Yes.

20 THE CHAIRMAN: We cannot just infer it, can we?

21 MR WEST: No, well, it is more that it is the reliance that is
22 placed by the Welsh Ministers on the scope of their
23 discretion, and what I have to say is they have exceeded the
24 scope of their discretion when looking at the documents and
25 the papers.

1 THE CHAIRMAN: Yes, okay.

2 MR WEST: I wonder if that was -- no, okay, thank you.

3 I want to move -- there are then various points made at
4 paragraph 27 about the points the Welsh Government
5 emphasises. You'll see that:

6 "... wide margin of judgment when making technical or
7 predictive judgments ..."

8 The issue in all of these cases that they recite there is
9 these cases are all fact-specific. So we would say a
10 technical or predictive judgment about pollution, which is
11 the first case you have got there, paragraph 27(1), is
12 qualitatively different to looking at whether a company is
13 ailing or insolvent.

14 Just to take another one, 27(3), the Patel case, this is
15 about public interest, it is a public interest area,
16 defraying money for legal aid, the point simply is it is very
17 difficult to take judgments on one factual set of
18 circumstances and from that adduce a principle which means
19 that there can be no attack on the proper exercise of any
20 discretion or rational behaviour.

21 The final point I wanted to just talk about was the
22 Tameside duty. We mentioned in our skeleton argument the
23 case for Plantagenet Alliance. I am afraid that has not
24 found its way into the bundle. We will arrange copies as
25 soon as we can. But I can make the point simply that there

1 are a number of principles that apply in the Tameside duty
2 and I just want to draw attention to the final of them, which
3 is -- these are a -- what happened was that the judge
4 summarised the case law on the Tameside duty into a number of
5 principles and these were then upheld in a subsequent case by
6 the Court of Appeal. The last one is:

7 "... the wider the discretion conferred on the secretary
8 of state, the more important it must be that he has all the
9 relevant material to enable him properly to exercise it."

10 So obviously it is, if you like, the counterpoint to
11 saying, "I have got a wide discretion". The counterpoint of
12 saying "I have a wide discretion" is you have to make sure
13 you have all the relevant material to enable you to exercise
14 it.

15 THE CHAIRMAN: You have given us a reference in your skeleton to
16 that.

17 MR WEST: It's in the amended notice of appeal and we will
18 arrange for copies.

19 THE CHAIRMAN: Can you give us a reference now to that passage?

20 MR WEST: Yes, it is paragraph 99.

21 THE CHAIRMAN: Yes, thank you.

22 MR WEST: It sets out -- that is where it starts and then
23 paragraph 100 sets out the principles to be gleaned from the
24 authorities and it is paragraph 100.6.

25 THE CHAIRMAN: Yes.

1 MR WEST: So, as we say, I mean, to put this point very
2 succinctly, a leitmotif that runs throughout the
3 Welsh Ministers' submissions is they had a very wide margin
4 of discretion. We don't actually accept the discretion is as
5 wide as is contended, as you know, but in any event you
6 cannot have it both ways. If you have got a wide discretion,
7 you have to make sure you have all the relevant material and
8 ask the right question, in particular.

9 So with that in mind, I would like, if I may --

10 THE CHAIRMAN: Yes, just before you move on from that, can I ask
11 you about reasons, the duty to give reasons.

12 MR WEST: Yes.

13 THE CHAIRMAN: I think Mr Peretz has suggested you might have at
14 least backed off, if not abandoned that bit of the case. I
15 mean, are you still persisting with those arguments?

16 MR WEST: We have not abandoned it but I was not intending to
17 devote limited time here to make submissions beyond those
18 which we have already made.

19 THE CHAIRMAN: So on the basis that if you were -- if that was
20 the only thing left, you were not so confident that it was
21 going to help you, is that -- (overspeaking) --

22 MR WEST: Well, I think the thing is that there is a general
23 strain in case law that reasons are a challenge you tend to
24 bring at the outset of proceedings. By the time you appear
25 in front of a court or Tribunal, you usually inevitably know

1 a lot more than you did than when you started, and as you say
2 it is -- I am trying to think of a case where you actually
3 succeed only on reasons and on nothing else.

4 So, yes, we make the point. I do not want to spend
5 a large amount of time pursuing it because I have to decide
6 where I am going to cut my cloth, basically.

7 THE CHAIRMAN: Yes, thank you.

8 MR WEST: But it is not formally abandoned.

9 So if we could turn now to grounds 1 and 2, they both
10 proceed from the proposition that at the time of the grant of
11 the subsidy Cardiff was ailing or insolvent, and you have
12 seen how I have put that, which is that if we are right on
13 ground 1, you then go to ground 2. If you get to ground 2,
14 you have only got section 19 or 20, if we're right on
15 ground 2. If not, there could be another route. You then
16 have to consider other issues, like value for money, which is
17 what the statutory guidance says, and we would say that in
18 circumstances where if you should have found something was
19 ailing and insolvent, that it would actually be irrational,
20 even to get beyond that stage, but if you did get beyond that
21 stage, it would certainly be hugely relevant to the
22 application of the principles. So that is the sort of --

23 THE CHAIRMAN: Yes, just before the break, when we were talking
24 about this, I think you said that if you were wrong about
25 ground 2, then ground 1 effectively becomes factual

1 background rather than if we stand (inaudible), or am I
2 misunderstanding that?

3 MR WEST: Well, I think on reflection it may go further than
4 that, because if they are right -- if we are right on
5 ground 1 and they are right on ground 2 --

6 THE CHAIRMAN: So factually it was -- I mean, in a way maybe
7 ailing and insolvent is not a particularly helpful reference
8 for ground 1. I think your case is actually just they should
9 have considered the financial condition as part of the
10 assessment. Well, at least more carefully and taken more
11 account of it. I mean, maybe -- I mean, I do not want to
12 encourage you to depart from your pleaded and argued case,
13 but at the end of the day if you are wrong, and just
14 hypothetically if you are wrong on ground 2, the question
15 does become: how does ground 1 fit into a separate
16 rationality argument or was it actually part of just your
17 argument about the principles?

18 MR WEST: Well, it would be part of ground 2 as well because in a
19 sense the statutory guidance, and we will come to this, talks
20 about value for money, and obviously value for money is hard
21 to demonstrate when you are giving money to an entity which
22 is ailing or insolvent or in financial difficulty.

23 THE CHAIRMAN: Yes, but if your point -- well, maybe we need to
24 see how you develop your case on ground 2, but I had
25 understood that you were more or less in the position where

1 either you are right about the construction of 19 or 20 or
2 you are not, and if you are not there is the question: what
3 are we actually looking at in ground 1? Perhaps you just
4 need to develop that and tell us as we go.

5 MR WEST: So coming to ground 1, then, we set out our case in the
6 amended notice of appeal at paragraphs 45 to 57 and we put
7 our case in different ways in accordance with judicial review
8 principles. You will see that, though, I do not want to turn
9 it up. We say there was a procedural failing in
10 Welsh Ministers not turning their mind properly or at all to
11 the question of whether Cardiff was ailing or insolvent.
12 There is also a breach of the Tameside duty. Welsh Ministers
13 proceeded on the basis that Cardiff was not ailing or
14 insolvent and did not set out any reasoned conclusion as to
15 why not. They failed to take account of relevant
16 considerations, including the views of their advisors, and
17 the situation of Cardiff as it stood at the time, and so also
18 we do say the position that Cardiff was not ailing or
19 insolvent is irrational.

20 As we have put in paragraph 46 of the amended notice of
21 appeal, and this really reflects the case law, including the
22 Wednesbury case itself, all of those grounds of judicial
23 review tend to be rather closely covered.

24 So ground 1 is covered in our skeleton at paragraphs 51
25 to 98 and, as we say there, whether an enterprise is ailing

1 or insolvent is critical to a proper and lawful application
2 of the subsidy control regime, because the purpose of subsidy
3 should not be to prop up businesses that would otherwise
4 fail, giving the harm to competition, and we would assume
5 that to be common ground.

6 So where an enterprise is failing and is likely to cease
7 operation without subsidy, there are circumstances under
8 which it may nonetheless be proper to give subsidy, first of
9 all, to stop the enterprise going under and then to give it
10 an ability to restructure, and those two limbs are recognised
11 as rescue aid and restructuring aid, both of which are
12 strictly controlled and limited.

13 Now, in some cases we would say the question of whether
14 an enterprise is ailing or insolvent is easily answered and
15 may actually not require much thought, but that is just
16 a statement of maybe of the obvious, but that clearly is not
17 the case in relation to Cardiff because, as we looked, I have
18 taken you to the agreed stated facts, Cardiff has been the
19 recipient of a lot of public funding, considerable amounts in
20 the past, including the rescue and restructuring package. In
21 total since it has come back into public ownership Cardiff
22 has had £180 million of public funds, and what is now
23 proposed is to put more than that amount in again. So we say
24 it was obvious that it was necessary to give very close
25 scrutiny to whether Cardiff was ailing or insolvent.

1 As we say from the disclosed materials, that was not the
2 case, but also we say there was clear evidence that Cardiff
3 was ailing or insolvent. Against that background, I am going
4 to go through the submissions as follows. I will first of
5 all look at what an ailing or insolvent enterprise is, then
6 look at the position of Cardiff before the SCF and the
7 extended SCF, then at the time of SCF and the extended SCF
8 being granted, and then I will conclude by looking at issue 1
9 and issue 2.

10 So, first of all, what is an ailing or insolvent
11 enterprise for the purposes of the Act? We find that if we
12 go to the authorities bundle, please, and if we could go to
13 tab 34, page 1495.

14 MR FRAZER: Which volume, sorry?

15 MR WEST: 3. Tab 34. So if you look at the definition in the
16 tab there, then an enterprise is going to be ailing or
17 insolvent if:

18 "(a) it would almost certainly go out of business in the
19 short to medium term without subsidies

20 "(b) it is unable to pay its debts as they fall due, or

21 "(c) the value of its assets is less than the amount of
22 its liabilities, taking into account its contingent and
23 prospective liabilities."

24 It is suggested in my learned friend's skeleton that limb

25 (a) sets out what it meant by "ailing" and (b) and (c) by

1 "insolvent", and it seeks there to draw a parallel with
2 section 123(1)(e) and section 123(2) of the Insolvency Act
3 1986. Now, we say that if it were the intention that
4 Parliament intended to map directly across to the
5 Insolvency Act, it would have done so, because it is not
6 clear why, if those were the definitions that were intended,
7 there was not just a direct cross-reference. So we say that
8 in the lack of such a cross-reference, the better view is
9 that you give these words their natural meaning.

10 But in any event, we say, and this becomes clear from
11 later in my learned friend's skeleton, we think there is
12 a conflation of whether an enterprise is ailing with whether
13 it is insolvent. Those are two different tests and certainly
14 cash from a balance sheet can only be relevant to insolvency,
15 whereas ailing is more open ended.

16 We also say in the context of considering whether
17 an enterprise is ailing, a public authority cannot take
18 a formalistic view of the criteria and it cannot take
19 an arbitrary definition of the short to medium-term and look
20 at that in isolation.

21 Before the question is asked, there is in fact no
22 definition of what is meant by short or medium-term in this
23 Act. As far as we can see, the respondent appears to
24 consider it is up to two years. We disagree. We say there
25 is no authority to support that proposition and on a natural

1 meaning of the words it must go beyond -- short to medium
2 must go beyond two years to at least four or five. But we
3 also say that you cannot ignore a long-term forecast which
4 goes beyond the very short to medium term; you cannot take
5 an arbitrary view of short to medium-term being two years and
6 then ignore what happens thereafter.

7 THE CHAIRMAN: Sorry, just explain that point. So if you have
8 got a long-term forecast which shows a cash flow problem at
9 six years, are you saying that that then affects your view as
10 to ailing -- (overspeaking) --

11 MR WEST: Yes, you cannot just draw a line, that is what we say,
12 at a two-year point.

13 THE CHAIRMAN: Yes, so (b) and (c) are defined by reference to
14 a point in time now, are they not?

15 MR WEST: Yes.

16 THE CHAIRMAN: Or at least now or thereabouts?

17 MR WEST: Yes, well.

18 THE CHAIRMAN: So (a) is the prospective one, is it not?

19 MR WEST: Yes. I mean -- well, (b) of course would depend upon
20 when the debts fall due, so that could be short or medium --
21 well, it could be at any point, could it not, logically.

22 THE CHAIRMAN: Yes, it does not say "is" or "will be", though, it
23 just says that it is unable to pay its debts.

24 MR WEST: Yes.

25 THE CHAIRMAN: Because otherwise -- I mean, otherwise it could be

1 extremely open-ended, could it not, if you have got something
2 which projects that something might not be able to pay its
3 debts for 15 years and you then have to find it was ailing or
4 insolvent (inaudible), that cannot be right, can it? It does
5 not seem --

6 MR WEST: It does not seem --

7 THE CHAIRMAN: So really (a) is the one we are most obviously --
8 we are looking forward.

9 MR WEST: Yes, I think I would --

10 THE CHAIRMAN: But that does limit the forward-looking to short
11 to medium term, so I am not quite sure why what happens in
12 six years' time helps you, other than perhaps to ask yourself
13 the question as to whether your medium term view was
14 consistent with what --

15 MR WEST: I think that is --

16 THE CHAIRMAN: That is your point.

17 MR WEST: That is the point. Exactly.

18 THE CHAIRMAN: But, of course, you would generally expect to know
19 more about the medium term than you would about the long
20 term.

21 MR WEST: And there is still the point on what you regard as
22 short to medium term, and we do say two years is not -- it
23 has to be longer than that for medium term.

24 So if we look at the situation, looking at the situation
25 prior to the grant of the SCF and the extended SCF, now, we

1 say, as we have already said, was Cardiff had been the
2 recipient of a large amount of public funding since it came
3 back into public ownership in 2013. We say it would not be
4 tenable to say it was not ailing or insolvent prior to the
5 rescue and restructuring subsidy package. But even if it
6 were the case that the loan write-off were consistent with
7 the CMO principle, that was not sufficient to ensure
8 Cardiff's continued existence, it needed rescue and
9 restructuring aid and thereafter the position remained
10 precarious.

11 Now, I took you earlier to the ministerial advice of
12 18 September 2023. You will remember that is the advice in
13 connection with the scanners.

14 THE CHAIRMAN: Yes.

15 MR WEST: I do not think I need to take you back to that, unless
16 you wish to see it, but you will recall what was said there
17 about the financial position.

18 THE CHAIRMAN: Yes.

19 MR WEST: That is particularly -- it is the fourth bullet point
20 under the recommendation in paragraph 5, just for the purpose
21 of your note.

22 I cannot really say more without breaching
23 confidentiality, but I think it is obvious what the situation
24 was at that stage.

25 THE CHAIRMAN: Yes. So just a CMO point, this point that you are

1 not accepting that that was somehow CMO terms or indeed
2 (inaudible) later.

3 MR WEST: That is later; that is the SCF. This is just part of
4 the background.

5 THE CHAIRMAN: This is part of the background.

6 MR WEST: So we have not suggested this is not (inaudible) CMO
7 principles.

8 THE CHAIRMAN: We will come on to that.

9 MR WEST: We will come on to that.

10 But I would also ask you to look -- we could just go
11 back, actually, if we could go back, it is bundle A, tab 26,
12 page 212. You will see paragraph 5, which I actually read
13 out. I do not have to read it again.

14 THE CHAIRMAN: Yes.

15 MR WEST: We just say that that is obviously -- we are not
16 challenging this directly, of course, but we do say that that
17 shows a fairly fundamental error, because it appears to say
18 the only way to make a no aid investment is if a commercial
19 investor would be satisfied that public support would be
20 forthcoming in the future. But we say that cannot be correct
21 because a commercial -- the words used there "sufficiently
22 convinced that the [Welsh Government] will provide, on a
23 lawful and sustainable basis, long-term financial support" --
24 we say how could a commercial investor ever know that would
25 happen and be sufficiently convinced? Because a rational

1 commercial investor does not take a leap of faith that some
2 funds would come forward in the future. On the contrary,
3 it would steer a wide berth around putting money into
4 an enterprise whose survival was dependent on a future
5 subsidy decision, which is that point not developed. So
6 I just make that point about that.

7 But I could also just take you, while I am here, to
8 page 215, which is -- this is open and I can read:

9 "There are a range of factors that have contributed to
10 the [rescue and restructure] Package being insufficient to get
11 CIAL to a financial position of breakeven."

12 This is page 215, paragraph 20.

13 So we say in short, and I think I can say this without
14 having to say anything confidential, that this shows that
15 Cardiff is in real difficulties. That is borne out by the
16 report that was received from Oxera in August 2023, which we
17 will come to. In fact, if we could go to that now, please.

18 This is bundle C, tab 41, page 945.

19 THE CHAIRMAN: Yes.

20 MR WEST: I have just taken you to the front page:

21 "Assessing the compliance of the Welsh Government's
22 support for Cardiff Airport with the subsidy control
23 principles."

24 If we could then go to page 949, and could you please
25 read -- I am afraid this is confidential and I cannot read it

1 out -- if you could read the first paragraph of that, please.

2 THE CHAIRMAN: Yes.

3 MR WEST: We say that is a clear indication there that Cardiff is
4 ailing or insolvent. I cannot say more than that without
5 quoting from the ...

6 THE CHAIRMAN: In August 2023.

7 MR WEST: I think you can see. If you want me to address you
8 more on why I say on the basis of that text I would have to
9 do it in closed, but I think it is fairly obvious from the
10 text itself why we say that is a clear indication that
11 Cardiff is ailing or insolvent.

12 Now, we have dealt with this report, this Oxera report at
13 length in our skeleton in paragraphs 62 to 70, and I do not
14 want to go over it all again, but I want to make a few short
15 points in response to what is said in the Welsh Government's
16 skeleton at paragraphs 72 to 76.

17 We do say that the disclosure of this report and the
18 subsequent explanation of how it was handled is troubling,
19 because it was not provided as part of the initial
20 disclosure. It was only provided -- we made a pre-action
21 request. The Tribunal will be aware, you make a pre-action
22 request, you get disclosure, you are told that is your lot
23 and that is the point when you decide whether to issue your
24 notice of appeal.

25 Then we pleaded our notice of appeal. We then got

1 a defence, and with the defence and with the evidence with
2 the defence we got the Oxera report, where we were told in
3 Mr Slade's evidence at paragraph 101 that it was not relied
4 upon in the final decision-making process, it was not
5 appended to the ministerial advice or the Cabinet paper, its
6 insights informed earlier stages of policy development and it
7 had been provided for completeness.

8 Now, we said quite about that in our amended notice of
9 appeal, and in the amended defence the position seems to have
10 shifted, because its position was that the Oxera report --
11 what I call the "Oxera 2023 report", to be clear, because
12 there was an earlier report from Oxera, 2019 -- the Oxera
13 2023 report was summarised and placed before key
14 decision-makers at an early stage in the process and taken
15 into account by those who drafted the assessment of
16 compliance and the ministerial advices. That is
17 paragraph 26H(a) of the amended defence.

18 So, in other words, it is now stated that the
19 Welsh Ministers did take the Oxera 2023 report into account
20 in the final decision-making process. So that does, we say,
21 beg the question of why it was not provided earlier,
22 consistent with duty of candour.

23 What is now said, it is now paragraph 74 of my learned
24 friend's skeleton argument, what is now said, we say, does
25 not assist. It is now said it was placed -- you will see

1 there at paragraph 74 of my learned friend's skeleton -- it
2 was placed before key decision-makers in the 18 December 2023
3 ministerial advice, two of whom went on to take the subsidy
4 decision.

5 Now, if we go back to that advice, go back, please, to
6 bundle A, tab 26, page 212.

7 THE CHAIRMAN: Yes.

8 MR WEST: There is a reference at paragraph 6. You will see
9 that:

10 "... due diligence undertaken by Oxera Consulting ... and
11 Kroll ..."

12 There are some references at pages 254 and 259, and the
13 report was attached as annex A, but you look in vain, at
14 least in the material that we can see, for any reference to
15 it or for a summary of the advice.

16 If you go to page 231 of the bundle, you will see it is
17 said there "Summaries of expert advice to support AAO
18 assessment". That is accounting officer assessment. You
19 see there "Kroll - NGS No aid case". That is all
20 confidential, but I would just draw attention, while I am
21 passing there, as to what is said at paragraph 100. I cannot
22 read it out, it is confidential, but it is further evidence
23 that at this stage Cardiff was ailing or insolvent.

24 But you note there is no reference, if you just --

25 THE CHAIRMAN: Sorry, can you just remind me, "NGS"?

1 MR WEST: Next generation --

2 THE CHAIRMAN: Yes, sorry, of course, I understand. Thank you.

3 MR WEST: So if you then just turn the pages, you see the

4 confidential pages with Kroll. There is then a large passage

5 redacted for professional privilege, and there is no mention

6 of Oxera anywhere.

7 THE CHAIRMAN: Did you say it is mentioned further on? Can you

8 give me those references again?

9 MR WEST: Sorry?

10 THE CHAIRMAN: You said it was mentioned further on?

11 MR WEST: There are references at page 254 and 259, then it is

12 appended, I accept it is appended at annex 6.

13 THE CHAIRMAN: Is that not Mr Peretz's point, which is that if it

14 is appended it is taken as being read, is it not?

15 MR WEST: I will come to that in a moment. So what is then said

16 is that ministers' memories were refreshed in the August 2024

17 and March 2025 statements of compliance, but that is not

18 correct. If we go to the first one, which is bundle B,

19 tab 30, page 336.

20 THE CHAIRMAN: Sorry, just give me that reference again.

21 MR WEST: Bundle B, tab 30, page 336.

22 THE CHAIRMAN: Yes.

23 MR WEST: You will see --

24 THE CHAIRMAN: This is the first assessment, yes.

25 MR WEST: Yes.

1 THE CHAIRMAN: Yes.

2 MR WEST: The reference there is to the 2019 Oxera study and the
3 same is true in the revised assessment as well.

4 So we say on the basis of this that the impact of the
5 Oxera 2023 report was substantially downplayed in the
6 ministerial advice, and not referred to thereafter in the
7 subsidy decision.

8 Now, the case that my learned friend relies upon is the
9 Friends of the Earth case, which we ought to look at. This
10 is authorities, tab 30, which must be the third bundle,
11 page 1325. We need to go to paragraph 199, 1367.

12 THE CHAIRMAN: 1367?

13 MR WEST: Yes. You will see what is said there:

14 "A minister only takes into account matters of which he
15 has personal knowledge or which are drawn to his attention in
16 briefing material. He is not deemed to know everything of
17 which his officials are aware. But a minister cannot be
18 expected to read for himself all the material in his
19 department relevant to the matter. It is reasonable for him
20 to rely upon briefing material. Part of the function of
21 officials is to prepare an analysis, evaluation and précis of
22 material to which the minister is either legally obliged to
23 have regard, or to which he may wish to have regard."

24 Now, there was not any analysis, evaluation or précis
25 here; what we have is (inaudible) a report. We say 200:

1 "But it is only if the briefing omits something which
2 a minister was legally obliged to take into account, and
3 which was not insignificant, that he will have failed to take
4 it into account a material consideration, so that his
5 decision was unlawful. The test is whether the legislation
6 mandated, expressly or by implication, that the consideration
7 be taken into account, or whether the consideration was so
8 'obviously material' that it was irrational not to have taken
9 it into account."

10 We say this was something that was obviously material; it
11 should have been taken into account. It should have been
12 taken in account in the subsequent decision. The fact that
13 it might have been looked at earlier, even if it was when, as
14 we can see, the attention given to it was very limited, it
15 did not come back in the subsequent decision.

16 THE CHAIRMAN: So you are saying that, although you -- I think
17 you are accepting that the ministers involved, I think there
18 were two ministers who are common, are there not, between
19 August 2004 and the assessment --

20 MR WEST: Yes.

21 THE CHAIRMAN: -- the decision, so you are accepting that in
22 August they should be taken to have known the contents of the
23 report, but you are saying that does not really help when you
24 get to the assessment which should have been properly --

25 MR WEST: Yes. Even if there were, there was no attempt,

1 effectively no attempt to reconcile what had been said there
2 would be taken into account starting at that period of time.
3 That is our point.

4 Now, they say it would not be irrational not to bring the
5 Oxera 2023 report to the attention of ministers. That is
6 their skeleton argument, paragraphs 74 and 76. They have
7 three points in that regard. The first is Oxera was not
8 asked to consider whether Cardiff was ailing or insolvent.
9 We say, well, first of all it is artificial to seek to
10 distinguish between commercial challenges and whether Cardiff
11 was ailing or insolvent, because the matters to which
12 we have made reference are plainly relevant.

13 The second point they make, this is paragraph 76(2), is
14 that the Oxera report was overtaken by changes to the
15 financial position of Cardiff. But we say that just
16 indicates the importance of what I call the extended SCF as
17 being a sticking plaster, and I will come to that.

18 The third point is that there were other analyses that
19 they say which set out the commercial risks. We say those
20 other analyses do not address the question of whether Cardiff
21 was ailing or insolvent.

22 Another strand of the Welsh Ministers' arguments is that
23 in July 2024 it was considering a grant of a fundamentally
24 different nature. I cannot say any more about that in open
25 Tribunal, but all we would simply say is I would invite

1 the Tribunal to look at the relative size and nature of the
2 two proposed subsidies.

3 They also say at one point that the Oxera 2023 report was
4 not aimed at -- that the subsidy under consideration in 2023
5 was not aimed at, this is the quote:

6 "... realising [Cardiff's] potential for growth in a way
7 that provided substantial benefits to the wider Welsh economy
8 in terms of development and connectivity".

9 But we say the fact that a future subsidy of a different
10 size and nature was under consideration cannot affect
11 an analysis of the position of the beneficiary, and we say
12 that position had not materially changed from the Oxera 2023
13 report at the time when the subsidy was under consideration.

14 THE CHAIRMAN: So there are two different points here, are there
15 not, and I am not sure that ... One point is as a matter of
16 fact whether the airport was ailing or insolvent --

17 MR WEST: Yes.

18 THE CHAIRMAN: -- and you are relying on the Oxera report and
19 what it says in October 2023 as providing a commercial
20 assessment of that.

21 MR WEST: Yes.

22 THE CHAIRMAN: There is a separate question, which I think to
23 some extent the different subsidy argument goes to, which is
24 why does it matter? Once you have decided to do something
25 quite different, why does it matter? You are back to the

1 Friends of the Earth where in 200 it talks about something
2 which a minister was legally obliged to take into account
3 which is not insignificant. So the question is, if you have
4 a completely different subsidy, why does it matter what
5 somebody thought about ailing or insolvent two years earlier?

6 MR WEST: Because you still have to look at the position of the
7 beneficiary. The subsidy can be different, but the position
8 of the beneficiary is what you have to focus on. So we say
9 it does not actually matter whether the subsidy is the same
10 or different. The point I am trying to make is that we say
11 as at this point Cardiff was ailing and insolvent.

12 THE CHAIRMAN: But why do you have to look at the position of the
13 beneficiary? Obviously your ground 2 point, but if you are
14 wrong about that -- this is the point I am really still not
15 quite sure I quite understand in your argument -- why does it
16 matter, if you are wrong about ground 2, why does ailing or
17 insolvent matter? What is the scale of the importance of
18 that point and how does it fit into the --

19 MR WEST: Can I address you when I come to (inaudible) -- but at
20 this point the point about the test for being ailing --
21 simply in terms of the point, the test for being ailing or
22 insolvent is a test that focuses on the position of the
23 beneficiary. It is the beneficiary you have to look at and
24 say: are you ailing or insolvent? Our simple point here is
25 we say --

1 THE CHAIRMAN: Not for subsidy.

2 MR WEST: Not for subsidy. Looking in 2023, we say from the
3 Oxera report and from the other materials I have shown you,
4 Cardiff was ailing or insolvent, and it does not matter,
5 therefore, when you get -- obviously, when you go further in
6 time you still have to assess again are they ailing or
7 insolvent, but the fact the subsidy may be different at
8 a different point in time does not affect whether they were
9 ailing or insolvent. That was the point I was trying to
10 make.

11 THE CHAIRMAN: Yes, I have the point.

12 MR WEST: Thank you. If we go back to the Oxera 2023 report.

13 THE CHAIRMAN: Just give us that reference.

14 MR WEST: Bundle C, tab 40, page 936.

15 THE CHAIRMAN: Yes.

16 MR WEST: This is the executive summary. You will see the same
17 words here as you have already seen at the top of the page.
18 If you then turn to -- my bundle is doing funny things -- if
19 you could then go down to page 940 and start reading two
20 paragraphs up. Just read there, there are two paragraphs
21 there I would like you to read.

22 (Pause)

23 So, we really say on the basis of that the suggestion
24 that is made, and this is in the amended defence,
25 paragraph 26E, that Oxera was not asked to opine on the

1 question of whether Cardiff was ailing or insolvent, they may
2 not have been asked that question, but we say that they would
3 not have come to a different conclusion. We say if they had
4 been asked to, then what they would have said, we say, is
5 obvious, based on the confidential material I cannot read
6 out. In particular, we say a rational decision-maker cannot
7 rely on its own failure to ask particular questions so as to
8 avoid considering information provided to it and drawing
9 conclusions from it.

10 Of course, it is probably worth saying Oxera, as far as
11 we are aware, were not asked to do any further work after the
12 June 2023 report.

13 So what we now turn to, so just to round off this point,
14 we are saying at this point prior to the grant of the SCF or
15 the extended SCF, we say Cardiff was ailing and insolvent on
16 the basis of those materials I have taken you to.

17 We then need to look at the position at the time that the
18 SCF and the extended SCF were granted and what happened after
19 that. Effectively here, the Welsh Ministers placed great
20 importance on the SCF and the extended SCF as meaning in
21 effect that the analysis and conclusions of the Oxera 2023
22 report can be disregarded. Their position, in essence, this
23 comes from their amended defence, paragraph 26C, that the SCF
24 and the extended SCF secured Cardiff's ongoing existence
25 with the subsidy intended to focus on development and

1 connectivity that will benefit the wider Welsh economy. In
2 the evidence, it is said by Mr Slade, this is his second
3 witness statement, paragraph 12, that there was a "strategic
4 pivot", is the phrase that is used.

5 Now, we have said in our skeleton that we do not think
6 that that assertion reflects a proper reading of the
7 contemporaneous documents, or indeed the respondent's own
8 evidence. I would like to go first, please, to Mr Slade's
9 first witness statement. This is bundle A, tab 22, page 148.
10 If I could invite the Tribunal, please, to read paragraphs 40
11 to 41, all of which are confidential.

12 (Pause)

13 THE CHAIRMAN: Yes. Thank you.

14 MR WEST: I do not really need to say anything about that or to
15 gloss it. This is the evidence, of course, of the respondent
16 itself. We say on the basis of that there can be no doubt
17 that at this point Cardiff was ailing and the SCF was
18 a device to keep it afloat.

19 THE CHAIRMAN: By "at this point", you mean before the SCF was
20 given?

21 MR WEST: Yes.

22 THE CHAIRMAN: Yes.

23 MR WEST: I would just say here at this point a general point
24 which I think I can make without breaching confidentiality.
25 It is a point actually which is relevant to the statutory

1 interpretation of section 26, that there is obviously -- we
2 have seen discussion in open, I have read documents that
3 refer to "going concern", a "going concern test"; section 26
4 is not, at least the ailing limb is not -- it is
5 a different -- "ailing and insolvent" is a different test to
6 "going concern".

7 THE CHAIRMAN: Yes.

8 MR WEST: It is a simple point, so just because --

9 THE CHAIRMAN: You are not equating the two.

10 MR WEST: No.

11 THE CHAIRMAN: Because "going concern" no doubt involves the
12 auditors and directors looking at a whole range of possible
13 outcomes.

14 MR WEST: Yes.

15 THE CHAIRMAN: Whereas "ailing or insolvent", at least in terms
16 of the short to medium term, talks about certainty, does it?
17 (Inaudible) uses the words --

18 MR WEST: (Inaudible). Yes, that is the point, they are
19 different tests, and I think the ailing limb is a different
20 test, certainly to going concern.

21 THE CHAIRMAN: So you are not suggesting that the mere fact that
22 there was a going concern gives rise to a conclusion of
23 ailing; you are relying actually on what is being said.

24 MR WEST: Yes. I think it is the other way around: I am saying
25 the mere fact there is a positive going concern opinion does

1 not mean that you still cannot fall within the terms of
2 section 24.

3 THE CHAIRMAN: I see.

4 MR WEST: It is that way round, because otherwise the answer
5 would then have to be every time you have got a going concern
6 opinion, that means you are not ailing or insolvent, and we
7 say that cannot work because section 26 -- 24 is different.
8 In normal language you can be an ailing enterprise but still
9 be a going concern. You are just limping -- you know, you
10 can be limping along or facing problems. You may be a going
11 concern for now, but not be a going concern --

12 THE CHAIRMAN: Well, going concern is normally a sort of 18-month
13 look forward, is it not, 12 to 18 months depending on your
14 auditor?

15 MR WEST: We were talking about short to medium and I'm afraid
16 there is no definition.

17 THE CHAIRMAN: You say that 18 months is within but does not
18 fully occupy your medium term.

19 MR WEST: Exactly.

20 THE CHAIRMAN: So you are saying that -- because presumably if it
21 was -- if it was just a question of whether we thought 18 months
22 was
23 medium, then a going concern statement is pretty powerful
24 evidence, is it not, that the company is not ailing or
25 insolvent. It is quite difficult to see how you can give

1 a going concern statement if your company is ailing or if you
2 think it is not go to survive --

3 MR WEST: If you think it is not going to survive, you could
4 still be ailing though.

5 THE CHAIRMAN: Well, could you be? Could you give somebody
6 a going concern --

7 MR WEST: It may come down, sir, to the time dimension that you
8 look at for the reasons you have just explored.

9 THE CHAIRMAN: But I think if you equate -- I mean, just
10 hypothetically, if you equate the time dimension, is there
11 any difference between them? It would be a very odd thing if
12 somebody gave a going concern statement but then under the
13 Act it was ailing --

14 MR WEST: Well, if you equate them, but we do not equate them.

15 THE CHAIRMAN: No, no, I understand.

16 MR WEST: That is our point.

17 THE CHAIRMAN: Yes.

18 MR WEST: I mean, the Tribunal may or may not be with us on that
19 but our point is we do not equate.

20 THE CHAIRMAN: So if there is a going concern problem, you are
21 not arguing that that by necessity means that there is
22 an ailing or insolvent situation, but you are saying it is
23 evidence of that.

24 MR WEST: Yes.

25 THE CHAIRMAN: It does not prove it, but we should take it into

1 account, is that right?

2 MR WEST: Yes.

3 THE CHAIRMAN: But if there happens to be a going concern
4 statement on the accounts, you are saying that, at least
5 insofar as the period after 18 months, we should not take
6 that as providing any assurance as to ailing or insolvent?

7 MR WEST: Yes. I think that is fair.

8 THE CHAIRMAN: Yes, that is helpful. Thank you.

9 How are you doing?

10 MR WEST: Well, we could start -- yes, that -- I think that --

11 THE CHAIRMAN: Well, it is just when it is convenient for you
12 and, apologies, we took a decent chunk of your time this
13 morning.

14 MR WEST: I will try and be fast this afternoon. If we stop
15 there, that is perfectly good. I am not going to get through
16 my analysis of SCF and extended SCF in the next couple
17 of minutes, so we may as well stop now, given you have
18 helpfully intervened and we have clarified some matters.

19 THE CHAIRMAN: Good. Okay, thank you. We will resume at
20 2 o'clock. You do not need extra time, you think you are on
21 schedule?

22 MR WEST: I hope so. I mean, it is going to be quite tight.

23 Maybe I should just clarify when the Tribunal is intending to
24 rise this afternoon.

25 THE CHAIRMAN: Well, I do not think we have any particular

1 constraint. I mean, we are as constrained as the court staff
2 and in particular the transcriber, so I do not think we want
3 to be going on for a substantial time past 4.30.

4 MR WEST: That is fine, 4.30. I shall be finished by then.

5 I will make sure I finish by then.

6 THE CHAIRMAN: Yes, well, thank you.

7 MR WEST: In fairness to Mr Peretz, I need to, otherwise we
8 will -- because I do need time to reply as well.

9 THE CHAIRMAN: Of course, so we will resume at 2 o'clock.

10 (1.00 pm)

11 (The luncheon adjournment)

12 (2.00 pm)

13 THE CHAIRMAN: Yes.

14 MR WEST: Thank you. I have just been addressing the Tribunal on
15 the situation when the SCF was put in place.

16 THE CHAIRMAN: Yes.

17 MR WEST: I would then like to move to the extension of the SCF.

18 This is in July 2024. Now, I cannot read this out in open
19 court, but if you could turn, please, to Mr Slade's first
20 witness statement, paragraph 47. That is bundle A, tab 22 on
21 page 150. Can I invite you, please, to read paragraphs 47 up
22 to 50?

23 (Pause).

24 THE CHAIRMAN: Yes.

25 MR WEST: There is there also the ministerial advice of

1 12 July 2024. I took you to that earlier this morning. I do
2 not know whether you need to turn it back up again. It is
3 bundle A, tab 28, page 291.

4 THE CHAIRMAN: Do you want us to?

5 MR WEST: I think all I ask is to look there very -- I think all
6 I can say in open is what the consequences would be if the
7 extended SCF were not put in place.

8 THE CHAIRMAN: Give us the reference again.

9 MR WEST: It is bundle A, tab 28, page 291.

10 THE CHAIRMAN: 291.

11 MR WEST: Obviously if I were able to -- I see what the
12 consequences are, but I think --

13 THE CHAIRMAN: Yes --

14 MR WEST: -- (overspeaking) --

15 THE CHAIRMAN: -- (overspeaking). That is fine. Which
16 paragraph?

17 MR WEST: It is paragraphs 1 to 7.

18 THE CHAIRMAN: Yes.

19 MR WEST: Look in particular if you could, please, at --
20 paragraph 5 and paragraph 6 are particularly important.

21 (Pause)

22 It is also relevant to note a change in the terms of the
23 extended SCF from the SCF itself. If we could turn,
24 please -- if we go to the extended SCF agreement, if we could
25 go, please -- this is bundle F, tab 63, page 1887.

1 Yes, if you look, please, at clause 4, which is the
2 purpose, if I could just say for your -- you can check this
3 after if you need to. For the purposes, your note the
4 equivalent purpose in the SCF is in bundle F, tab 62,
5 page 1840. You do not need to turn that up.

6 The essential point is in the SCF, the purpose was as
7 expressed in 4.1.1 there:

8 "capital expenditure necessary for safety and security at
9 Cardiff Airport ..."

10 4.1.2 and 4.1.3 are additions in the extended SCF --

11 THE CHAIRMAN: Yes.

12 MR WEST: -- which we say make clear what the real purpose of
13 this extended SCF was:

14 "general operational costs to maintain and operate
15 Cardiff Airport, including but not limited to salaries,
16 utility bills, cleaning costs, and insurance premia ..."

17 Very wide-ranging indeed.

18 THE CHAIRMAN: Yes.

19 MR WEST: So that explains why the extended SCF was put in place.

20 Then we can look at the financial position of Cardiff without
21 the extended SCF if we go to the counterfactual that was
22 prepared. For this, we need bundle G, please, tab 107,
23 page 2183. I am going to have to be very careful with this.
24 It is an Excel spreadsheet, which creates problems for the
25 purposes of doing it electronically. It helps to be on

1 an iPad where you can just stretch it indefinitely.

2 THE CHAIRMAN: 2183?

3 MR WEST: 2183, yes. You will see at the top there it says:

4 "Cardiff International Airport Limited

5 "10 Year forecast."

6 This is all confidential. So what I have to draw your
7 attention to, please, is down towards the bottom, you will
8 see a line "Cash Inflow/Outflow". Does the Tribunal see
9 that? There is a summary cashflow on the bottom left. If
10 you go up from that in the main table, four tables up, there
11 is "Cash Inflow/Outflow".

12 If you then look up from that, you will see there are
13 two lines which -- I think I can say this -- are "Credit
14 Facility" and "Secondary Funding" and they are brown shaded.
15 What that is showing is the effect of the credit facility and
16 the secondary funding, which are things like asset sales
17 coming in.

18 Our simple point -- I am afraid it requires a little bit
19 of -- you can then see how the cash inflow/outflow works and
20 look at the position in particular at March '27, which is the
21 third column in. If you were doing some mental maths to
22 remove the credit facility, you can see what the effect would
23 be, I hope.

24 I hope I do not need to say any more than that because
25 I think it should be quite clear, at least. So we say this

1 is -- even on the basis of the counterfactual, there is
2 evidence that we can look at. This shows, we say, the
3 criticality of the extended SCF.

4 I would now like to look at the nature of the extended
5 SCF, which -- just to be clear that these were not known
6 about to Bristol prior to the service of the defence. They
7 were not referred to publicly when the subsidy was announced.
8 You will recall possibly, I think, in the ministerial
9 advice -- I think I read the passage out to you this morning
10 where it refers to the fact that it had become public when
11 the accounts were published. So we did not know about this
12 until we got (inaudible).

13 We say, in short, and it was not -- the extended SCF was
14 not granted in accordance with CMO principles. That is
15 paragraphs 80 to 84 of our skeleton. I do not really want to
16 go into that in any great detail because I think you can read
17 it and you can see the assertions that we are making, but
18 just in brief, we say the following four short points.

19 First, that there was no assessment as to compliance with
20 the CMO principles in July of 2024.

21 Secondly, it is said that the asserted CMO principles
22 rely upon general policy and the Welsh Government being
23 a patient strategic investor. We can see that in Mr Slade's
24 second witness statement, paragraph 20. That is bundle A,
25 tab 25, page 199, if we just turn that up.

1 THE CHAIRMAN: Just give the page reference again, please.

2 MR WEST: It is page 298. So if you read paragraph 20, which
3 quotes from the ministerial advice:

4 "The commercial rationale for providing the credit
5 facility from the point of view of a commercial owner of
6 [Cardiff] in the position of the [Welsh Government], is that
7 there is a very clear intention from the [Welsh Government]
8 as a matter of general public policy to put in place a
9 longer-term financial support arrangement to set the airport
10 on a growth pathway, with a view to a potential partial or
11 full sale of the business in the medium to long term. As
12 owner, the [Welsh Government] is a patient strategic investor
13 willing to take a very long-term view of its strategic
14 commercial assets."

15 Now, we say those are not proper CMO principles.

16 I would also like at this point just to cover a general
17 point about Mr Slade's second witness statement. I do not
18 want to labour this point, but in many places, Mr Slade's
19 second witness statement is in fact opinion evidence. He is
20 not an expert and he cannot give expert opinion evidence, so
21 he is actually not himself in a position to give evidence as
22 to what the CMO, commercial market operators, might think and
23 what attitude they would take.

24 I say that because we are criticised in the skeleton
25 argument of my learned friend for not grappling with

1 Mr Slade's evidence. Well, we say do not have to grapple
2 with inadmissible opinion evidence is the short point. I do
3 not want to labour that point, but I just make it for the
4 record.

5 THE CHAIRMAN: So are you submitting that we need to reach
6 a conclusion about whether CMO principle was complied with?
7 Do we have to make a finding about that?

8 MR WEST: So you do not have to. We say it was not on CMO terms.
9 We say it does not actually make any difference to our
10 analysis whether it was or it was not. So you do not
11 necessarily have to go that far, in my submission. I will
12 make that good in a moment.

13 THE CHAIRMAN: It is quite a difficult thing for us to do that
14 now, is it not? I mean, one can draw conclusions along the
15 lines that you are advancing. Indeed, Mr Peretz we know he
16 has some things to say about that. It is quite difficult for
17 us to reach a concluded view when actually in ordinary
18 circumstances, to do that, we would expect all the evidence
19 that would come from a challenge, a proper challenge.

20 MR WEST: You mean a freestanding challenge.

21 THE CHAIRMAN: Yes.

22 MR WEST: Yes.

23 THE CHAIRMAN: Yours is not a challenge because you are out of
24 time, so he may have an argument about it, but you are not in
25 a position to do it.

1 MR WEST: We say in any event, it does not affect the analysis
2 whether it is on CMO terms or not --

3 THE CHAIRMAN: No.

4 MR WEST: -- because we say the reality is that the jurisdiction
5 for granting the extended SCF is not that it complied with
6 CMO principles. It is essentially, I would say -- I will be
7 careful what I can say in open, but I would say it is
8 essentially a sticking plaster.

9 We say the basis for granting it as a matter of general
10 policy, because the respondent is a patient strategic
11 investor, those are not CMO principles, so they cannot
12 support CMO compliance. We say the justification is that
13 this was done to deal with an ailing or insolvent business.

14 Now, we have identified -- again, I am not going to
15 labour it. We have identified features; paragraph 83 of our
16 skeleton. They are in the amended notice of appeal; features
17 that we say go to whether this is or is not on CMO
18 principles.

19 I would now just like to take you to it just so you can
20 see the background to this. If we can go back to the
21 ministerial advice, please, this is bundle A, tab 28,
22 page 299. "Recommendation and financial detail",
23 paragraph 31:

24 "Having regard to the above, officials recommend that
25 [Cardiff] is provided with the increased credit facility.

1 Officials have taken advice from the DBW on the market rates
2 for the commercial terms of the facility."

3 There is then a passage redacted for privilege. Not
4 entirely clear why that is legal professional privilege given
5 this is reporting advice from DBW, who are not providing
6 legal advice or are not lawyers.

7 32:

8 "In the time available, officials have not obtained any
9 further independent analysis on how well the commercial terms
10 attached to the facility align with the private creditor
11 test. Officials don't believe that this position needs
12 reassessing by external financial experts given that, as
13 explained in the advice for the credit facility ..."

14 Then there is confidential material that I am afraid you
15 will have to read.

16 THE CHAIRMAN: Yes.

17 MR WEST: Then if you could also read paragraph 33 while you are
18 there too. Again, most of that is confidential, so I will
19 not read it out to the Tribunal.

20 Our short point here, and I am not going to labour it, is
21 despite purporting to rely on the CMO principles, the Welsh
22 Ministers did not actually carry out a full and proper
23 analysis and asked about market rates. There is obviously
24 only one component. We say, for the reasons I have said, set
25 out at paragraph 83, it was not on CMO terms and we say the

1 purpose of it was very clear.

2 Now, in their skeleton -- I am focusing on
3 paragraph 82 -- Welsh Ministers make a number of points.

4 THE CHAIRMAN: Which paragraph, sorry?

5 MR WEST: Paragraph 82. This is where they deal with the CMO
6 issue. I am just going to deal with this very briefly.

7 First of all, they say -- this is subparagraph (1) --
8 there was a broad margin of discretion. Well, we do not
9 accept it could go so wide as to not require proper
10 application of CMO principles.

11 At subparagraph (2), it is said:

12 "... a rational commercial investor in the
13 [Welsh Ministers'] position would have provided credit (on
14 appropriate terms) pending the Subsidy Decision ..."

15 That was obviously preferable to doing nothing. We say
16 that is just assertion and not accepted because there is no
17 basis to assume a rational investor would put £180 million
18 into the airport after the previous sums had been put in.

19 The same criticism also applies to subparagraph 82(3).
20 We say in essence that it is common sense that no commercial
21 operator would lend on the terms we pointed to. The
22 ministerial advice expressly states that Welsh Ministers have
23 not considered whether it is CMO or not.

24 Then the other reason, there is a lot said about it not
25 having been called upon. We say one reason it has not been

1 called upon is that Cardiff has delayed paying its suppliers.
2 I can show you a reference to that in due course.

3 So the important point here, though -- and this is
4 relevant to your point, sir, about whether you can determine
5 whether the extended SCF is on CMO terms or not -- it is very
6 important to focus on the link between the extended SCF and
7 the subsidy.

8 For that, I need to go to the terms. If you could go,
9 please, back to bundle F, tab 63, page 1877.

10 THE CHAIRMAN: Which page again?

11 MR WEST: 1877.

12 THE CHAIRMAN: Thank you.

13 MR WEST: I am afraid I am again island-hopping, but I draw
14 attention to various provisions here. Recital (C):

15 "The Facility will only be available if, during the
16 Availability Period, the Subsidy is not approved
17 unconditionally or it is subject to an objection or appeal
18 process of any kind."

19 So it is only available if the subsidy is not approved.

20 If you then go down to page 1887, clause 5.1.

21 5.1 essentially, there may have been an issue about some
22 point earlier, but the point is that the extended SCF
23 replaces the SCF and that is what clause 5.1 does. You do
24 not have two of them at the same time.

25 Clause 6.1, again a reflection:

1 "The Borrower may only make a Drawdown Request, and the
2 obligations of the Lender and Agent under this Agreement only
3 arise, if, during the Availability Period, the Subsidy is not
4 approved unconditionally or it is subject to an objection or
5 appeal ..."

6 Clauses 8.2 to 8.4, so I am now over the page on 1888,
7 you will see there interest accrues.

8 THE CHAIRMAN: Sorry, just give me the reference again.

9 MR WEST: Sorry, it is 1888 and it is clauses 8.2 to 8.4.

10 THE CHAIRMAN: Yes.

11 MR WEST: This is the provision for interests being accrued and
12 capitalised.

13 Then we have to go to schedule 4, which is on page 1899.
14 Schedule 4, clause 1.2 explains about available cash:

15 "... the Borrower shall repay the Loan in an amount equal
16 to Available Cash ..."

17 So you have to have available cash, excess cash, to be
18 repaying.

19 Schedule 4, clause 2, immediately below,
20 "Mandatory Prepayment":

21 "In the event that the Subsidy is made available ... the
22 Facility will be immediately cancelled and shall immediately
23 cease to be available ..."

24 So as we have said in our skeleton, we say correctly
25 analysed, in deciding to grant the subsidy, Welsh Ministers

1 were endorsing the basis on which the extended SCF had been
2 granted, which was intrinsically linked to Cardiff's position
3 and outlook. Now --

4 THE CHAIRMAN: Sorry, just explain to me what you mean by that.

5 MR WEST: Well --

6 THE CHAIRMAN: I know generally what you mean, but specifically.

7 Are you saying that there is a connection between the subsidy
8 and the extended facility that is so close we should treat
9 them as the same thing? Is that the point?

10 MR WEST: Yes, because, one, you have the extended SCF, but its
11 existence is predicated on there being a subsidy and the
12 subsidy, when it comes in, means the extended SCF will
13 disappear. So that is why we say my analysis of looking at
14 the position of Cardiff is to say in very crude terms it was
15 ailing or insolvent prior to the SCF and the extended SCF
16 being put in place.

17 That was put in place and the phrase I used is
18 "a sticking plaster". That has been put in place as
19 a sticking plaster to get you to the subsidy. It disappears
20 when the subsidy comes into effect and, therefore, the
21 correct analysis for ailing and insolvent purposes is to look
22 at the position when the subsidy was granted absent the
23 extended SCF being put in place. That is why we say
24 ultimately, it does not really matter whether it is on CMO
25 principles or not. It is still a sticking plaster. That is

1 the essence of our case.

2 I accept the situation might be different if the extended
3 SCF had a life of its own; that is to say if it had been put
4 in place, subsidy comes in, extended SCF is still sitting
5 there in the background. That would be a different. That is
6 not the position. That would be a different position, but
7 the extended SCF and those provisions I have shown you goes
8 when the subsidy kicks in.

9 THE CHAIRMAN: Could you not see it a different way? I think
10 probably this is what Mr Peretz is going to say; that if you
11 have got a going concern consideration which is the basis on
12 which the extended facility is put in place, for the reasons
13 advanced in the assessment about the prospects of the
14 airport, once you grant the subsidy, you no longer have the
15 going concern consideration. Otherwise, you are just working
16 on a different set of projections and the going concern
17 issues go away. Is that an alternative way of looking at it?

18 MR WEST: I am not sure. I do not think I --

19 THE CHAIRMAN: Well, on the face of it, the reason why the
20 facility and the extended facility are put in place are to
21 address going concern considerations.

22 MR WEST: Yes.

23 THE CHAIRMAN: You could take the view that once you know you
24 have got the subsidy, you do not have a going concern
25 consideration; not because it changes materially your, say,

1 immediate cashflow, your immediate ability to pay your debts
2 or whatever it happens to be, but actually because the
3 economic basis on the airport going forward on the basis of
4 a subsidy is quite different.

5 MR WEST: It is. Well, it is different, but it is the
6 counterfactual minus the lines that I showed you which is the
7 problem.

8 THE CHAIRMAN: But that is assuming that you should be taking the
9 lines away, so --

10 MR WEST: But they have to go away because the extended SCF
11 disappears when the subsidy is granted.

12 THE CHAIRMAN: In the factual, but not in the counterfactual. In
13 the counterfactual, the subsidy is never granted, is it?
14 That is the point of it. I am not sure how the
15 counterfactual point fits into the -- as I understand it, you
16 are saying as a matter of principle, there is a sufficiently
17 close link between the SCF and the subsidy, so they should be
18 effectively viewed as one --

19 MR WEST: Yes.

20 THE CHAIRMAN: -- because they are really doing the same thing.

21 MR WEST: It is had a sticking plaster. It is a way of
22 getting -- if you did not have the extended SCF -- and the
23 point is if they did not have the SCF and the extended SCF in
24 place, we say Cardiff would be ailing and insolvent and that
25 would create problems for the subsidy --

1 THE CHAIRMAN: Yes.

2 MR WEST: -- which was not given on the basis of Cardiff was
3 ailing or insolvent. All the SCF and the extended SCF have
4 done is to create a sticking plaster because they fall away
5 the moment the subsidy comes in. In fact, they should not be
6 taken into account when looking at the position, the proper
7 position, when the subsidy is granted, because they do not
8 exist at the point because the two are not going to exist
9 side by side.

10 Now, Mr Peretz has a point about the availability period
11 that goes into the future, but that is the availability
12 period if the subsidy has not kicked in. The moment the
13 subsidy kicks in, from those provisions I have taken you to,
14 the extended SCF disappears. So that is why we say it
15 becomes a sticking plaster.

16 MR ALTY: I think this is for the record and so forth. Just
17 pursuing this line of argument, I think what you are saying,
18 but correct me, is that because it is a sticking plaster, as
19 you call it, and it falls away immediately, therefore, when
20 the Welsh Government is looking at the decision to grant the
21 long-term subsidy, the position of the airport is exactly the
22 same as it was before the extended credit facility went in.

23 MR WEST: Yes.

24 MR ALTY: But would the alternative argument not be that that
25 credit facility is in place and, therefore, the airport is,

1 at that stage, in a different position and it only loses its
2 credit facility if the subsidy is granted?

3 MR WEST: I mean, that is Mr Peretz's argument, in essence, but
4 the problem is my case is that you have to look at the point
5 where the subsidy is granted. The moment the subsidy is
6 granted and there is no challenge, the extended SCF falls out
7 of the picture, so why then should you take it into account
8 in determining the question of whether it is ailing or
9 insolvent at that point? But the point you put forward, sir,
10 is obviously the alternative analysis, and the Tribunal has
11 to decide which of those two is the correct one.

12 THE CHAIRMAN: Is there not just a logical difficulty with your
13 argument, which is that up until the point -- maybe you do
14 not accept this, but up until the point when the subsidy is
15 granted, the ESCF provides liquidity? I think Mr Peretz
16 says, therefore, there is no question of being ailing or
17 insolvent because you have the facility, and the moment the
18 subsidy is granted, you have the subsidy and so there is no
19 question of ailing or insolvent. Is that not the problem
20 with your analysis?

21 MR WEST: Yes, but, in my respectful submission, that is
22 artificial because you are simply relying on the extended SCF
23 to disguise what the true position of the airport is.

24 THE CHAIRMAN: Yes, I see. So, for example --

25 MR WEST: Essentially --

1 THE CHAIRMAN: -- and these are not these facts, and I do not
2 want Mr Peretz to jump up to remind me they are not -- but if
3 you have a situation where somebody wanted to give a subsidy
4 and, on your case, wanted to avoid the ailing or insolvent
5 problem, you are saying they could just lend -- they could
6 find a basis on which to lend, which would convert it from
7 being ailing or insolvent to being solvent and then ignore
8 the solvency problem, but that is your argument, is it not?

9 MR WEST: That would have to be rescuing.

10 THE CHAIRMAN: Yes, that is right. That is your argument, but is
11 it not inherent in that that there has to be some intention
12 to do that? Are you actually going as far as to say that is
13 what they intended to do here? It is not what the papers say
14 and it is not what the ministerial assessments say.

15 MR WEST: No, no, I accept it is what it said, but what we have
16 to look at is what the reality was and what the actual effect
17 was.

18 THE CHAIRMAN: Well, it is not just that, it is also the
19 intention, is it not? Because I can understand if you are
20 advancing the argument that someone was trying to circumvent
21 provisions of the Act by making (inaudible), then obviously
22 then one would hope that is not going to survive scrutiny.
23 But if it is not intended to do that, that actually there was
24 a very genuine intent to address a going concern
25 consideration with the extended facility, but a recognition

1 that it would no longer need to be made available if
2 a subsidy was granted, then what is wrong with that. As
3 a matter of compliance with the Act, why it is not --

4 MR WEST: Well, it would be disguising the fact, if we are
5 correct, and absent the extended SCF this is an ailing or
6 insolvent concern, then you are stuck we say in a situation
7 where you can only have rescue or restructuring aid.

8 THE CHAIRMAN: But that is circular, is it not, because they have
9 addressed the earlier insolvent point, not necessarily
10 directly in terms, but for going concern reasons they have
11 put in place something which deals with that problem for that
12 reason and there is therefore no longer ailing or insolvent.

13 (Inaudible) that is a temporal point, but certainly as far as
14 the next 18 months is concerned, once you have a going
15 concern, once you have a facility and someone is prepared to
16 sign the going concern statement, for the next 18 months you
17 could not say there is almost certainly going to be a --

18 MR WEST: That then becomes rescue aid. That must necessarily be
19 rescue aid. If the entity is going to disappear without
20 having aid, that is a classic rescue --

21 THE CHAIRMAN: That is what I said. I said they are doing it to
22 address going concern considerations. That is what they say
23 they are doing.

24 MR WEST: Well, we say looking at the evidence it is clear
25 that -- well, you have seen what is said what would happen if

1 the extended SCF were not made available, which we say puts
2 it into a classic rescue situation.

3 THE CHAIRMAN: Well, I can see -- I mean, certainly I understand
4 your point about -- I can see why you want to make your
5 points about the CMO basis and we had a discussion about
6 that. I can see what you are saying about -- and obviously
7 I understand the submissions you are making about whether or
8 not the SCF was done on (inaudible) CMO principles, but
9 I think there is a real difficulty in drawing a conclusion,
10 at least in terms of a final conclusion under the Act, as to
11 whether that is the position. I am not sure we can do that
12 just because of the way it has come to us and because of the
13 evidence we have got, and so you certainly are able to paint
14 a picture, or Mr Peretz paints a picture, but if we were to
15 like your picture and find it attractive, then it is all just
16 part of background, is it not, really, rather than getting
17 you home?

18 I am just not sure what the thing is that you say gets
19 you home by effectively taking the facility out of the
20 counterfactual. That is not really clear to me, other than
21 this point that how you do not need it when the subsidy
22 arrives.

23 MR WEST: Well, I think the two points are you have to look at
24 what would happen if there were no SCF, that is the evidence,
25 what would --

1 THE CHAIRMAN: Well, I understand that, but I think let us just
2 assume for the purposes of this discussion that you have made
3 your point good that at the time of the SCF the airport was
4 ailing or insolvent. That is just hypothetical, I am not
5 saying that is the answer, but just to pursue this point with
6 you, let us assume you have got that far, the problem you
7 have got then, I think, is that the facility goes into place,
8 the extended facility goes into place, provides significant
9 liquidity to deal with the going concern considerations, and
10 at that stage it seems quite difficult to say it is ailing or
11 insolvent the day after the facility has gone into play.

12 MR WEST: Well, it comes back to the point about the linkage.

13 It is only there to get the subsidy in place, and when the
14 subsidy gets in place it disappears, so --

15 THE CHAIRMAN: But that connection does not mean you ignore it,
16 though, does it? So there are perfectly good reasons why
17 the respondent would say, "We are not going to continue with
18 this facility once you get a subsidy", so you would not
19 expect them to leave it in place, would you --

20 MR WEST: -- (overspeaking) -- on our case it then takes you back
21 to the problems that exist in the airport.

22 THE CHAIRMAN: It does not, because they have the subsidy, and
23 the subsidy provides for a completely different economic
24 basis for the airport going forward.

25 MR WEST: Yes, but the subsidy then has been -- then on our case,

1 that then means the subsidy properly ends up being -- should
2 be properly considered as aid for rescue and restructuring,
3 because that is an ailing and insolvent enterprise.

4 THE CHAIRMAN: Right, I think we are going round in circles and I
5 am not sure we are going to make that much more progress, why
6 do you not keep going?

7 MR WEST: Thank you. I think I have covered some of the points.
8 Yes, I mean, there are other -- just a couple of other more
9 contemporaneous documents I would just like to show you. One
10 is a report from Ernst & Young, this is 17 December 2024.
11 This is bundle D, tab 47, page 1305.

12 THE CHAIRMAN: Yes.

13 MR ALTY: What page, sorry?

14 MR WEST: 1305. What I am looking at there -- first of all,
15 I just need to show -- these are contemporaneous documents.
16 This is Ernst & Young and what they say in the top paragraph,
17 the second sentence --

18 THE CHAIRMAN: So this is -- just to remind us about the
19 chronology, this is --

20 MR WEST: This is December 2024.

21 THE CHAIRMAN: So is it before or after the -- it is after the
22 extended facility, is it?

23 MR WEST: Yes.

24 THE CHAIRMAN: Yes.

25 MR WEST: And then if you look at page 11, which is -- sorry, if

1 we go back a couple of pages, 1303, I am looking there -- if
2 you just read what is said about going concern there, most of
3 which is confidential.

4 (Pause).

5 THE CHAIRMAN: Yes.

6 MR WEST: Then I did refer you to, and I should make this point
7 good -- I think some of the points I was going to make we
8 have actually already discussed, so if we could go, please --
9 I did say, you will recall, that we said there were
10 short-term measures, which we said have had an effect on the
11 financial position, that is in our amended notice of appeal
12 at paragraph 46L. To make this good, can we go to the
13 accounts for the year ending 31 March 2025. This is bundle
14 E, page 1687, just to show you what the documents are.

15 Just a couple of short points here, if you go to
16 page 1712, I just invite you to look at the change in the
17 statement of -- this is the statement of cashflow -- the
18 change "Increase/(decrease) in [debtors]".

19 THE CHAIRMAN: Sorry, just the page number again.

20 MR WEST: It is 1712.

21 THE CHAIRMAN: 1712. Yes, and we are looking at ...?

22 MR WEST: The line is "Increase/(decrease) in [debtors]" --

23 THE CHAIRMAN: Yes.

24 MR WEST: -- which is explained in note 18 to the account, which
25 is at 1729. You will see there the sharp increase in "Trade

1 creditors" --

2 THE CHAIRMAN: Yes.

3 MR WEST: -- which obviously is going to affect -- I mean that is
4 a financial management point, it is obviously going to affect
5 the position of the business.

6 So we say there is --

7 THE CHAIRMAN: Is that relevant -- that is relevant to the
8 question as to why the facility was not drawn on --

9 MR WEST: Yes, and it is also relevant to cash position,
10 obviously.

11 THE CHAIRMAN: -- and just generally the cash position, yes.

12 MR WEST: Yes. So this is a cash point, not a net asset -- this
13 is -- we are saying, you know, effectively you get to that
14 position by -- normally by delaying payments to suppliers.
15 So this is a short-term solution, we say, and could not
16 continue.

17 So what appears to be being said is that, as we
18 understand it, being able to keep Cardiff Airport going for
19 what we say is a very short period, that is enough to mean it
20 is not ailing to have further subsidy under the rescue and
21 restructuring (inaudible).

22 THE CHAIRMAN: So are you -- so is this -- are you now looking at
23 the position post the extended facility --

24 MR WEST: Yes.

25 THE CHAIRMAN: -- before subsidy, and so putting aside the

1 discussion --

2 MR WEST: Essentially, yes.

3 THE CHAIRMAN: -- we had about -- but you are saying that even
4 with the extended facility, there are questions about --

5 MR WEST: Yes, exactly.

6 THE CHAIRMAN: So just putting aside the question of whether you
7 ignore the facility in the analysis, you are saying your
8 question -- (overspeaking) --

9 MR WEST: Yes, because the reason it has not been called upon is
10 because of the way in which the business has been managed.

11 THE CHAIRMAN: Yes.

12 MR WEST: So that would still make it -- we say that would still
13 make it fall within the ailing or insolvent (inaudible).

14 I have addressed you on whether it makes any difference
15 whether the extended SCF is on CMO terms and you raised the
16 point about the ability to challenge the CMO compliance with
17 the extended SCF. I think it is probably best to see what my
18 learned friend says in submissions. I may come back to that
19 in reply ...

20 [Proceedings continued; to be transcribed separately]

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