

1 Tuesday, 10 February 2026

2 (10.30 am)

3 (Proceedings delayed)

4 (10.36 am)

5 Housekeeping

6 MR WEST: I have just handed up a table of  
7 breaches that has been prepared overnight, which  
8 I hope will assist the tribunal. Essentially what  
9 we have tried to do is give you a table that  
10 refers to the paragraphs of the amended notice of  
11 appeal. (inaudible) principles C, B, F and G, and  
12 then what we say the allegation of breach is,  
13 where we say the key documents on which we rely  
14 are to be found and then how we say you couch the  
15 challenge in terms of judicial review principles.

16 MR TIDSWELL: (Off microphone - inaudible) -- in  
17 relation to the particular breach (inaudible).

18 MR WEST: I am terribly sorry. I can do that --  
19 I can amend it. It follows the logic of the order  
20 (inaudible) -- we can easily do that.

21 MR TIDSWELL: (Off microphone - inaudible).

22 MR WEST: (Inaudible) principle by principle, so  
23 I mean, broadly speaking, the first entry relates  
24 to principle C, and by the time you get to the end  
25 you are at principle G, but we can certainly go

1 and do that.

2 MR TIDSWELL: Well, I think it would be quite  
3 helpful if you would not mind. There is no rush  
4 on that (inaudible).

5 MR WEST: It would not be today, unless I can do  
6 it on the train on the way back.

7 MR TIDSWELL: (Inaudible) -- that's the bit I want  
8 to nail down. I want to be clear (inaudible) --

9 MR WEST: I am terribly sorry.

10 MR TIDSWELL: (Inaudible) -- clarify that. When  
11 we are looking at principle C, I want to know  
12 exactly what it is you say on principle C, what  
13 you rely on and (inaudible). I think (inaudible)  
14 95% of that (inaudible).

15 MR WEST: The second point I wanted to just cover  
16 with you, yes, the statutory guidance. You asked  
17 I think a question about that process diagram,  
18 whether it is referred to in the text. It is not  
19 referred to in the text.

20 MR TIDSWELL: (Overspeaking - inaudible).

21 MR WEST: The third point was I think that I have  
22 to come back to you on is the issue of if Cardiff  
23 is found to be ailing and insolvent for the  
24 purposes of applying the principles, which  
25 principles do we say it affects. I can clarify

1       that very easily. We say there are three  
2       principles.

3       MR TIDSWELL: So, sorry, just remind me, this  
4       point --

5       MR WEST: This point is you asked the question, I  
6       understood, if -- (Pause).

7                       (Off microphone discussion)

8       MR TIDSWELL: Yes, is it effectiveness or  
9       appropriateness?

10      MR WEST: Appropriateness.

11      MR TIDSWELL: Interesting. It is effectiveness in  
12      the list of issues, which is why I keep calling it  
13      effectiveness, which is why everybody probably  
14      looks blankly when I do.

15      MR WEST: (Off microphone - inaudible).

16      MR TIDSWELL: Appropriateness, yes.

17      MR WEST: (Off microphone - inaudible).

18      MR TIDSWELL: I think there was a point about the  
19      business plan and about where in the assessment  
20      the respondent did not accurately record the  
21      position on the business plan.

22      MR WEST: -- in the table. We can find that then  
23      I am sure.

24      MR PERETZ: (Off microphone - inaudible) I can  
25      check that (inaudible).

1 MR TIDSWELL: You showed us the master plan, which  
2 indicated an interest in long haul because of the  
3 new planes available for shorter runways. I think  
4 that was the point that was made. The bit I was  
5 looking for was where in the assessment that is  
6 mischaracterised. If you have not got it to  
7 hand -- I do not want to take up more time. You  
8 can -- I mean, it is a detail point. You can come  
9 back to us this afternoon with that.

10 MR PERETZ: (Off microphone - inaudible).

11 MR TIDSWELL: Yes, I see.

12 MR WEST: That is the point (inaudible) revised assessment of  
13 compliance, page 509.

14 MR TIDSWELL: Yes, I understand. Okay, that is  
15 helpful.

16 MR WEST: Does that answer the question?

17 MR TIDSWELL: That does answer the question, thank  
18 you.

19 MR WEST: In that case, sir, I have nothing  
20 (inaudible).

21 MR TIDSWELL: Oh, yes. You were going to come  
22 back and just give us your final word on the  
23 status of the decision. I think I invited you to  
24 go away and think about whether there was anything  
25 that you thought was still within our

1 jurisdiction.

2 MR PERETZ: (Off microphone) Yes, I can certainly  
3 (inaudible).

4 MR TIDSWELL: I am not looking for argument on it.  
5 I just want to know what your position is. Are  
6 you saying that we are without jurisdiction at all  
7 because the decision ceases to be the one before  
8 us, been withdrawn, or are you saying that we can  
9 properly go ahead, or at least are you willing to  
10 accept and agree that we should properly go ahead  
11 and decide some issues on the basis (inaudible)  
12 before us? In other words, do we just -- if you  
13 are right, do we produce a judgment that says we  
14 have no jurisdiction or do we produce a judgment  
15 that says we are able to deal with these points  
16 because the parties accept that we should resolve  
17 them?

18 MR WEST: (Off microphone - inaudible).

19 MR TIDSWELL: Yes.

20 MR WEST: (Off microphone - inaudible).

21 MR TIDSWELL: Yes, so you say the whole decision  
22 is affected by the withdrawal of the part of it  
23 that --

24 MR WEST: (Off microphone) Yes. So we say you  
25 cannot, after the event, (inaudible). The

1       respondent, after the event, seek to characterise  
2       (inaudible).

3       MR TIDSWELL:  Sorry.  Just give me that -- sorry  
4       just give us of the reference again.

5       MR WEST:  (Inaudible) Tab 33, page 620.

6       MR TIDSWELL:  620.  Yes, that says --

7       MR WEST:  (Off microphone - inaudible).  So our  
8       position is --

9       MR TIDSWELL:  Sorry, just, and tell us again what  
10      it says.  What does it say?

11      MR WEST:  (Off microphone) It says:

12                 "(Inaudible)."

13      MR TIDSWELL:  Yes.  So that is your position.  You  
14      say it is all -- so it follows from that you are  
15      saying the decision is no longer before us.

16      MR WEST:  (Off microphone - inaudible).

17      MR TIDSWELL:  Yes, and you are not inviting us to  
18      do anything to resolve any issues beyond that if  
19      that's right.  Is that what you are saying?

20      MR WEST:  (Off microphone - inaudible).

21      MR TIDSWELL:  I understand.  You do not know we  
22      agree with you and we do not know that either,  
23      because we have not heard from Mr Peretz, but if  
24      that turns out to be the outcome, you say that is  
25      all we need to resolve and you are not interested

1 in us giving you the answer to ground 1 or ground  
2 2 in those circumstances.

3 MR WEST: (Off microphone - inaudible).

4 MR TIDSWELL: That is absolutely clear. No, it  
5 does. Thank you, it does.

6 MR WEST: (Off microphone - inaudible).

7 MR TIDSWELL: No, that is fine.

8 MR WEST: (Off microphone - inaudible).

9 MR TIDSWELL: No, it comes as no surprise. That  
10 is what I invited you to do.

11 Yes, thank you very much, Mr West.

12 Submissions by MR PERETZ

13 MR PERETZ: Good morning.

14 MR TIDSWELL: Mr Peretz, good morning.

15 MR PERETZ: (Off microphone - inaudible) -- award  
16 actually is. I am very conscious that the  
17 tribunal will have read the assessment of  
18 compliance very carefully and will have a pretty  
19 detailed background knowledge of what the subsidy  
20 actually is, but we want to bring that to the  
21 foreground. I am also conscious that there are  
22 people out there who might have been following  
23 yesterday's proceedings and be somewhat in the  
24 dark as to what is actually being proposed.

25 So if I can pick it up in the assessment

1 of compliance at page 424. That is bundle B,  
2 tab 31. Mr West took to you to this yesterday,  
3 and took you through the first four  
4 paragraphs under the policy objective. I just  
5 remind the tribunal, because I will come back to  
6 it later, of the third paragraph, third beginning,  
7 "For example ...", which deals --

8 MR TIDSWELL: Which page?

9 MR PERETZ: Page 424. So the third  
10 paragraph below the heading beginning, "For  
11 example". I will come back to this point later,  
12 but this all goes to the question of what is the  
13 relevance of there being an international airport  
14 based in South Wales. I will come back to that in  
15 a moment, but we went through that yesterday.

16 If the tribunal then goes on to the next  
17 page or rather page 426. You will see here that  
18 the assessment notes the existence of:

19 "... a long-established and thriving  
20 cluster of aviation and aerospace businesses in  
21 South Wales, with a healthy local supply chain and  
22 links to further and higher education  
23 establishments that provide a pipeline of skilled  
24 workers."

25 A number of companies are then listed and

1 it is noted at the bottom that:

2 "The importance of this cluster to the  
3 wider UK aerospace sector was recognised by the  
4 [CAA] during a recent visit to Wales."

5 There is then a discussion of the role  
6 which the airport -- Cardiff Airport plays in  
7 servicing that cluster. I would just invite the  
8 tribunal, without reading it out, to just look  
9 through the various points that are made there.  
10 There is reference to agglomeration effects and  
11 the potential of the airport to help in the  
12 development of, for example, sustainable aviation  
13 fuel, SAF.

14 Then at the bottom, it is said that:

15 "Allocating some of the Airport's capacity  
16 to supporting growth in non-passenger aviation and  
17 aerospace businesses ..."

18 That is what I think is being referred to  
19 as package 1 element:

20 "... makes sense given the existing  
21 strengths of these sectors ..."

22 Given the existing cluster.

23 Then, over the page, there is a brief  
24 reference to Bristol Airport. If you then go down  
25 to the bullet points, this is what the overall

1 strategy is in relation to the subsidy, it is:

2 "Attracting to the Airport new,  
3 non-passenger businesses ...

4 "Maintaining ... current connectivity and  
5 developing a small number of new air routes,  
6 concentrating on global aviation hubs and economic  
7 centres ..."

8 So a slight veering into package 2 there:

9 "... that are central to the WG's wider  
10 economic growth aspirations."

11 As you can then see, there is then  
12 a discussion of the way in which the proposed  
13 subsidy will help the tourism, sports and arts  
14 industry. Discussion of events. Going on to  
15 page 428, and this is going back to the question  
16 of there being an international airport in Wales:

17 "... the firm belief of the  
18 [Welsh Government] that the presence of a  
19 well-connected and high standard international  
20 airport in Wales will reinforce the image of Wales  
21 as a whole as a vibrant, outward facing trading  
22 nation and a great place in which to invest."

23 It is noted that it is difficult to assign  
24 a growth value added uplift figure to that, but it  
25 is equally difficult to provide quantitative

1 evidence the other way. We say that is  
2 a perfectly reasonable assessment. This is --  
3 the question of whether Wales has an international  
4 airport has a potential image value. Image can be  
5 important. The late Sir Jeremy Lever, if anyone  
6 attended any of his memorial services this year or  
7 last, will have heard the well-known anecdote of  
8 his turning up to a CMA investigation into the  
9 supply of perfume, he was wearing dungarees, and  
10 the point being made was that image counts. Well,  
11 image does count in a way that is very difficult  
12 to quantify. The question of what exactly the  
13 economic value is, Wales being able to say, "We  
14 have an international airport", is not -- it is  
15 a real thing, but the fact that it is not  
16 (inaudible) to quantify it, does not mean it is  
17 not real. It is also eminently a question of  
18 essentially political judgment. It is the sort of  
19 thing about which politicians are likely to  
20 disagree with each other, because it involves  
21 a set of beliefs about the way in which the world  
22 works.

23           Going back to page 428, it is then said,  
24 essentially for the reasons I have just given:

25           "It is ... reasonable for the [Welsh

1 Government] to place some weight upon [that]  
2 qualitative argument ..."

3 We say, yes, very much it is.

4 Then there is a discussion of the way in  
5 which the subsidy aligns with other policies,  
6 which I will skip over. But picking it up at 431,  
7 there is then a discussion of the regional  
8 employment and gross value added impacts. It is  
9 noted that the effect of the subsidy, particularly  
10 on the cluster and the businesses that are based  
11 in the Bro Tathan industrial park, the sorts of  
12 jobs -- the discussion of the sorts of jobs that  
13 are likely to be created.

14 Then the "Major events", the discussion  
15 beginning on page 432. There is an analysis of  
16 the role the airport can play in assisting Wales  
17 to gain major events, sporting events, business  
18 conferences, international political conferences,  
19 such as the NATO summit, that sort of thing.

20 There is then a discussion beginning at  
21 page 434 of the way in which package 1 fits into  
22 the specialist skills that a number of local  
23 education institutions have in the aviation and  
24 aerospace sector and there is a discussion of the  
25 various institutions that specialise in aerospace

1 and aviation related courses and how that will fit  
2 into package 1, there is major synergy there.

3 Page 435 for further discussion of that.  
4 Then, at the bottom of that page, discussion of  
5 the "Aviation Cluster", and a discussion -- which  
6 is called confidential, but the tribunal will be  
7 able to look at it -- of the British Airways  
8 Maintenance Cardiff, which is BAMC, who are looking to  
9 modernise their Cardiff airport base facilities  
10 and how all that fits into the plan.

11 "Fire Training Centre" is referred to at  
12 the bottom of page 436.

13 If we can then jump to page 450, because  
14 there is then a long discussion, which I think is  
15 not at all contentious, of the reasons why  
16 South Wales is one of the less advantaged parts of  
17 the United Kingdom. I do not think that is  
18 a controversial point.

19 If you go on to page 450, there is  
20 discussion of how the subsidy will address the  
21 equity objective and again a discussion of the  
22 strategy.

23 Going on to page 451, there is discussion  
24 of synergy, discussion of agglomeration effect and  
25 maintenance repair, and then the discussion of

1        what is actually proposed under the maintenance,  
2        repair and overhaul. There is going to be an  
3        investment in additional MRO facilities. It is  
4        discussed why Cardiff Airport is ideal for this.

5                The bullet points at the bottom of  
6        page 451 are worth having a look at, because these  
7        are the reasons why Cardiff Airport is quite  
8        different from Bristol Airport. It is a 24-hour  
9        operation. It does not have any restrictions on  
10        timetable so "zero slot constraints". It can  
11        accommodate wide-bodied aircraft because it has  
12        got a long runway. Bristol does not have a long  
13        runway capable of accommodating the wide-bodied  
14        aircraft that are currently necessary to operate  
15        long haul. Then Cardiff is located in this  
16        aerospace engineering cluster with vacant land  
17        nearby. So that is why Cardiff, as opposed to  
18        anywhere else, is well-placed to deliver the  
19        package 1 element of the strategy.

20                Then there is a discussion, page 453, of  
21        exactly what the planned new MRO facilities will  
22        be.

23                Discussion at 454, general aviation  
24        operations. This is essentially serving small  
25        private jets, private passenger planes and there

1 is a discussion of why that is important, being  
2 able to improve the handling of those, essentially  
3 because it helps in making Wales attractive as  
4 a sports event/business destination. People who  
5 want to fly in on small jets can do so.

6 There are other benefits of general  
7 aviation. There is also the benefit of the flying  
8 school, 455. The new hangars that are going to be  
9 developed.

10 456, the cargo operation, and investments  
11 in improving the airport's ability to handle  
12 cargo.

13 457 is a long discussion of the benefits  
14 in terms of lower carbon aviation technologies and  
15 sustainable fuel.

16 Then 459, a long discussion of the  
17 economic benefits that all you have that is going  
18 to produce.

19 Then, at page 461, this starts discussing  
20 package 2, that is the air route connectivity.  
21 The proposal, you can see bullet points, near the  
22 top of page 461, is to have regular scheduled air  
23 services to key economic centres, major cities in  
24 continental Europe, hub airport in North America,  
25 hub airport in the Middle East. It is noted that

1 the Welsh Government already has a diplomatic  
2 presence in all those areas. So that ties in with  
3 developing international routes.

4 Then 462, it is all expanded on, in  
5 relation to each bullet point, dealing in detail  
6 with each of those particular destinations. The  
7 assessment discusses in some detail the recent  
8 record of the airport and notes that there are  
9 optimistic signals in the market, page 464, and  
10 that is -- the tribunal can quickly look through  
11 what is said there.

12 MR TIDSWELL: (Off microphone - inaudible) --  
13 certainly my reading of it is that quite a lot of  
14 this is on business and inbound tourist travel.

15 MR PERETZ: Yes, because that is going to be the  
16 focus of the new route or routes that are for  
17 business and inbound tourism.

18 I mean, it is not possible, of course, to  
19 draw a sharp dividing line between routes that are  
20 business and inbound travel and routes that are  
21 outbound tourist travel.

22 MR TIDSWELL: (Off microphone) -- so what you have  
23 with businesses is you have (inaudible) and basis  
24 on which there are foreign investors into Wales --

25 MR PERETZ: Yes.

1 MR TIDSWELL: A separate point (inaudible) mostly,  
2 is that not right, where there is a discussion of  
3 those markets which are the larger visitor markets  
4 to Wales. (Off microphone - inaudible).

5 MR PERETZ: Yes. You can change planes somewhere  
6 in the Middle East, in the UAE or Qatar, or  
7 somewhere, and then fly straight to Cardiff, that  
8 makes that straightforward for most flights from  
9 Australia to London.

10 MR TIDSWELL: Then you get to the question of  
11 outbound.

12 MR PERETZ: Yes.

13 MR TIDSWELL: (Inaudible) discussion of the  
14 low-cost carriers; just understand the economic  
15 basis of that proposal.

16 MR PERETZ: Yes.

17 MR TIDSWELL: So, as I understand it (inaudible),  
18 this is more about growing the infrastructure of  
19 the (inaudible).

20 MR PERETZ: There will be further passage of  
21 traffic as a result of having a -- if you get  
22 an LCC carrier. You will get some further --  
23 a passage of traffic. That obviously increases  
24 the ability of the airport to do things with more  
25 revenue. That is the point being made at the

1 paragraph at the bottom of the page there. Then,  
2 of course, you know, the particular routes served  
3 by low-cost carrier, that is the point I was  
4 beginning to make. You cannot neatly divide  
5 between outbound tourist routes and routes that  
6 are important for inbound tourist/business  
7 investment. A flight to Paris is going to be used  
8 by Parisians wanting to visit Wales, it is going  
9 to be used by Welsh people wanting to visit Paris,  
10 which is outbound leisure (inaudible). Paris is  
11 obviously an important business centre. It is  
12 quite difficult to top that. One might be able to  
13 say a flight to Mykonos or Canary Islands is  
14 almost certainly going to be just for outbound  
15 leisure, but that is right at one end of the  
16 spectrum. There are going to be destinations like  
17 Barcelona or Athens where you can have quite  
18 a discussion about what the main use of that  
19 flight may well be.

20 MR TIDSWELL: This is the last  
21 paragraph (inaudible). They are not doing it for  
22 that reason. You are saying (inaudible).

23 MR PERETZ: Yes.

24 MR TIDSWELL: It is not the same. They are not  
25 doing it for that reason.

1 MR PERETZ: They are not doing it for that reason.

2 MR TIDSWELL: (Inaudible).

3 MR PERETZ: Yes.

4 MR TIDSWELL: (Inaudible).

5 MR PERETZ: Yes. That is is --

6 MR TIDSWELL: (Inaudible).

7 MR PERETZ: If you want a one-paragraph summary,  
8 that is it.

9 MR TIDSWELL: Yes.

10 MR PERETZ: Read in context, it is developed a bit  
11 over the next page. I am sure the tribunal will  
12 read it in context.

13 MR TIDSWELL: Yes. Thank you.

14 MR PERETZ: Then at page 465 it is recorded that  
15 new air routes will require upfront incentive  
16 payments to airlines. In a minute, I am just  
17 going to go to a bit of the Altair report which  
18 describes why that is necessary, but just before  
19 that I want to have a quick look at the way in  
20 which Bristol -- the tribunal will be able to put  
21 this away in a minute, but before I put it away,  
22 I just want to go to page 400 -- I will just check  
23 the note. I have a wrong reference there. Sorry,  
24 503. I am dealing with this here and then we can  
25 put this document away.

1                   503 deals with the analysis of  
2 Bristol Airport that was criticised by my learned  
3 friend yesterday. It said here that:

4                   "... the Airport will take a substantially  
5 different approach to Bristol Airport, with focus  
6 on a small number of routes, some long haul, to  
7 important economic centres and global air hubs,  
8 served by major carriers ... it is not focusing on  
9 massive growth of high-volume tourist and LCC  
10 flights, which is the main thrust of Bristol  
11 Airport's strategy."

12                   My learned friend criticised that on the  
13 basis that, as he put it, we seem to believe that  
14 Bristol was not interested in long-haul flights.  
15 First of all, that is not quite what we say. What  
16 we say is that high volume tourist and LCC flights  
17 is the main thrust of Bristol Airport's strategy.  
18 We do not say there that we do not believe that  
19 Bristol has any interest at all in long-haul  
20 flights, it is just that that is not its focus.

21                   That description of Bristol is, we say,  
22 absolutely accurate. If you go to the master plan  
23 that my learned friend took you to yesterday,  
24 which is in bundle F.

25 MR TIDSWELL: Can we put B away?

1 MR PERETZ: Yes, you can put B away. This is in  
2 bundle F, tab 92, which is the 2024 Bristol master  
3 plan. I cannot now locate the reference, but the  
4 2024 master plan is referred to in the assessment  
5 of compliance. So it is a document --  
6 (overspeaking) -- was aware of. This is 2024. It  
7 is a sort of consultation document, but it is  
8 a consultation document that explains what Bristol  
9 is trying to achieve.

10 I'm afraid the numbers are pretty  
11 difficult to read because they are right at the  
12 bottom, but at page 2093, which has a picture of  
13 an aeroplane at the bottom, which probably doesn't  
14 help much, but an aeroplane taking off, and it  
15 says on the right "Runway Improvements". Bristol  
16 has a short runway, as said here. It is pointed  
17 out that other airports have a much longer runway.  
18 Then it says:

19 "We are proposing a small extension ... of  
20 some 150 metres, which will make it around 7%  
21 longer."

22 That is a proposal. Then it is pointed  
23 out even with that extension they still could not  
24 hold the largest aircraft, such as Airbus 380, but  
25 medium-sized ones would be able to use it, which

1 would open up more opportunity for long-haul  
2 travel. There is also a reference to new  
3 aircraft, such as the Airbus A321XLR, similar to  
4 the size of the ones that Bristol Airport  
5 currently hosts, but have a longer range owing to  
6 the amount of fuel they carry, so they can do long  
7 haul as well. So it is flagged up that there is  
8 a possibility. If the runway is extended, they  
9 can take some planes that currently fly long haul.  
10 Even if the runway is not extended, they can take  
11 this new plane that is about to come on-stream,  
12 and you can see on the previous page the  
13 description of the A321XLR, which we have had  
14 a look at, is expected to come in next year.

15 So these are all possibilities. If I can  
16 put it this way, they are all a bit subjunctive.  
17 This is not something that Bristol is actually  
18 currently doing. It depends on various factors  
19 such as development of new aircraft and being able  
20 to extend the runway. Against that background, it  
21 is, we say, absolutely correct to say that as  
22 matters stand, to the extent that one can predict  
23 the immediate reasonable future over the next few  
24 years, Bristol's focus is not on long haul. The  
25 main thrust, if I can use that word, of Bristol's

1 activities is not long haul.

2 So we say what is said in the assessment  
3 of compliance about Bristol is absolutely  
4 accurate, given the 2024 master plan. There is no  
5 error as to what Bristol's focus was.

6 I said I would go back to the Altair  
7 report. This is to deal with the reasons why  
8 airlines have to have front-loaded incentive  
9 schemes in order to attract them. The Altair  
10 report is at tab 49 in volume D and this is very  
11 close to the date of the decision, as you can see.  
12 It is 28 February 2025.

13 MR TIDSWELL: (Inaudible).

14 MR PERETZ: It was done in response to the SAU,  
15 that is absolutely right.

16 MR TIDSWELL: Which page have you got?

17 MR PERETZ: I am sorry. 1349. If I could take  
18 you to -- it must be the reference -- I hope that  
19 is -- yes, 1355, and then halfway down the page  
20 this is the explanation of why it is that  
21 front-loaded incentive payments are so important.  
22 Can I just invite the tribunal to read from "For  
23 an airline" down to the bottom of the page and  
24 perhaps the overlapping paragraph and then the  
25 first full paragraph on page 1356.

1 MR TIDSWELL: (Inaudible).

2 MR PERETZ: Indeed. That is, as Altair reported,  
3 just the way in which the European -- certainly  
4 the European; I do not know what the position is  
5 elsewhere -- but certainly the European airport  
6 market is working. If airports want to attract  
7 airlines, this is the game they have to get into.  
8 That is true of a private sector airline, it is  
9 true of an airport subject to EU state aid rules,  
10 we will have to navigate those. If you want to be  
11 in the game in Europe of attracting airlines to  
12 come and use your airport, you have to be prepared  
13 to offer these front-loaded incentives for the  
14 reasons that are set out.

15 MR TIDSWELL: How long do these need to be provided for?

16 MR PERETZ: It depends slightly what you mean by  
17 how long for. In Cardiff, there is a ten-year  
18 period in relation to Cardiff Airport, because  
19 this is not all going to happen at once,  
20 particularly because as one route lands,  
21 (inaudible) you may be able to attract other  
22 routes coming in. This is not a one-shop process.  
23 I think it is quite front-loaded. The idea is we  
24 will proceed over the next ten years, and as  
25 matters progress new -- (overspeaking) --

1 MR TIDSWELL: (Inaudible).

2 MR PERETZ: If you are talking about the  
3 relationship of each individual route and how long  
4 you need to offer an incentive, not a subsidy to  
5 the airline, because this is just how the market  
6 works --

7 MR TIDSWELL: (Inaudible).

8 MR PERETZ: -- this is just what you have to do as  
9 a commercial airport if you want to attract  
10 airlines. They also make the point that  
11 (inaudible) I cannot now remember, but there is  
12 a discussion somewhere, that for long-haul flights  
13 it will be a longer period before the airline  
14 knows whether it is profitable. The airline may  
15 demand an incentive for a longer period.

16 MR TIDSWELL: The money will be upfront.

17 MR PERETZ: The money will be upfront.

18 MR TIDSWELL: (Inaudible) Whatever it is, the  
19 money is paid upfront (inaudible).

20 MR PERETZ: Yes.

21 MR TIDSWELL: (Inaudible).

22 MR PERETZ: That is a commercial airport, thinking  
23 about this in a commercial way, and, of course,  
24 the way Cardiff has been structured is to think  
25 about it in a commercial way. If you are thinking

1 about it in a commercial way, you will want to  
2 think about the period, how long the incentive  
3 lasts, obviously. You will be wanting to look at  
4 terms that tie the airline into maintaining the  
5 route for a certain minimum period. The question  
6 of how much you can actually, as it were, get away  
7 with is going to be a question of commercial  
8 negotiation and commercial judgment. I will come  
9 on to the details of how the arrangements work,  
10 but that is precisely why you have in schedule 1  
11 to the funding agreement a process which enables  
12 that commercial reasoning by Cardiff Airport to be  
13 scrutinised each time it applies for funding under  
14 this package.

15 MR TIDSWELL: (Inaudible).

16 MR PERETZ: Yes, because that is just how the  
17 market works, as Altair explain.

18 My learned juniors are handing me another  
19 couple of useful references. 1371, in relation to  
20 low-cost carriers, it is said here that it is  
21 clear that they are adept at "subsidy shopping".  
22 One could argue about the word -- certainly  
23 "incentive shopping". I think the word "subsidy"  
24 has been used rather loosely there. Establishing  
25 bases and routes where the most attractive

1 incentives are to be found. I mean, anybody who  
2 follows various case law involving (inaudible) v  
3 Ryanair will sort of recognise this picture or  
4 indeed the various public announcements that  
5 Ryanair sometimes makes about its decision to open  
6 or close routes to particular airports; reference  
7 is often made to this.

8 If I can start off with reminding the  
9 tribunal precisely what the subsidy package is,  
10 the key point is that it is far more than just  
11 keeping the airport open, which was a proposal --  
12 we will come to this -- being discussed by Oxera  
13 in 2023, which was a sort of business-as-usual  
14 arrangement. This is a much bigger package. My  
15 learned friend criticised it, but it is admittedly  
16 a much bigger package. It is bigger because it is  
17 designed to do completely different things. It is  
18 designed to achieve all the benefits in terms of  
19 package 1 that are set out in the assessment of  
20 compliance, and all the benefits in terms of  
21 package 2 that are set out there as well, and  
22 those are quite different benefits.

23 I now turn, before getting on to the  
24 individual grounds, to some general remarks about  
25 basic principles of review. I am not sure there

1 is an enormous amount between us, my learned  
2 friend and me, on this. I am very conscious that  
3 the chair has just delivered a very comprehensive  
4 judgment on all of this in the Weis case that we,  
5 with great respect, entirely adopt.

6 MR TIDSWELL: I would like to make clear it was  
7 not actually me; it was Hodge Malek.

8 MR PERETZ: I apologise; it was Hodge Malek.

9 Anyway, it was an excellent judgment, which we  
10 commend, and I do not think my learned friend was  
11 criticising it either. What my learned friend did  
12 criticise was a reference that we made to the  
13 judgment of Lord Justice Carnwath in IBA Health.  
14 You will recall that Lord Justice Carnwath makes  
15 the point that in relation to what he calls "matters of  
16 political judgment" the courts must exercise  
17 restraint. My learned friend thought the matters  
18 set out in the subsidy control principles were not  
19 matters of political judgment. We disagree with  
20 that. In our submission, the matters set out in  
21 the subsidy control principles are eminently  
22 political in the sense that in a big project of  
23 this scale of national significance, they are the  
24 sorts of things that politicians absolutely argue  
25 about and where political judgment is -- however

1 well informed those political judgments are,  
2 experts, such as economists, are absolutely  
3 critical. Applying the subsidy control principles  
4 means trading off incommensurables -- that is what  
5 principle G expressly asks you to do -- to trade  
6 off distortion of competition against often  
7 non-economic benefits of a subsidy. Those involve  
8 value judgments, which are eminently political.  
9 It obviously involves a judgment of principle A  
10 about what is an equity rationale. That is  
11 a political judgment.

12           Even the concept of market failure, as  
13 anybody who thinks about it for a moment knows, is  
14 not an uncontentious judgment. It again involves  
15 political considerations; value judgments of  
16 various kinds. Assessing matters such as  
17 passenger forecasts is going to be a matter of  
18 political judgment. Passenger forecasts are  
19 notoriously difficult to make because the aviation  
20 sector is so uncertain, so dependent on the  
21 risks and terms of economy; also, of course,  
22 susceptible to shocks of various kinds, as anybody  
23 who thinks back to the last 20 years will recall.

24           The question of whether a particular set  
25 of forecasts is credible or not is going to be

1 a matter of political judgment, because the sorts  
2 of things being thought about involve the sorts of  
3 things that involve politics, if you study  
4 politics at university --

5 MR TIDSWELL: I was with you until you got to  
6 there. (Inaudible) not sure forecasts can be political.

7 MR PERETZ: Perhaps a better example is the one we  
8 were just looking at earlier about the extent to  
9 which it is important for Wales to have  
10 an international airport. One might ask who is  
11 best qualified to make the sort of judgment about  
12 how important it is to the Welsh economy to have  
13 an international airport. Who are the best people  
14 to do that? There is quite a case for saying that  
15 it is politicians, because politicians go and talk  
16 to lots of people. They will engage -- the  
17 (inaudible) certainly does this -- the politicians  
18 will engage with potential foreign investors.  
19 They will go on international trips to promote  
20 Wales. They will get involved in discussions  
21 about whether Wales should or should not have  
22 a major sporting, artistic, cultural, political  
23 business event. They hold these conversations.  
24 It is not a quantitative exercise, but if you are  
25 asking who talks to lots of people, is able to

1 reach a reasonably reliable view, politicians are  
2 as well placed as anybody, and one might suggest  
3 slightly better placed than lawyers to make that  
4 assessment.

5           So in that sense we therefore do not  
6 accept the remarks of Lord Justice Carnwath that  
7 political judgments do not apply to subsidy  
8 control principles. In our view they certainly  
9 do. There obviously can be some sub-issues under  
10 the principles which are questions of technical  
11 evaluation, technical expertise, but they are  
12 essentially in a context of value judgment,  
13 predictions about the future, the way the world is  
14 going, which are very much ones where it is for  
15 elected politicians in this case to make that  
16 assessment.

17           I should also deal briefly with my learned  
18 friend's claim that it is relevant that Bristol is  
19 outside the jurisdiction of the Welsh Government.  
20 The position is simply that the Bristol Airport  
21 has the same rights under the subsidy control  
22 assessment as any business in Wales, and the Welsh  
23 Government has the same duties under the subsidy  
24 control assessment towards Bristol Airport, as it  
25 has to any business in Wales, no less, but also no

1 more.

2 Bristol Airport obviously has no vote in  
3 the Senedd elections (inaudible) Welsh  
4 Government is not answerable to Bristol Airport,  
5 and Bristol Airport would not have a vote if it  
6 was this side of the Severn, because it is a legal  
7 person, not somebody who is on an electoral  
8 register. So we do not see how that matters.

9 Ultimately at the end of the day my  
10 learned friend was simply unable to point to any  
11 evidence that the Welsh Government treated  
12 Bristol's position any differently because it  
13 happens to be located on the other side of the  
14 Severn, than it would have done had it been  
15 elsewhere. (Inaudible) obviously for the point  
16 that Bristol is not an airport located in Wales,  
17 so to the extent that it is important to have  
18 an airport located in Wales, it is treated  
19 differently, but we say there are good reasons for  
20 that.

21 I now come on to the grounds starting,  
22 I think, with a brief discussion of the concept of  
23 ailing or insolvent. Sections 19 and 20 both use  
24 that phrase. Of course it is "ailing or  
25 insolvent", not "ailing and insolvent", though it

1 is easy to get that wrong when drafting, as my  
2 learned friend can attest when one looks at  
3 paragraph 79, page 22 of his skeleton. I think we  
4 are down to one misquote each side of the relevant  
5 test at the moment I think!

6 As to the definition in section 24, I can  
7 take the tribunal to it, but I imagine the  
8 tribunal is familiar with it. We think it is not  
9 necessary to explore to what extent subparagraphs  
10 (b) and (c) are tied to the Insolvency Act  
11 definitions. They are the ones that relate to  
12 being unable to meet debts that fall due and so  
13 on.

14 MR TIDSWELL: (Inaudible).

15 MR PERETZ: They do indeed. (Inaudible)  
16 essentially the basis on which my learned friend  
17 is putting his case. The issue is really  
18 sub-paragraph (a):

19 "it would almost certainly go out of  
20 business in the short to medium term ..."

21 That is where the dispute lies. We do not  
22 think it is really necessary for the tribunal to  
23 express a view on (b) or (c); the argument is  
24 about (a).

25 There is obviously some doubt as to what

1 short or medium term means. Medium term is used  
2 by different people in different contexts,  
3 and there is no guidance as to what it means.

4 We suspect it actually does not matter  
5 very much, at least in this case, because of the  
6 key adverb "almost certainly". The tribunal has  
7 probably heard enough about the uncertainty of  
8 this industry -- as I said, procyclical,  
9 susceptible to shocks of various kinds, behaviour  
10 of airlines that, at the drop of a coin, can  
11 change their strategy quite dramatically, to know  
12 that forecasts beyond 18 months are about as  
13 reliable as Sybill Trelawney gazing into a crystal  
14 ball. So in practice it probably does not make  
15 much difference whether medium term is 2, 3 or  
16 5 years because when one is looking at predictions  
17 beyond 18 months or so, it is going to be very  
18 hard to say that anything is almost certain, and  
19 therefore the "almost certainly" element of the  
20 test is not going to be satisfied. There may be  
21 cases where that is true, but we say in this case  
22 that is going to be the position pragmatically.  
23 So that is our view on the interpretation of  
24 "ailing and insolvent".

25 Turning now to the grounds, it is, of

1 course, our case that the subsidy control  
2 assessment permits a subsidy to ailing or  
3 insolvent enterprises as long as it is not  
4 a restructuring subsidy. So we do not accept that  
5 sections 19 or 20 are an exclusive regime that  
6 need to be used when an enterprise is ailing  
7 and insolvent.

8 We suspect that part of the problem here  
9 is that subsidy control lawyers who are brought up  
10 on the state aid regimes, as for obvious reasons  
11 most of us were, tend to assume that you cannot --  
12 can fall into the error of assuming that you just  
13 cannot give subsidy to an ailing or insolvent  
14 undertaking, because under the EU state law  
15 regime, it is well-established that you cannot  
16 give state aid to an undertaking in difficulty, to  
17 use the cognate EU term, unless it is rescue or  
18 restructuring aid.

19 The way in which that result is achieved  
20 in the EU state aid regime is not by anything in  
21 the text of what is now article 107 or 108 of the  
22 TFEU. It is instead achieved by a consistent  
23 commission practice which has been there as long  
24 as I can remember, which is now distressingly  
25 long. It simply will (inaudible) clear if

1 an individual aid is notified to it; it will not  
2 clear that aid if the undertaking is in  
3 difficulty, and all the commission block  
4 exemptions, including the ministers' (inaudible),  
5 that all exclude undertakings and difficulties  
6 from its scope. So the effect of all of that is  
7 a prohibition; you cannot notify and cannot get  
8 exemption. So that is the position under the  
9 state aid regime and it has been commission  
10 practice backed up by commission legislation for a  
11 long time.

12 Against that background, we say it is  
13 quite significant that when the United Kingdom and  
14 the EU came to negotiate the Trade and Cooperation  
15 Agreement -- and we will look at that; it is  
16 page 1508 of the authoritative bundle.

17 MR TIDSWELL: Which tab is that?

18 MR PERETZ: I am afraid I do not have tabs in my  
19 bundle. 35.

20 MR TIDSWELL: Thank you.

21 MR PERETZ: It is "Prohibited subsidies and  
22 subsidies subject to conditions". Sorry, 1508.  
23 Under the heading "Rescue and restructuring", you  
24 can see:

25 "Subsidies for restructuring an ailing or

1 insolvent economic actor without the economic  
2 actor having prepared a credible restructuring  
3 plan shall be prohibited."

4 So the key concept there is subsidies for  
5 restructuring an ailing or insolvent economic  
6 actor; "economic actor" being the odd term used in  
7 the TCA, which is translated domestically as  
8 enterprise under the SCA, or a term used in the  
9 EU. Ironically, the rather more Anglo-Saxon term  
10 is "undertaking".

11 That language is very significant against  
12 the background of the state aid rules, because had  
13 the negotiated wish to agree between the UK and  
14 the EU that there would be effectively an absolute  
15 prohibition on ailing or insolvent economic actors  
16 or enterprises, they could easily have drafted  
17 that. They could have simply said "no aid shall  
18 be given to an ailing or insolvent economic actor  
19 unless [such and such]". They did not draft in  
20 that way. We say that was absolutely deliberate.

21 That language, of course, is language that  
22 carries over directly into sections 19 and 20, it  
23 is exactly the same language used, and we say that  
24 that language should be construed consistently  
25 with trade and cooperation agreement under the

1 usual rule of thumb: when you are interpreting  
2 a domestic provision designed to implement  
3 an international agreement, you, where possible,  
4 interpret it according to that agreement. It is  
5 a (inaudible) construction.

6 MR TIDSWELL: I suppose it might also be said in  
7 argument that the TCA is ensuring that the UK has  
8 a regime in relation to subsidies that is  
9 an imported equivalent. I cannot remember what  
10 the wording is, but there is an expression, is  
11 there not, about replicating a subsidy scheme? We  
12 have not got the beginning of the agreement, have  
13 we? Just a short point I am making actually --  
14 I cannot remember what I said -- but there is  
15 some basis for an argument that when looking at  
16 (inaudible) one might think that the EU approach  
17 was a reasonable guide, not binding, not in any  
18 way requiring you to do it (off microphone -  
19 inaudible).

20 MR PERETZ: We say it is significant that  
21 (inaudible) reflected the EU position, and since  
22 it would have been very easy to use such language,  
23 you have to assume it makes a difference. I think  
24 we would reject, I'm afraid, the contention that  
25 you have to try to interpret the subsidy control

1 regime or the trade and cooperation agreement in  
2 line with EU law.

3 MR TIDSWELL: (Inaudible) would not go that far.

4 MR PERETZ: Yes. There is a discussion of that --

5 I do not think it is in the bundle -- by

6 Mr Justice Foxton in the British Sugar v

7 Department of International Trade judgment. He

8 makes a point I think in particular in relation to

9 particular rules on when a tax measure is to be

10 regarded as specific, to use our language. The

11 language of the relevant clause -- I do not think

12 we have it in our bundle -- the relevant section

13 of the subsidy control act, and indeed the TCA, is

14 so redolent of the ECJ case law, applying the

15 three-stage test to the question of whether a tax

16 measure is specific or selective in the EU terms.

17 Mr Justice Foxton makes the point it is there

18 pretty -- obviously legitimate to start looking at

19 the CJEU case law, because it looks very clear

20 that the TCA drafters and the drafters of the SCA

21 did intend to import that jurisprudence in --

22 (overspeaking) -- (inaudible) a distinction.

23 MR TIDSWELL: You say the same thing, do you not,

24 (inaudible)? You are effectively assuming

25 (inaudible).

1 MR PERETZ: That is is under the state aid regime,  
2 but yes --

3 MR TIDSWELL: (Overspeaking - inaudible).

4 MR PERETZ: No, it is not. It is about 28 and 29.  
5 It is applying the state aid regime directly at  
6 that point. I'm afraid we do not have it in the  
7 bundle, but Mr Justice Foxton in British Sugar,  
8 and certainly the Court of Appeal in Bulb, were  
9 very clear that you had to be careful about that.  
10 I slightly bear the scars, because I had the job,  
11 on behalf of my client, of trying to persuade the  
12 Court of Appeal to look at EU law precisely in  
13 relation to the question of restructuring  
14 subsidies, and there was some judicial reluctance  
15 to do that. It was over a different point  
16 relating to restructuring subsidies.

17 MR TIDSWELL: You are saying we do not need to do  
18 that (inaudible).

19 MR PERETZ: Yes.

20 MR TIDSWELL: (Inaudible).

21 MR PERETZ: Yes.

22 MR TIDSWELL: (Inaudible).

23 MR PERETZ: Yes. There is a policy rationale for  
24 the difference, which is nothing to do really with  
25 wanting to make it much, much easier to grant aid

1 to keep companies that should have died afloat.  
2 The rationale is simply that it can cause some --  
3 the EU carve-out, the way in which the system  
4 worked in state aid rules, it is well-known to  
5 practitioners can cause a number of difficulties,  
6 and those emerged most clearly during the COVID  
7 period, because at the beginning of the COVID  
8 period when the UK was still in the EU for -- in  
9 the transitional period when it effectively was  
10 still in the EU -- the initial COVID relief  
11 measures were all taken under the state aid rules,  
12 and initially they contained the standard  
13 carve-out: you cannot give COVID aid to  
14 undertakings in difficulty. That caused a lot of  
15 problems, because when you are trying to deliver  
16 large amounts of subsidy to many businesses very,  
17 very fast, forcing businesses to provide  
18 information that enabled you to determine they  
19 were not ailing and insolvent, of course if you do  
20 not know anything much about a business, you do  
21 not know that it is ailing or insolvent, was a bit  
22 of a bureaucratic bottle-neck and there was a lot  
23 of criticism of it. In the end in fact I think  
24 the COVID scheme was modified to remove that  
25 qualification.

1           That is an example of the sorts of  
2           problems you can get into. That is a policy  
3           rationale as to why the British Government may  
4           have succeeded in persuading the EU, if that is  
5           how it happened. Anyway, the parties together  
6           reached a view that it was not necessary between  
7           them to agree that there should be a mirror image  
8           of the EU solution -- only one route to aid  
9           position on this side of the Channel and the Irish  
10          Sea.

11           We also say that that view is supported by  
12          the DBT guidance, which is in the authority  
13          bundle at 1552. I am afraid again I do not have  
14          the tab number. We have been to paragraph 5.38  
15          before, I think, but we say certainly the second  
16          sentence of paragraph 5.38 could not be clearer.

17           "There is no wider prohibition against  
18          giving subsidies that are not rescue or  
19          restructuring subsidies to ailing or insolvent  
20          enterprises."

21           My learned friend tried to suggest that  
22          this was just restricted to some point about  
23          schemes and tried to first rely on the following  
24          sentence, but the following sentence starts "For  
25          example". It is not intended to be a definitional

1 provision; it is an example. The wider point being  
2 made in the second sentence "may cash out".

3 My learned friend also took you to -- I'm  
4 afraid it is not in the bundle, it was  
5 a loose-leaf -- section 30, subsection (1) of the  
6 subsidy control act, which is the provision, if  
7 you will recall, that appears to disapply all the  
8 prohibition provisions that precede section 30 on  
9 subsidy schemes and says "A-ha, that is perhaps  
10 what the Department of Business and Trade was  
11 thinking of here". My learned friend forgot to  
12 take you to the next section, section 30,  
13 subsection (2), which makes it clear that as far  
14 as subsidy schemes are concerned, the prohibitions  
15 apply to the extent they would apply to any  
16 subsidy given under the subsidy scheme.  
17 Section 30 is not removing subsidy schemes from  
18 the prohibitions, it is simply making  
19 an adaptation of the way in which the prohibitions  
20 work when it concerns subsidy schemes. So I'm  
21 afraid my learned friend's submissions on that are  
22 misconceived.

23 He also relied on the flow chart that you  
24 have got in front of you. We have established  
25 that flow chart is not cross-referenced in the

1 text. It is headed "Rescue and restructuring  
2 subsidies", so it applies to subsidies that are  
3 rescue and restructuring subsidies. There is no  
4 indication there that it is designed to tell you  
5 what a rescue and restructuring subsidy is, or to  
6 indicate that if you are granting subsidy to  
7 an ailing or insolvent business, that flow chart  
8 necessarily applies.

9 One can take other examples, but I may --  
10 government will often be taking decisions as to  
11 whether to award contracts or to grant subsidies  
12 in return for enterprises doing things where it  
13 makes eminent sense to enter into that contract or  
14 grant that subsidy to a business that at that  
15 particular time happens to be quite vulnerable.  
16 There are lots of businesses around which have to  
17 live a slightly hand-to-mouth basis, which are  
18 vulnerable to various shocks of various kinds,  
19 that are very dependent on very big contracts.  
20 Shipbuilding might be an example.

21 If, for example, the Royal Navy is  
22 thinking of entering into a procurement contract  
23 with a particular shipyard, that is the best  
24 place, because it has special expertise, to build  
25 that particular class of destroyer, or whatever it

1 is, for the Royal Navy. If the Royal Navy entered  
2 into the contract with a shipbuilder, and the  
3 shipbuilder happened to be in that position  
4 because it had not won a contract for a while, in  
5 a slightly vulnerable financial position, you  
6 would not describe what the Royal Navy or Ministry  
7 of Defence were doing as rescuing or restructuring  
8 that shipbuilder by entering into the contract,  
9 because it is entering into a contract for really good  
10 reasons to do with what the government needs in  
11 terms of defence and the ability of that  
12 shipbuilder to provide it.

13 Similarly, when it comes to subsidy, here  
14 the position is for reasons set out in the  
15 assessment of compliance, Cardiff Airport was  
16 particularly well placed to deliver the particular  
17 package of things -- it happens here to be  
18 a subsidy, because it is not a procurement, the  
19 Welsh Government is not buying anything for  
20 itself, but it wants infrastructure of various  
21 kinds to be built in order to promote the wider  
22 needs of the Welsh economy, and Cardiff Airport,  
23 for the reasons explained in the assessment of  
24 compliance, is the best place to do it.

25 One might ask rhetorically why should it

1 be a block to subsidy that it so happened that at  
2 the particular moment that the decision came up to  
3 be taken, Cardiff happened to be in a position of  
4 being ailing or insolvent?

5 We say there are very good policy reasons  
6 why the regime is in that respect more liberal  
7 than, to use a loose term, the EU regime. There  
8 is also the example Mr Frazer gave, which, with  
9 respect, is an excellent example of where it might  
10 be entirely obvious to grant a subsidy. It was  
11 his example of a subsidy to an ailing or insolvent  
12 business which was in financial difficulty  
13 precisely because of a market failure that the  
14 subsidy was designed to address. That is another  
15 excellent example of why as a matter of policy  
16 a different view might be taken, and we say was  
17 taken.

18 My learned friend tried to argue -- it has  
19 occurred to me I should keep an eye on the time.

20 MR TIDSWELL: Whatever time is convenient to you.

21 MR PERETZ: Let me just finish off this point and  
22 then there can be a break.

23 My learned friend tried to argue, and  
24 I think essentially his point was that in any case  
25 where the government or a public authority enters

1       into a subsidy with a business that is ailing or  
2       insolvent, as it were, the first tranche or the  
3       first slice of that must be for the purpose of  
4       rescue or restructuring. I have sort of labelled  
5       it to myself the first slice argument.

6               The problem with that argument is that it  
7       just proves too much, because if that analysis is  
8       right, it would apply to any subsidy that is given  
9       to an ailing or insolvent business. His argument  
10      would always work. Because it proves too much --  
11      if we are right on the statutory construction, as  
12      we say we are, that view must be wrong. It is of  
13      course inconsistent as well with the DBT guidance  
14      for exactly that reason; it leaves no room for the  
15      second sentence of paragraph 5.38.

16             My learned friend also suggested -- again,  
17      to paraphrase -- that the problem with our  
18      approach is that it might be an avoider's charter,  
19      that it might enable all sorts of things that were  
20      actually aimed at rescuing businesses,  
21      restructuring them, to avoid the restrictive  
22      provisions of sections 19 and 20, which, of  
23      course, the whole point of them is to confine the  
24      situations in which such subsidy can be given.

25             We say that is not a real risk. In any

1       subsidy control -- any public authority granting  
2       a subsidy has to assess its purpose, it has in  
3       practice to write a detailed assessment of  
4       compliance, certainly for a significant one. It  
5       is, in really big cases, subject to the review and  
6       advice of the CMA, obviously subject to challenge  
7       in this tribunal. And that assessment of  
8       compliance and that process will mean that any  
9       attempt, as it were, to dress something which is  
10      really a rescue or a restructuring subsidy as  
11      something else, is bound to fail.

12                As any lawyer knows, the problem with  
13      shams is in the end they do not work. It is never  
14      a sensible thing to do. In our submission, the  
15      tribunal can be confident there is no avoider's  
16      charter here arising out of our definition.  
17      Anything which is really a rescue or restructuring  
18      subsidy will be caught.

19      MR TIDSWELL: (Inaudible) you mean anything that  
20      does not have another purpose?

21      MR PERETZ: Exactly.

22      MR TIDSWELL: You have to show compliance.

23      MR PERETZ: You have to show compliance, exactly,  
24      as we say we have done here. I think that would  
25      be a good time to have a short break.

1 (11.48 am)

2 (A short break)

3 (12.01 pm)

4 MR TIDSWELL: I has this difficulty with the  
5 bundle.

6 MR PERETZ: I will use modern technology to pick  
7 it up --

8 MR TIDSWELL: (Off microphone - inaudible).

9 MR PERETZ: Yes.

10 MR TIDSWELL: (Off microphone - inaudible).

11 I mean, I think it may -- it is not entirely clear  
12 why it does or does not, but what it does is it  
13 disapplies under (inaudible) in paragraph 1.

14 MR PERETZ: My Lord, thank you.

15 MR TIDSWELL: (Inaudible) for the scheme, and then  
16 at --

17 MR PERETZ: (Overspeaking - inaudible).

18 MR TIDSWELL: -- (overspeaking - inaudible) --  
19 again under paragraph 2, and it is not clear at  
20 all why (inaudible), unless there is something in  
21 the chapter that isn't a prohibition and therefore  
22 isn't covered by 2 (inaudible) that there was.

23 MR PERETZ: I think the point is probably that it  
24 means you would not be able to come to this  
25 tribunal if a subsidy is granted under the subsidy

1       scheme and say, "Hey, that subsidy is prohibited  
2       under the section 19, 20, or any of the other  
3       ones".

4       MR TIDSWELL:  Yes, I see.  So it is to remove the  
5       individual challenges --

6       MR PERETZ:  It is part of -- it is -- certainly  
7       the individual challenge route is already removed  
8       by section (inaudible), subsection 2, but it --  
9       where a subsidy is actually granted under the  
10      scheme --

11      MR TIDSWELL:  Yes.

12      MR PERETZ:  -- it is perhaps belt and braces to  
13      that.  What, in very broad terms, it appears to do  
14      is to shift the focus on to the scheme rather than  
15      on to the decision itself.  So you will evaluate  
16      at the point of evaluating the scheme whether  
17      subsidies given under the scheme are likely to be  
18      prohibited under that chapter.  I suspect that is  
19      how it works.

20                 So I now turn to grounds 1 and 2.

21      I propose to start by the picking up of the hammer  
22      of Thor, to use the (inaudible) reference that  
23      Mr West will enjoy, and try to pick up a  
24      (inaudible).  The essential facts here are not  
25      really in dispute, which I suppose is what it

1 should be in a judicial review case. Cardiff  
2 Airport's financial position before the standby  
3 credit facility and the extended credit facility  
4 was, on any view, well-known to the Welsh  
5 ministers, and we were taken by my learned friend  
6 to the July 2024 submission that went up to  
7 ministers that set out in some detail what the  
8 financial position of Cardiff Airport was at that  
9 stage. Given that submission to ministers,  
10 essentially, my learned friend made an awful lot  
11 about what Oxera were saying in 2023, but that is  
12 really irrelevant given what Ministers were told  
13 later. Ministers were well aware as -- certainly  
14 after that submission, what the financial position  
15 was. We say essentially sort of questions of  
16 (inaudible) side failure or enquiry really sort of  
17 fall away. The position was known.

18 The standby credit facility and the  
19 extended credit facility changed that position, as  
20 they were designed to do. My learned friend  
21 disputes that they counted, but does not dispute  
22 that if they count, then Cardiff was not ailing  
23 and insolvent as of March 2025, when the  
24 decision --

25 MR TIDSWELL: I am not sure that is right.

1 I thought he did say in response to a question  
2 from me that he was still arguing that.

3 MR PERETZ: Yes. The position is, or his argument  
4 is obviously at that stage much weaker if they  
5 count, because you have the extended credit  
6 facility guarantee which was designed to keep  
7 going for some time after the subsidy.

8 I mean, you may have an argument,  
9 I suppose, as to -- and this may be where we get  
10 back to I am ailing and insolvent -- but we would  
11 say is, as of that point, given the existence of  
12 the extended credit guarantee going on for  
13 a significant period after the subsidy decision or  
14 absence of a subsidy decision or a cross subsidy  
15 decision --

16 MR TIDSWELL: (Overspeaking - inaudible).

17 MR PERETZ: -- because these are the sorts of  
18 things -- yes. We say, at that point, it is not  
19 ailing in the sense that it is likely to go out --  
20 or almost certainly going to go out of business in  
21 the medium term, given what I was saying about the  
22 medium term.

23 MR TIDSWELL: Yes --

24 MR PERETZ: The difficulty is to say anything  
25 coherent about what would happen two years~--

1 (inaudible) two-year timeframe.

2 MR TIDSWELL: So just (inaudible) -- can I -- am  
3 I able to talk about timing, is that confidential  
4 for the extended facility? Can we talk about  
5 the --

6 MR PERETZ: I cannot, off the top of my head,  
7 remember. That is not confidential.

8 MR TIDSWELL: It is not confidential?

9 MR PERETZ: Yes.

10 MR TIDSWELL: Good. So, as I understand it, so  
11 (inaudible) its (inaudible) runs out in  
12 October 2027.

13 MR PERETZ: Yes.

14 MR TIDSWELL: So, in a way, just -- perhaps if  
15 one -- so, and you would say March 2005 to  
16 October 2027 is --

17 MR PERETZ: Two and a half years.

18 MR TIDSWELL: -- two and a half years beyond the  
19 window.

20 MR PERETZ: We would say first -- probably two  
21 lines. One is, that that is medium -- short or  
22 medium term.

23 MR TIDSWELL: Yes.

24 MR PERETZ: Secondly, if we are wrong about that  
25 and it is a -- medium term is slightly longer,

1       then you cannot say, given all the uncertainties  
2       that affect the airline industry, those  
3       uncertainties including, you know, an airline  
4       deciding that it might want to locate in  
5       Cardiff -- we have seen that airlines, you know,  
6       move around, they behave strategically, throw  
7       their weight about, as it were; it is perfectly  
8       possible. Certainly it cannot be described as  
9       anything, you know, as a sort of fanciful  
10      possibility that an airline would decide Cardiff  
11      was an appropriate location, if encouraged to do  
12      so. So that is the sort of thing that would  
13      change -- turn Cardiff round.

14                So it is a strong thing, we say far too  
15      strong, to say that even if one assumes the  
16      extended credit facility was not renewed that that  
17      would mean almost certainly post-October 2027,  
18      from a March '25 starting point, Cardiff would go  
19      out of business, which is what (inaudible)  
20      required.

21      MR TIDSWELL: So you are focusing on the  
22      (inaudible) and I was not quite sure that you were  
23      focusing on the (inaudible) --

24      MR PERETZ: (Inaudible) certainties as well.

25      MR TIDSWELL: (Off microphone - inaudible) -- and

1 obviously you might say (inaudible) -- can be  
2 discussed or (inaudible) on some other way of  
3 funding.

4 MR PERETZ: Yes.

5 MR TIDSWELL: All of that could (inaudible) --

6 MR PERETZ: Yes.

7 MR TIDSWELL: -- for different reasons.

8 MR PERETZ: Indeed, and there are various options  
9 explored, as you will see, in the Ernst & Young  
10 papers about alternative routes forward(?) that do  
11 not involve subsidy, and those -- again, if one  
12 reads the Ernst & Young report, it is very  
13 difficult to apply the word "certainty", even  
14 "almost certain", to anything in that report.

15 MR TIDSWELL: That might be why (inaudible) took  
16 the view that they were not really viable options  
17 (inaudible).

18 MR PERETZ: What, that was --

19 MR TIDSWELL: I am not suggesting that excludes  
20 them from a situation where (inaudible) we are  
21 starting a counterfactual.

22 MR PERETZ: Yes.

23 MR TIDSWELL: Talking about (inaudible). It is  
24 not obvious if you put into it a financial  
25 trajectory of the airport that it would change

1           dramatically (inaudible) 2027. It might.

2           MR PERETZ: It might.

3           MR TIDSWELL: It might not. Indeed, it might get  
4           worse. Then, of course, you might have to  
5           speculate on that (inaudible) false economy, but  
6           I do not think it is that easy to say that it is  
7           clear and (inaudible).

8           MR PERETZ: Yes. That is -- almost certainly go  
9           out of business requires that you have to be --  
10          you know, the uncertainty is -- where there is  
11          uncertainty, it suggests there is not almost  
12          certainly.

13          MR TIDSWELL: Well, I suppose (inaudible) that  
14          actually really I think the case we are meeting  
15          (inaudible) making about this. Really, I think  
16          the case we are meeting (inaudible) about this, we  
17          can -- unless, just for present purposes, assume  
18          that the (inaudible) about ground 2.

19          MR PERETZ: Yes.

20          MR TIDSWELL: So if you want to (inaudible)  
21          a question of ground 2, Mr Peretz. I wonder, in  
22          those circumstances really, whether (inaudible) is  
23          a particularly helpful definition for what the  
24          respondents should be considering. Therefore,  
25          they are then back in the territory, are you not,

1       where the question is: should the respondent have  
2       been thinking about solvency --

3       MR PERETZ:   Yes.

4       MR TIDSWELL:  -- for the purposes of the  
5       principle --

6       MR PERETZ:  (Overspeaking) Yes.

7       MR TIDSWELL:  -- (overspeaking - inaudible).  
8       That, of course, is set closely against the  
9       central analysis, in other words, (inaudible)  
10      might be?

11      MR PERETZ:  Yes.  I think we would make two  
12      points.  One is that the concept of ailing or  
13      insolvent of itself is not relevant at that stage,  
14      because that is a particular defined and precise  
15      concept that fits only in sections 19 and 20.

16                 That said, we would certainly accept that  
17      the financial stability, to use a neutral term,  
18      neutral but distant term from ailing and insolvent  
19      is something that can factor in to the subsidy  
20      control principles.  They can, because it depends  
21      on the case.

22                 Now, my learned friend, if I have written  
23      down what he said this morning correctly, says,  
24      well, ailing or insolvent or, as I would put it,  
25      financial uncertainty or financial instability,

1        might factor into principle E, because it would  
2        not be appropriate. Well, circumstances where  
3        that is obviously -- he would obviously be right  
4        about that. If you had a business that was about  
5        to go into a very dramatic insolvency and you were  
6        going to give it a relatively small subsidy, you  
7        would effectively be throwing the subsidy into  
8        a black hole. That cannot possibly be  
9        appropriate. So obviously in that case it would  
10       be a -- a public authority that failed to pay  
11       attention to that would be not acting consistently  
12       with the subsidy control principles. That would  
13       be a case of fairly evident irrationality trying  
14       to that apply principle E. There are cases where  
15       it is not quite so certain, but where there would  
16       be an appreciable risk that the public authority  
17       would have to evaluate as to whether that might  
18       happen.

19                That is not this case. Nobody is  
20       suggesting, post-subsidy, Cardiff Airport is  
21       likely to use the words "financially unstable" at  
22       all. So my learned friend has no basis for making  
23       that submission and he does not make it. So it is  
24       hard to see how it is really relevant under  
25       principle E.

1            Principle F, my learned friend says, well,  
2            a public authority has to be concerned to minimise  
3            negative effects which include not propping up  
4            an insolvent business. Again, this is really --  
5            one has to think about exactly how strong  
6            a principle that is. I think my learned friend is  
7            suggesting it is a sort of universally applicable  
8            principle, and in a sense is trying to achieve by  
9            the back door what he has not been able to achieve  
10           by reading of sections 19 and 20, by saying "Ah,  
11           if ever a public authority gives money to  
12           an enterprise that is ailing or insolvent, then it  
13           is propping up a business and that means it cannot  
14           possibly satisfy paragraph F". It cannot possibly  
15           be as high as that. It may be a factor in  
16           paragraph F. One can see that. Whether it is  
17           a factor that deserves any particular weight in  
18           any particular circumstance seems to us to be  
19           a matter of the decision maker's judgment. It is  
20           a factor that can come in. We say, in a situation  
21           such as this one, there is no particular reason  
22           why the Welsh government should have given it any  
23           particular weight. There will be other cases  
24           where it might be necessary to do so, but it is  
25           not a universal rule that this has to be

1 an important factor.

2 G is really -- because it is a balancing  
3 exercise, it feeds into G because it feeds into  
4 the other principles which are (inaudible) to  
5 balance, so I think there is a separate point  
6 there.

7 MR TIDSWELL: So, just to be clear, do we know  
8 that the assessment does refer to -- in places to  
9 consideration of (inaudible).

10 MR PERETZ: Yes.

11 MR TIDSWELL: (Inaudible), is there not, which is  
12 that there was a potential reason (inaudible) --

13 MR PERETZ: Yes.

14 MR TIDSWELL: -- has been discounted.

15 Is there, beyond that -- so, are you --  
16 would you say that of course that amounts to  
17 a proxy for the consideration of financial  
18 stability or are you actually saying that is not  
19 something that was considered? Because I do not  
20 think -- or (inaudible) because of the way that  
21 (inaudible).

22 MR PERETZ: Yes. I think --

23 MR TIDSWELL: More the latter.

24 MR PERETZ: More the latter, yes.

25 MR TIDSWELL: So you are not (inaudible) there is

1 not a section which deals with (inaudible)  
2 reference to this issue (inaudible), you say that  
3 is not --

4 MR PERETZ: Well, in principle E it is simply  
5 obviously not relevant, because there is simply  
6 no -- I mean, my learned friend does not suggest  
7 there is any risk post-subsidy of -- I mean, a key  
8 point under E is: is the entity, the enterprise,  
9 you are giving the money to capable of doing what  
10 you are giving it the money to do? That is not  
11 in issue. Nobody is suggesting that Cardiff  
12 Airport cannot deliver on what it is undertaking  
13 to do under the subsidy. There will be cases  
14 where that could be suggested and would be  
15 something that would have to be thought about.  
16 But that is not this case.

17 MR TIDSWELL: Once you get away from -- if on this  
18 premise ground 2 is wrong -- if one is wrong on  
19 ground 2, (inaudible).

20 MR PERETZ: (Inaudible), we say, falls away, yes.

21 MR TIDSWELL: (Off microphone - inaudible).

22 MR PERETZ: Yes, yes.

23 MR TIDSWELL: Okay. Thank you. That's helpful.

24 MR PERETZ: Let me just check where I was.

25 I think we had started that interesting

1 discussion when I had made the point that the  
2 standard credit facility and the extended credit  
3 facility clearly changed Cardiff's financial  
4 position.

5 The third point I was saying is not in  
6 dispute is that the standby credit facility and  
7 the extended credit facility were entered into in  
8 anticipation of the subsidy, which the subsidy was  
9 decided on, which at the stage that they were  
10 entered into, the subsidy proposal was well in  
11 development, the discussions had been -- were more  
12 than on going, were getting quite intense.

13 Also to cover the aftermath of any  
14 successful challenge is why the ECF has provisions  
15 about what happens if the subsidy is successfully  
16 challenged or there is a delay because of  
17 a challenge.

18 It is also common ground that post-subsidy  
19 Cardiff is not ailing or insolvent.

20 So, against that factual background, we  
21 say the problem is not some failure of enquiry --

22 Sorry, Mr Alty?

23 MR ALTY: Well, I was only just going to come back  
24 on the (inaudible) you have just been putting  
25 about why really (inaudible) principles are not

1 relevant. I suppose one of the judgments to be  
2 made is how effective granting aid in this way is  
3 going to be. Mr West was talking about the  
4 possibility of providing aid in a different way to  
5 try and achieve the objectives.

6 MR PERETZ: Yes.

7 MR ALTY: I suppose that one question might be to  
8 look at the track record of Cardiff Airport in the  
9 past and see whether the amount of aid that would  
10 be required for it meant that one should be  
11 cautious about (inaudible).

12 MR PERETZ: That is -- I mean, what we would say  
13 to that -- it is a very high level point, I am  
14 afraid I can only answer in high level terms --  
15 was thought about throughout the assessment of  
16 compliance. It is not that the Welsh government  
17 were unaware of that history, indeed, the  
18 (inaudible) plans repeats it, and we say it was  
19 adequately addressed. This proposal is very  
20 different from anything that was done before.

21 MR ALTY: Sure.

22 MR PERETZ: So, in that sense -- the old mantra  
23 that the past performance is no guide to the  
24 future is particularly true. This is something  
25 quite different in -- I mean, my learned friend

1 has made the point that it is different in scale.

2 MR ALTY: (Off microphone) Yes. I suppose the  
3 point is that you might take a different view of  
4 the appropriateness in providing aid(?) depending  
5 on the sort of track record of the organisation.

6 MR PERETZ: Yes, yes. To which we say the track  
7 record was looked at and taken into account. It  
8 cannot possibly be a decisive criterion, not least  
9 because, you know, businesses change and, as  
10 I said, this is a very different type of proposal  
11 to anything that was done before.

12 So we say the problem here is not any  
13 failure of enquiry or not taking into account the  
14 2023 Oxera report, because, as I said, essentially  
15 the Welsh ministers were well aware of the  
16 financial position.

17 What we say ground 1 is really getting at  
18 is a legal proposition that on those facts the  
19 only correct legal approach for the Welsh  
20 ministers to take was to find that Cardiff Airport  
21 was ailing or insolvent. The only reason why that  
22 can be a criticism is the claim that a finding of  
23 ailing or insolvent means that all routes to  
24 subsidy were closed outside sections 19 and 20.  
25 So that is ground 2. So this is perhaps

1 a slightly long-winded way of saying that they are  
2 agreeing, I think the conclusion the tribunal may  
3 reach or perhaps is heading towards is that the  
4 success of ground 1 is dependent for the  
5 appellants on their success on ground 2. If they  
6 do not win on ground 2, they are not going to win  
7 on ground 1. We discussed the possible exception  
8 so that, which we say does not get them anywhere,  
9 which is the suggestion that it might feed into  
10 the principles, which we say in this particular  
11 case, for the reasons we have just been  
12 discussing, it does not.

13 So the -- oh, yes. Thank you. So --  
14 sorry, just pause a moment.

15 So if we win on ground 2, and for the  
16 reasons I have already gone over, we say we do win  
17 on ground 2, we are correct on the construction of  
18 sections 19 and 20, ground 1 simply is not  
19 a relevant issue.

20 What if we are wrong on ground 2? What if  
21 ailing or insolvent businesses have to -- can only  
22 receive subsidies through the route of sections 19  
23 and 20? The basis on which the Welsh Ministers  
24 dealt with that is clear. If we can go back to  
25 the assessment of compliance at page 417. So that

1 is B, tab 31, page 417. The passage that begins,  
2 "Despite recent operating losses ...". So it is  
3 said:

4 "Despite recent operating losses, as  
5 a result of this package ..."

6 That is the 2021 rescue and restructuring  
7 package:

8 "... and other support provided by [the  
9 Welsh Government] on a commercial basis ..."

10 Including the next generation security  
11 scanners investment:

12 "... CIAL remains a going concern and does  
13 not fall under the category of 'ailing ...":

14 It should be "or":

15 "... insolvent' ..."

16 That is the misquote on our side:

17 "... as defined in Section 24 of the  
18 Subsidy Control Act ..."

19 So the basis on which the view was taken  
20 was that it was not (inaudible), it was taking  
21 into account all the various packages of support,  
22 including the extended and standby credit  
23 facilities. That is the view that was taken, and  
24 for the reasons we have just been going over, that  
25 was, we say, an entirely correct view.

1                   Mr Slade, in his witness statement at A22,  
2 page 170, I cannot read it out, but it is  
3 paragraph 120.

4                   (Pause).

5                   So that -- again, that is making the same  
6 point.

7                   So in order for my learned friend to  
8 succeed on ground 1, even if he wins on ground 2,  
9 he has got to --

10 MR TIDSWELL: (Off microphone - inaudible).

11 MR PERETZ: Sorry, I made the mistake of putting  
12 it away. Yes, I will have to get back to you on  
13 that. I am sorry, yes.

14 MR TIDSWELL: I did not think it was correct, but  
15 it may be that there is a reason why it is like  
16 that.

17 MR PERETZ: Yes, I will have to ask about that.  
18 Yes, I am afraid I do not know the answer off the  
19 top of my head.

20                   So my learned friend has to -- bearing in  
21 mind the previous discussions we have had, he can  
22 only succeed if he can -- if his claim that the  
23 extended credit facility and the stand by credit  
24 facility, in my words, do not count succeeds.

25                   Now why does he say they do not count? He

1 has two prongs of attack. The first prong of  
2 attack he says is that the two credit facilities  
3 were not CMO, commercial market operator, to which  
4 our response is to say that the facilities were  
5 CMO or at least there is no adequate basis for  
6 this tribunal to set aside the Welsh ministers'  
7 view that it was.

8 The focus here of the CMO challenge is not  
9 to the terms of the agreement. It is not  
10 a Weis-like complaint about the interest rates  
11 being offered or anything like that. We have not  
12 been taken in any detail to the terms,  
13 (inaudible). Rather the challenge is to the very  
14 idea that a rational private owner of  
15 Cardiff Airport would, in a situation where it was  
16 exploring with the Welsh government a wider  
17 subsidy of the type that has now been granted,  
18 consider granting a credit facility of the type  
19 contained in the SCF or the ECF in order to  
20 copper bottom the airport's survival until that  
21 point. So that is the claim that is being made,  
22 is that it is self-evidently, because my learned  
23 friend offers little evidence or argument, he have  
24 simply says it is self-evident, that a private  
25 owner of the airport would not grant those credit

1 facilities. He has to show -- now my learned  
2 friend has to show that that denial of the very  
3 possibility that a rational investor would take  
4 that decision is the only rational position to  
5 take. This is the net result of the tribunal  
6 holding Weis and cases going back to Blue Sky.  
7 So the question is that it is a range of  
8 reasonable investor responses. Investors of  
9 course, differ: some are long-term, some are very  
10 short-term. Obviously an extremely myopic,  
11 short-term investor might not want to do that.  
12 But we say certainly there are classes of rational  
13 owners, to put it at its lowest, that would in the  
14 circumstances in which the owner of the --  
15 a putative private owner of the airport found  
16 itself in, in the period of 2023/2024 when the  
17 credit facilities were being granted, would have  
18 said to itself: "Well, we are entering into  
19 discussions with the Welsh government about the  
20 subsidy. The Welsh government seems to be fairly  
21 serious about this. It does seem to be a pretty  
22 large package of subsidy. If it is granted, the  
23 financial position of the airport will be secure.  
24 It seems to us sensible to copper bottom the  
25 survival of the airport until then by granting

1       these credit facilities". We say, to put it at  
2       its lowest, that is a perfectly rational view that  
3       a perfectly rational market-orientated investor  
4       would have taken. That is the CMO justifications.

5       MR TIDSWELL: (Off microphone) So I think he says  
6       that you cannot in that analysis assume the  
7       expectation of a subsidy, because the subsidy is  
8       tied to the public ownership. (Inaudible)  
9       situation where (inaudible) is a state-owned  
10      commercial entity and he has (inaudible) or what  
11      the market divisions might be. The question  
12      I think (inaudible) if you like, a trial within  
13      a trial, a very difficult proposition but  
14      (inaudible).

15      MR PERETZ: Yes. We actually say you can deal  
16      with this fairly shortly but --

17      MR TIDSWELL: Which is what one (inaudible) really  
18      looking at this.

19      MR PERETZ: Yes.

20      MR TIDSWELL: I think the point he does make, he  
21      says, "Well, how can it be? How could a rational  
22      private investor (inaudible) without emphasising  
23      (inaudible)"?

24      MR PERETZ: I think what we say is there is no  
25      reason why one should not -- you know, one is in

1 a counterfactual, so you are not, in a sense, in  
2 the real world. But there is no reason why the  
3 private investor counterfactual also has to assume  
4 away other things which are very much in the real  
5 world. There is no reason why the counterfactual  
6 has to disregard the possibility of subsidy.  
7 Where does this prohibition come from? We do not  
8 see it.

9           When you are considering the CMO test  
10 here, you have to posit a private investor, so we  
11 are in an artificial world. There is no need to  
12 make it more artificial than that and no reason  
13 why it should be more artificial than that.  
14 I mean, one might sort of raise the question: what  
15 would my learned friend if Cardiff Airport was, as  
16 some other airports, Manchester Airport is, happy  
17 to be owned by a consortium of local authorities,  
18 so different public authorities? Would he say --  
19 what would his position in that sense be? Would  
20 he say there was some prohibition against those  
21 local authority owners taking into account sort of  
22 the imminent and real likelihood of a large  
23 subsidy package from the Welsh government to do  
24 these things for the reasons set out in the  
25 assessment of compliance or not? I think,

1       logically, he would have to say they would also  
2       somehow be (inaudible) from taking into account  
3       that reality.

4               As I say it, seems to us to be -- you  
5       know, counterfactuals are inevitably somewhat  
6       artificial, but this is to pile artificiality on  
7       artificiality, and we do not see where that  
8       requirement comes from.

9               I mean, it may be tied into its second  
10      argument, which I am going to come on to  
11      (inaudible). His point is not just I think the  
12      CMO. This is the second way he puts his case,  
13      which is to say that the credit facilities were in  
14      some way linked, I think was the word he used. So  
15      that is a separate point, I think, from them not  
16      being a CMO.

17              Again, our position on that is just keep  
18      it simple. As Mr Alty put it in argument  
19      yesterday, on the basis of the discussion we had  
20      a few minutes ago, Cardiff Airport was not ailing  
21      or insolvent as of the subsidy date because of the  
22      credit facilities, not ailing or insolvent after  
23      it, which is common ground, and it is as simple as  
24      that. It is not ailing or insolvent.

25              Again, one perhaps goes back to the

1 counter example of Cardiff Airport being in  
2 separate public ownership, not owned by the Welsh  
3 government, but owned by say a consortium of Welsh  
4 local authorities. Would he say that, in that  
5 situation, that the credit facilities granted by  
6 those local authorities in this case would be  
7 linked to the government -- to the subsidy granted  
8 by the Welsh government?

9 We say all this is getting rather  
10 complicated and difficult and it is not clear what  
11 distinctions are being drawn and what the legal  
12 basis is for the point. The answer is just take  
13 it as a straightforward question of fact. The  
14 fact is that because of the credit facilities, the  
15 airport was not ailing or insolvent as of the date  
16 of the subsidy, and trying to sort of get round  
17 that point by rather difficult to apply and  
18 unclear concepts of whether the previous  
19 arrangement might or might not have been linked to  
20 the subsidy just has no legal basis and does not  
21 get anyone anywhere. It is just as simple as  
22 that.

23 So in our submission ground 1 fails even  
24 if my learned friend succeeds on ground 2 and, as  
25 I said earlier, if we succeed on ground 2, then

1 ground 1 falls away in any event. I am keeping  
2 an eye on the time. I have a bit of time.

3 Oh, yes. I have just been given a note.  
4 I think this refers back to a couple of earlier  
5 discussions. I think on the -- a discussion that  
6 we were having about the track record. It is  
7 suggested -- I think that is sensible -- you look  
8 at paragraphs 38 to 40 of Mr Slade's second  
9 witness statement. That is at tab 25, Bundle A,  
10 page 204, which is an analysis of the way in which  
11 Cardiff recovered from the pandemic.

12 I can then make a start on ground 3. What  
13 I have not had a chance to do is to look at my  
14 learned friend's table that he handed in this  
15 morning. So what I propose to do is to make  
16 a start, I will look at that table over lunch, and  
17 if it raises some point I have missed by the time  
18 I get through, I will just have to come back to  
19 it. I am going to deal with this on the basis of  
20 my recollection of what my learned friend said  
21 yesterday, and simply respond to that.

22 MR TIDSWELL: Just before you (inaudible). There  
23 is the question of the status of the decision. When  
24 are you planning to deal with it?

25 MR PERETZ: I was going to deal with that --

1       because it all ties into ground 4, it seemed  
2       sensible to deal with it at that stage. I mean,  
3       in our submission, it is all a non-issue, and I am  
4       going to, mixing metaphors, try and pour oil on  
5       what has become a bit of a storm in a teacup. We  
6       have not withdrawn the position and I will explain  
7       the position when we come to ground 4.

8       MR TIDSWELL: (Off microphone - inaudible).

9       MR PERETZ: So, ground 3.

10               Now, subject to everything my learned  
11       friend says in the table which I still have not  
12       looked at, we understand the criticism he made in  
13       argument, yesterday, on ground A essentially to be  
14       what I have labelled to myself as -- I am going to  
15       use some Welsh -- the "y Ddraig Goch" point, the  
16       red dragon point, which we have covered a bit  
17       which is the idea that the equity rationale is  
18       a sort of fig leaf, I suppose, for a real  
19       reasoning, which is a determination to keep  
20       an international airport in Wales, come what may.  
21       The short answer to that is one I have really  
22       already covered when one looks at how that is  
23       addressed in the assessment of compliance. It is  
24       a factor -- the image of Wales on the  
25       international stage and the importance of the

1 airport through that image are both  
2 unquantifiable. You cannot -- these are things  
3 that are very difficult to quantify or even  
4 actually to prove, the sort of robust,  
5 indisputable evidence. But they are plainly, we  
6 say, matters on which a rational grant-awarding  
7 authority can reach -- can assess and accept as  
8 being a factor -- it is not obviously the decisive  
9 factor -- it simply comes in as a factor in  
10 deciding whether or not to grant the subsidy and  
11 to give that factor some weight in applying the  
12 subsidy control principles. It is obviously  
13 judgmental. As I said earlier, (inaudible) was a  
14 bit political because it is the sort of thing  
15 politicians do argue about, the importance of  
16 particular things on the international stage. It  
17 is the sort of thing, as I say, it is in the  
18 Senedd or the Westminster Parliament are often  
19 conducted about different views on that matter,  
20 but the fact it is judgmental does not mean that  
21 it is not real.

22 MR TIDSWELL: Was he not making the slightly  
23 broader point which was that you -- the thrust of  
24 what is really happening here is the focus on the  
25 airport (inaudible) by constructing an empty

1       rationale and therefore disguising it through  
2       (inaudible).

3       MR PERETZ:  Yes.  Well, to the extent he is  
4       suggesting that, he has to show it by evidence,  
5       not by assertion.  The assessment of compliance  
6       says what it says.  We say it should be subject to  
7       evidence to the contrary taken on its face.  Sir,  
8       you made the point that my learned friend has not  
9       applied to cross-examine Mr Slade if he gives  
10      evidence to that effect.  I mean, my learned  
11      friend is in no position to say that the reasoning  
12      in the assessment of compliance is not the real  
13      range, it is somehow trying to disguise what was  
14      really going on, or to say that Mr Slade is not  
15      quite disclosing the whole picture about what was  
16      really going on.  Certainly, at this stage, he  
17      cannot say that; he has no evidential basis to say  
18      it.

19      MR TIDSWELL:  It is not just a practical  
20      (inaudible), you cannot actually fulfil the equity  
21      rationale and the way it occurs (inaudible)  
22      assessment anticipates unless the airport exists.

23      MR PERETZ:  Yes.

24      MR TIDSWELL:  There is a certain circularity in  
25      this argument, which is if you do not have the

1 evidence, then you cannot (inaudible). But in  
2 a way it is almost as if the airport -- I think  
3 this is clear from the assessment, the airport  
4 (inaudible) infrastructure, and there is not that  
5 much difference between saying, "We have got the  
6 critical infrastructure, how can we use that to  
7 achieve an (inaudible) objective" and "We have got  
8 some critical infrastructure and (inaudible)". So  
9 I wonder whether actually this is not really  
10 a white line point, and you come back to the point  
11 about whether there is an alleged legitimate credit  
12 risk, which is based on the --

13 MR PERETZ: Yes, I mean, it is -- I mean, this is  
14 an example of a case. So it is not -- I mean,  
15 Mr Alty will know, it is not unique in government.  
16 When government needs things to be done by the  
17 private sector, or here, a public sector body --  
18 it does not make any difference -- needs to be  
19 done by a business outside government and there is  
20 only one (inaudible) that can do it. That is, you  
21 know, a routine -- I gave the example of sort  
22 Royal Navy defence (inaudible) as a routine  
23 element, but I am sure Mr Alty can come up with  
24 other examples of areas where, you know, there is  
25 really only one business capable of doing

1 something, because it has the specialist  
2 expertise. It has the facilities. It happens to  
3 be in the right place. All these various things.  
4 In those cases, you are inevitably -- if that  
5 company is in some difficulty -- I gave the  
6 example of the ship builder and the MoD contract.  
7 Obviously that is not a subsidy, but you would --  
8 plainly, in the example I gave of the sort of MoD  
9 contract, as it were, landing in the nick of time  
10 and it just happens to rescue the business, is the  
11 purpose of that contract, one might say, to rescue  
12 the business? Well, in some senses, it might be.  
13 The two will be perhaps, in that situation,  
14 complete -- what you actually have to do with --  
15 obviously you cannot challenge (inaudible) --  
16 challenge the contract of a (inaudible), but you  
17 are not applying the subsidy control principles to  
18 a contract. But what you would have to do is you  
19 would, if you were able to do so in some analogous  
20 way, you would have to look at the reasons that  
21 were being given by the public authority for what  
22 it did. There is obviously a potential, a sort of  
23 mixed overlap in motives. The question of whether  
24 there are is to be judged by the evidence.  
25 MR TIDSWELL: (Off microphone - inaudible) --

1 tolerably clear that there are (inaudible).

2 MR PERETZ: Yes.

3 MR TIDSWELL: (Off microphone - inaudible) -- and  
4 inevitably linked into the whole question of the  
5 equity objective --

6 MR PERETZ: Yes.

7 MR TIDSWELL: -- (inaudible).

8 But, as I say, I am not entirely sure how  
9 helpful it is to try and dig into that and to try  
10 and disengage those two objectives.

11 MR PERETZ: The critical point here is that,  
12 I mean, this is going way beyond what is necessary  
13 to -- this is a -- as my learned friend has made  
14 the point several times, this is a large scale  
15 subsidy designed to do a lot of important things  
16 to improve the Welsh economy. So it goes way  
17 beyond the survival or not of Cardiff Airport. If  
18 the concern was only about the survival of the  
19 airport, one would be looking at the sorts of  
20 scheme that the Oxera '23 report was actually  
21 looking at, which is a sort of keeping it going on  
22 a somewhat hand-to-mouth basis but keeping it  
23 going, business as usual. I think "BAU" is used  
24 fairly frequently throughout these papers. It is  
25 a very different -- but that is not the proposal

1 we are looking at, that was a very different  
2 proposal that has been under consideration at  
3 various times. The proposal here was to do  
4 something much more ambitious and deliver much  
5 wider benefits to the Welsh economy.

6 Going back to my ship builder example, it  
7 would be the difference between placing just  
8 an order for one ship or one very small ship with  
9 an aim to sort of keep the business ticking over,  
10 and one might say in that situation (inaudible),  
11 as opposed to ordering, I do not know, 20  
12 destroyers or something -- I am no expert in  
13 defence procurement but ... -- which just goes way  
14 beyond that. At that point it would make sense to  
15 say, "Oh, the purpose of this contract was to keep  
16 the business going", because you are doing far  
17 more than that.

18 MR TIDSWELL: (Off microphone - inaudible) --

19 I mean, you might say the sequence is there is the  
20 pre-occupation in 2023 to find a way to make the  
21 airport more sustainable (inaudible).

22 MR PERETZ: Yes.

23 MR TIDSWELL: The thought process develops  
24 (inaudible), no doubt (inaudible), one of which  
25 might be (inaudible) is quite different.

1 MR PERETZ: Yes. That is discussed in the papers.

2 MR TIDSWELL: (Off microphone - inaudible) --  
3 then, as you say (inaudible) the possibility of a  
4 (inaudible) equity rationale.

5 MR PERETZ: I think it is that the opportunity is  
6 spotted to do something much more ambitious to  
7 benefit the Welsh economy.

8 MR TIDSWELL: Yes. It also has the effect to keep  
9 the airport --

10 MR PERETZ: It does, yes.

11 MR TIDSWELL: (Off microphone - inaudible). But  
12 you would say (inaudible).

13 MR PERETZ: You have to approach it on its own  
14 terms, yes. The opportunity was spotted and the  
15 benefits for the Welsh economy were identified and  
16 we proceeded.

17 How am I doing on time? Right.

18 So I am moving on to my learned friend's  
19 attack, which I think is under the heading of  
20 principle E. I got slightly confused, at least in  
21 my notes, about which attack went under which  
22 principle, so I hope he and the tribunal will  
23 forgive me if I get this wrong. I think this was  
24 under principle E. He was looking particularly at  
25 the issue of low cost carriers. In a sense,

1 again, we covered this ground when we were going  
2 over the assessment of compliance and had  
3 a discussion about it. One needs to understand in  
4 order to address that what the particular role of  
5 the part of the package 2 was going to go to low  
6 cost carriers is. It is to provide, as it were,  
7 a sort of financial floor to Cardiff Airport, give  
8 it some passenger revenue, which enables it to  
9 then achievement real objectives, which is the  
10 particularly long haul routes that are important  
11 for business and for inbound tourism. That is how  
12 the low cost carriers element addresses the equity  
13 rationale.

14 My learned friend criticised the amount of  
15 money per passenger that his calculations  
16 suggested the package 2 element of the subsidy  
17 involved. I would invite the tribunal to go to  
18 Mr Slade's first witness statement, paragraph 50,  
19 which is at tab 25, page 207. There is no need to  
20 go to it now, but he gives an explanation of why  
21 those calculations do not work, because they do  
22 not include -- essentially because they do not  
23 include what is called non-aeronautical revenue.  
24 That is the point.

25 MR TIDSWELL: (Inaudible).

1 MR PERETZ: This is Slade 1, paragraph 50.  
2 I mean, essentially what you gain as an airport  
3 from having a route is two elements. They were  
4 discussed in some detail. I did a case for the  
5 Civil Aviation Authority eight months ago about  
6 fighting(?) at Heathrow Airport, the perennial  
7 review. So I got rather familiar with this stuff.  
8 But essentially there are two ways in which  
9 an airport makes money out of passengers and one  
10 is what the airline pays in fees, and the other,  
11 of course, is what the passengers spend going  
12 through the airport/car parks/shops indirectly,  
13 because that feeds into the revenue of the rental  
14 value of the shops and other services, which  
15 airports tend to be quite keen to sell you as you  
16 walk through the fast route -- through security, all  
17 the other things airports sell, and it does not  
18 appear that that has been taken into account in  
19 Bristol's calculation.

20 Oh, Slade 2. I am -- it is Slade 2,  
21 paragraph 50. Yes, sorry, my note is incorrect.

22 My learned friend I think also said  
23 several times that is considering an entirely  
24 different proposal. So here, for example, we are  
25 just looking at extra jobs created or saved at the

1 airport as a result of the subsidy, which was what  
2 Oxera were looking at, but are jobs that are going  
3 to be created in the wider economy, in all the  
4 aviation related sectors that we went through when  
5 we were going through the assessment of compliance  
6 and so on. So the Oxera report has really just  
7 been over taken by events and is not -- was not  
8 relevant to the consideration of what was actually  
9 being proposed.

10 MR FRAZER: (Off microphone) Can I just ask a  
11 question. Just on your last point about the jobs  
12 created in the wider economy, that is not related  
13 to the low cost tariffs (inaudible)?

14 MR PERETZ: It would not be -- (inaudible) at the  
15 airport, did you say? Yes.

16 MR FRAZER: (Off microphone - inaudible).

17 MR PERETZ: But not so much the wider economy.  
18 I mean, there is -- I mean, precisely the point we  
19 were making earlier, it is not possible in many  
20 cases to sort of divide routes neatly up into ones  
21 that help inbound tourism and business or ones  
22 that are for outbound. I mean, a lot of routes do  
23 quite a bit of both and inevitably there is going  
24 to be some leakage. I mean, if there was  
25 an incentive package to, say, Dubai, to take an

1 example completely at random, that is obviously a  
2 very important business destination. But it is  
3 also, as the tribunal well knows, a place that  
4 a lot of British tourists quite like to go to. So  
5 there will inevitably be some, as it were, leakage  
6 into outbound tourism as a result. That is just  
7 inevitable. That leakage was acknowledged. There  
8 is bound to be some (inaudible).

9 MR FRAZER: (Off microphone - inaudible) The other  
10 point I had was you talked about the subsidy to  
11 locals (inaudible) providing financial  
12 (inaudible). In other words, bringing in revenue  
13 through the (inaudible) operation of the airport.  
14 So I suppose -- and that is a bit of a contrast  
15 with some of the other subsidy, which is to  
16 directed at stuff that is going on around the  
17 airport. So I suppose it is -- it is another, if  
18 you like, indication that that is the (inaudible)  
19 which may have the biggest impact on (inaudible),  
20 because it is not about the stuff around  
21 (inaudible), it is about the flights.

22 MR PERETZ: Yes. I am going to get on to the  
23 distortion of competition analysis in a minute.  
24 It is plain that there is a distortion of  
25 competition. That was acknowledged and discussed.

1 Of course, it is not an absolute objection to  
2 a subsidy if there is a distortion of competition.  
3 In many cases it is right to proceed even if there  
4 is one, the subsidy principles require you to  
5 correctly identify what it is and then you balance  
6 it up.

7 Then I think -- I have these under  
8 headings of principle C. There was a complaint  
9 based on the Ernst & Young advice that we should  
10 have considered alternatives such as sale. You  
11 were taken to passages of that advice, which said,  
12 "It is recommended that further consideration be  
13 given".

14 Now Mr Slade -- I am pretty sure this is  
15 Slade 1 -- does address at paragraph 93, which is  
16 A, tab 22, page 163, and he explains -- let me  
17 find it -- he explains at paragraph 96 why the  
18 market was not tested. I cannot read those  
19 reasons out, but that is -- I think the tribunal  
20 can have a look at them.

21 There is also, of course, the point which  
22 is imminently, pre-imminently a matter of  
23 political judgment that the Welsh ministers felt  
24 that it was desirable for the airport to be in  
25 public ownership by the Welsh government, so that

1 the government could most effectively ensure that  
2 the airport strategy was that which was best for  
3 the people of Wales as a whole. It is hard to  
4 think of a more political judgment than that, if  
5 one thinks of the political history of the last  
6 50 years.

7 My learned friend identified the possible  
8 risks of airlines taking incentives and, as it  
9 were, sort of disappearing. Again what we say is  
10 the issues here were correctly identified and  
11 considered in the assessment of compliance.

12 (Inaudible) -- without prejudice to looking at the  
13 details of what was said there, a number of  
14 particular points one might make.

15 First of all, it is less likely, for  
16 reasons we have gone into, with long-established  
17 airlines flying long haul than perhaps for low  
18 cost carriers, and that, of course, the former is  
19 the main target of what is proposed.

20 MR TIDSWELL: Do you have an evidential basis for  
21 that? Can you give us a reference?

22 MR PERETZ: We had a discussion on the long  
23 haul -- the airlines having a longer perspective,  
24 long haul, because it said in the Altair report --  
25 I think we looked at it --

1 MR TIDSWELL: (Inaudible) - The Altair report said that the LCCs were  
2 somewhat --

3 MR PERETZ: Yes. I thought we had gone -- I think  
4 there was a note my learned junior passed me, that  
5 the long haul airlines are going to be  
6 impatient --

7 MR TIDSWELL: (Inaudible) -- forgive me if  
8 I missed that. So that is your reference point?

9 MR PERETZ: That is the reference point in the  
10 Altair report. I do not have it immediately.  
11 1355, I am told. It is also in Slade 2.

12 Then my learned friend relied to some  
13 extent on -- he took you very briefly, you will  
14 remember to a report on the Scottish incentive  
15 scheme and we had a quick look at a map with  
16 arrows all over it. The problem with drawing  
17 lessons from the experience of the 2000s is -- and  
18 this is explained in Mr Edmond's evidence at  
19 paragraph 22. I will give the tribunal the  
20 reference, which is tab 24, Bundle A, page 190.  
21 Mr Edmond there explains the difficulty with  
22 drawing comparisons with the 2000s is that there  
23 is, as it were, quite a high rate of disappearance  
24 and that is because there was a sort of a rather  
25 a wave of disappearance of regional airlines over

1 the late 2000s/early 2010s. That is the reason  
2 why you have a rather high disappearance rate, and  
3 he cautions against, as it were, the past being  
4 a guide to future performance, saying they have  
5 a rather different aviation market.

6 In the end, all of this, as I think became  
7 clear during the discussion you were having with  
8 my learned friend, it is a complaint about the  
9 weight that was given to these factors in the  
10 Welsh government's assessment. They were looked  
11 at. The risks were considered and identified. My  
12 learned friend says not enough weight was given to  
13 them. That is not a basis for a judicial review  
14 challenge.

15 I think that might be a good time to pause  
16 for lunch.

17 MR TIDSWELL: Yes. How are you doing for time?

18 MR PERETZ: I am doing fine. We do not need to  
19 come back early or anything like that. No. I am  
20 aware of have the discussion of the subsidy scheme  
21 to come. I am hoping to be able to deal with it  
22 fairly shortly, but I am obviously in other  
23 people's hands on that.

24 MR TIDSWELL: Okay. Thank you. (Inaudible).

25 (1.00 pm)

1 (The short adjournment)

2 (1.59 pm)

3 MR PERETZ: I am now most of the way through  
4 ground 3.

5 Next point, picking up on what my learned  
6 friend was saying yesterday, is a complaint that  
7 the impact on Bristol Airport was not properly  
8 examined. I think we have essentially looked at  
9 that, because I took the tribunal to the passages  
10 in the assessment of compliance where Bristol was  
11 looked at, and we have dealt with the issue of the  
12 alleged error in relation to long haul routes and  
13 the low cost carrier element.

14 MR TIDSWELL: Are we in F or (inaudible)?

15 MR PERETZ: I am not actually sure about the  
16 reliability of my own note at this point. It is  
17 probably apparent in Mr West's table which heading  
18 this point goes under, however, of course, he did  
19 not put the principles in it.

20 In any event, however it fits, I think we  
21 have dealt with the reasons why that complaint  
22 does not go anywhere.

23 There is a complaint about -- relating to  
24 the size of the subsidy. That goes to the  
25 proportionality assessment. Insofar as that is

1 a complaint going under principle B, of course,  
2 principle B says that:

3 "Subsidies should be proportionate to  
4 their specific policy objective." [As read]

5 So I think the point that we make in our  
6 skeleton that proportionality is about its  
7 relationship with the policy objective and not  
8 about some other factor, such as the size of the  
9 subsidy, is we say pretty evident from B.

10 MR TIDSWELL: Yes. (Inaudible) the Subsidy Advice Unit suggested  
11 that the size of the airport was relevant.

12 MR PERETZ: Yes.

13 MR TIDSWELL: I think also there is something in  
14 the assessment (inaudible).

15 MR PERETZ: Indeed, and that is the other limb of  
16 the questions that we did consider. We were very  
17 well aware of what the scale of the subsidy was  
18 and we considered what the distortionary impacts  
19 of it were going to be as we have gone through, we  
20 say, acceptably carefully, if I can put it that  
21 way.

22 There is a complaint, I think, as a sort  
23 of sideswipe about what Bristol was told in a meeting on  
24 4th December 2024 -- you remember we went to  
25 a note of that meeting -- about -- where Bristol

1        were informed in broad terms what the subsidy  
2        would consist of. We say there is nothing  
3        inaccurate in what was said to Bristol in that  
4        meeting. We are concentrating in the subsidy on  
5        Middle Eastern, North American and mainland Europe  
6        routes, which is what was said, and we are not  
7        focused on low cost tourist routes. So we say there  
8        was not any misleading of Bristol in that meeting  
9        to the extent that that is a relevant point.

10            Apart from that, I think I have finished  
11        on ground 3. It is obviously extensively  
12        canvassed in our skeleton argument. My learned  
13        friend, quite sensibly, took a reflective approach  
14        to what he dealt with in oral argument and I hope  
15        I have picked up the main points that he made  
16        orally, but otherwise I am content to rely on what  
17        we say in writing on ground 3.

18            So that brings me to ground 4 and the  
19        subsidy scheme issue. There is a sort of, as it  
20        were, bridge point between ground 3 and ground 4  
21        which I will deal with quickly first. I mean, one  
22        answer to the complaints about the way in which  
23        we dealt with the distortionary impact of the  
24        package 2, (inaudible) the possible distortionary  
25        impacts on Bristol is -- and it is said at various

1 points: how do you know that will not be a spill  
2 over and a much greater distortion of competition  
3 with Bristol than you are envisaging?

4 (Inaudible) part of the answer to that is  
5 actually to be found in schedule 1(2) of the grant  
6 funding agreement, and that is at the core of the  
7 ground 4 issue as well, because that is the  
8 mechanism by which the way in which the subsidy to  
9 Cardiff Airport is spent, in terms of providing  
10 incentives to airlines, is controlled by the  
11 Holdco, the body wholly-owned by the Welsh  
12 government, which in turns owns Cardiff Airport,  
13 and by the Welsh government itself.

14 Before we look at that schedule, just to  
15 emphasise a couple of key points about ground 4.  
16 The first is that package 2 is -- we acknowledge  
17 this and we treated it as -- a subsidy to  
18 Cardiff Airport. That is because it gives  
19 Cardiff Airport, if I put it this way, a reserve  
20 which it can ask to draw down on in order to  
21 obtain airline (inaudible) for providing  
22 front-loaded incentives of the sort that, for  
23 the reasons I explained before lunch, are  
24 necessary in today's European market to attract  
25 airline business.

1           So there is no doubt that it is a subsidy  
2           to Cardiff Airport to provide it with an economic  
3           advantage that it did not previously have, that  
4           degree of, if I put it this way, fire power.

5           However, it is not, or at least not unless  
6           something goes wrong, a subsidy falling under  
7           section 28, which was a subsidy to an air carrier.  
8           That is because a flight incentive to an airline  
9           can be on CMO terms. As we saw earlier, look  
10          looking at the Altair report, commercial airports,  
11          as well as publicly owned airports, routinely give  
12          such incentives. In the case of commercial  
13          airports, that is plainly because they think it is  
14          in their commercial interests to do so rather than  
15          for sort of wider development goals.

16          So there is no doubt that incentive to  
17          an airline can be under CMO principles. The  
18          question is going to be a question in each case of  
19          looking at the detail, exactly what incentive is  
20          given on exactly what terms, and that involves  
21          a case-by-case analysis.

22          That is what is being done under the GFA  
23          mechanism that I now at last turn to, which is  
24          I think at tab 33, volume B, page 610. 609 is the  
25          beginning of schedule 1. That defines the

1 purposes of the funding and refers back to the  
2 subsidy control principles assessment. Then  
3 paragraph 2 requires the airport to use the  
4 funding to -- on the activities set out in the  
5 table below. The table below has a breakdown of  
6 the particular amounts of money which is to be  
7 spent, the maximum amount of money which is to be  
8 spent on each purpose.

9 Then over the page, a general obligation  
10 under paragraph 4 for value for money, and then  
11 paragraph 5, dealing with the Environment (Wales)  
12 Act 2016.

13 Then paragraph 6, in relation to  
14 package 2, is a key provision:

15 "To the extent that you intend to use any  
16 part of the Funding for the purpose of or towards  
17 any arrangement with any commercial airline, you  
18 must ensure that any such arrangement is made by  
19 you on [CMO] terms compliant with the CMO  
20 Principles."

21 That is the obligation.

22 Then that obligation is given teeth by  
23 paragraphs 7 and 8. Paragraph 7 requires the  
24 airport to provide the Welsh government with  
25 a business case supported by independent

1 professional advice as necessary or desirable  
2 explaining why the proposed deal is compliant with  
3 the CMO principles. So Cardiff is obliged to do  
4 that.

5 Then 8 says what the Welsh government will  
6 then do. It has a huge amount of discretion. It  
7 can request further information. It can require  
8 further information or documentation to be  
9 obtained. It can appoint independent experts to  
10 look at the assessment on its behalf. It can make  
11 payments of funding subject to conditions. It can  
12 make amendments, subsequent amendments to those  
13 conditions, and, finally, it can exercise rights  
14 which include, but are not limited to withdrawing  
15 all or part of the funding.

16 So it is clear from that that the Welsh  
17 government has effective control by means of this  
18 contract over the extent to which Cardiff can draw  
19 down any part of the funding for the purposes of  
20 package 2, and it is that mechanism which is going  
21 to ensure that the deals in relation to which the  
22 funding is given are on CMO terms.

23 That is really the answer to the complaint  
24 at ground 4. On the basis that all of this  
25 works -- I will come on to the consequences if it

1 does not -- but on the basis that all of this  
2 works, there simply will be no funding to air  
3 carriers -- no subsidy given to air carriers and  
4 therefore nothing that falls under section 28.

5 Now, my learned friend, as I understood  
6 it, sought to get round that by saying, "Well, the  
7 airlines clearly get a benefit from the subsidy",  
8 I think he might have used the words "trickled  
9 down to them". In any event he said, well, they  
10 get a benefit.

11 We say that that is not enough and it  
12 involves a false leap. Perhaps the best way of  
13 illustrating this is with an example which is  
14 pretty familiar in the world of subsidy control,  
15 indeed one that Mr Alty may have come across in  
16 his work in Whitehall. It is a fairly routine  
17 situation. A public authority, government/local  
18 authority, decides that it wants a business park,  
19 which is going to have premises for commercial  
20 tenants carrying out business activity. It might  
21 be space for factories. It might be space for  
22 offices, whatever. It takes the view there are  
23 insufficient such facilities in the area at issue.  
24 So it gives some money to a developer to build  
25 that business park. Now that is clearly a subsidy

1 to the developer. There is no doubt about that.

2 Tenants then move into those premises and  
3 they do so on entirely commercial rates. Is there  
4 a subsidy to the tenants? No, there is not,  
5 because the tenants moved in on entirely  
6 commercial rates. That is so even though it could  
7 be said, perhaps correctly in a sort of lease way,  
8 that the tenants have got a benefit from the  
9 subsidy. The offices, the factories which they  
10 are moving into would not be there had the subsidy  
11 not been given. They would not have had the  
12 option to enter into their commercial contract had  
13 these premises not been there. So in that sense  
14 they receive a benefit, but in the sense of the  
15 subsidy control act, (Latin spoken) true under  
16 state aid rules, they have received no subsidy,  
17 because the rate on which they occupy those  
18 premises is on commercial terms.

19 It is typically a condition when  
20 an authority enters into an agreement with  
21 a developer on those terms that the premises will  
22 be let on commercial terms precisely to avoid any,  
23 as it were, leakage of the subsidy and any  
24 suggestion that the tenants who move in are  
25 indirect beneficiaries of the subsidies. That is

1       why a CMO condition is imposed.

2               Now that structure is exactly the same in  
3       all material respects as the structure we have  
4       here. There is a subsidy to Cardiff Airport to do  
5       things. That is a subsidy. But the possibility  
6       of subsidy to air carriers is eliminated by means  
7       of the mechanism set out in schedule 1. As  
8       I said, we say that is really a complete answer in  
9       principle to ground 4.

10              Now, of course, nothing is perfect in this  
11       world. There is always the possibility of things  
12       going wrong. Now, we say you cannot decide this  
13       case -- the challenge to this particular decision  
14       on the basis that something might in future go  
15       wrong. But it is obviously a possibility that  
16       it -- and indeed, doing so would be premature,  
17       because there is no basis to suppose that it will  
18       go wrong.

19              What, one might ask, rhetorically happens  
20       if it does? What if a case is put forward by  
21       Cardiff -- it makes a CMO case that is outside the  
22       range of reasonable CMO cases that could be made?  
23       The Welsh government takes a view, "Yes, that is  
24       fine", which is outside the scope identified in  
25       Weis as to what public authorities can do when

1        opening on CMO principles; obviously there is a range  
2        and it is possible to be outside it. So what  
3        happens then?

4                Now, if -- that is where, and we say  
5        really only where, the possibility that this is  
6        a subsidy scheme may come in. It comes in --  
7        actually, if our, sort of, on balance view that it  
8        is a subsidy scheme is right, actually helps  
9        Bristol.

10               Let us assume for the moment that this  
11        contention is wrong and this is simply a subsidy  
12        to the airport. The problem at that stage is  
13        what would Bristol's practical remedy be? We see  
14        a difficulty. We do accept that, you know, there  
15        are some problems with that because there is no  
16        duty on the Welsh government to publicise or  
17        notify any decision taken under paragraph 8 and  
18        (inaudible) to do so, but that is -- there is no  
19        requirement for it to do so; it is not a separate  
20        subsidy on this analysis. If Bristol comes to  
21        know about it, and it might, there might be  
22        a certain amount of publicity. In practice there  
23        often is a certain amount of publicity when these  
24        deals are done. So Bristol might come to know  
25        about it. How would it challenge that? As far as

1 we can see it is not a decision that falls under  
2 section 70 of the Act, because it is not, on this  
3 analysis, the grant of a subsidy. The subsidy has  
4 already been granted. So there will be  
5 a difficulty.

6 If, however, it is our analysis that it  
7 could be a subsidy scheme is right, then there  
8 will then be a registration obligation on the  
9 Welsh government, because it will have to register  
10 each particular drawing down as a separate subsidy  
11 given under the subsidy scheme. So that  
12 simplifies, we say, Bristol's possible route of  
13 challenge.

14 So that brings me then to the question of  
15 whether this is actually a subsidy scheme. As  
16 I said, we are not particularly wedded to either  
17 side of this argument. It just struck us on  
18 analysis that it seemed to us more likely than not  
19 that the arrangement set out here fell under the  
20 definition of a scheme -- subsidy scheme in  
21 section 10.

22 It is probably worth having a brief look  
23 at section 10, although it does not clarify  
24 matters very much. That is at authorities  
25 bundle 1489. Now, I am afraid I do not have the

1       tab number, but it is subsidy control. 34.  
2       I have a slight sniffle because I made the rookie  
3       mistake of anyone visiting Wales that  
4       the weather -- fine weather at 10.30 this morning  
5       would be repeated at 1 o'clock this afternoon, and  
6       I am afraid it is not. For the sake of any  
7       inbound tourism, it will be lovely again by 4.30.

8               Yes, so paragraph 10 -- section 10,  
9       subsidy schemes. Here we are told what a subsidy  
10      scheme is, it means:

11               "... a scheme made by a public authority  
12      providing for the giving of subsidies under the  
13      scheme."

14               It does not really tell you very much.  
15      The rest of the section tells you about who may  
16      make it. It deals with the -- it makes the points  
17      that a scheme can be made by some authorities,  
18      such as the Welsh ministers or other authorities.  
19      A streamlined subsidy scheme is defined, mechanism  
20      for making a (inaudible) subsidy scheme. That is  
21      pretty much it. So it does not -- there is no  
22      help there.

23               There is guidance issued by the Department  
24      of Business and Trade, the guidance which we have  
25      looked at before. I think if you go to the next

1       tab, page 1520, this is the DBT's view, "Subsidy  
2       or scheme?". The very fact that the DBT feels the  
3       need to give guidance on this suggests that this  
4       is not (inaudible) a distinction otherwise it  
5       would not be necessary to give more than one  
6       sentence bit of guidance. Instead it goes into  
7       a little bit of detail. It says that:

8                "A subsidy is a binding commitment with  
9       a specific beneficiary."

10               It says:

11               "[It] may include contingencies ... but  
12       these contingencies should leave no discretion to  
13       the public authority if the relevant conditions  
14       are met."

15               Then:

16               "A scheme, on the other hand, is  
17       usually ..."

18               So, a sort of interesting adverb,  
19       expresses a certain amount of uncertainty perhaps:

20               "... usually not a binding commitment and  
21       may give a public authority a substantial degree  
22       of discretion in deciding ... which possible  
23       subsidies under the scheme should be given. It  
24       can have any number of beneficiaries ..."

25               One is a number so it does not seem to be

1       there that it is necessarily contemplated that it  
2       has to be more than one:

3               "... who need have no connection to each  
4       other ..."

5               So it so does not -- it -- again, it is  
6       helpful as far as it goes, but it does not go that  
7       far.

8               So it seems to us that it is at least  
9       a possibility that the mechanism that I have  
10      described above, because of the amount of  
11      discretion that it affords the Welsh government  
12      whether to permit any particular drawing down of  
13      the funding, amounts to a subsidy scheme rather  
14      than a subsidy.

15              Now, my learned friend suggested at one  
16      point you cannot possibly have a subsidy scheme  
17      with only one beneficiary. Well, if he is right  
18      about that, then it is not a subsidy scheme, it is  
19      a subsidy, and he may be right about that. As  
20      I said, we are not wedded to any particular  
21      conclusion on this, so, in a sense, what we are  
22      asking the tribunal to do is just to give us some  
23      guidance on this. We do not have any particular  
24      stake in this game. It does not strike us that --  
25      for reasons I will come on to, it does not strike

1 us that it matters for the purposes of the rest of  
2 (inaudible) whether it is a subsidy scheme or not.  
3 But it does have some impact on the question of  
4 how we handle each particular decision on the  
5 drawing down of funding, whether we treat it as  
6 a separate subsidy or not.

7 Sorry. Mr Frazer.

8 MR FRAZER: (Off microphone - inaudible) -- in  
9 terms of section 10, we have the definition of the  
10 subsidy scheme. In section 10(2)(b):

11 "A subsidy scheme may be made --

12 "... by ... a primary public  
13 authority ..."

14 That is to say the Welsh ministers:

15 "... for the giving of subsidies by other  
16 public authorities ..."

17 MR PERETZ: Yes.

18 MR FRAZER: Just to satisfy my curiosity, in this  
19 case, Cardiff International Airport would be  
20 a public authority?

21 MR PERETZ: No, I am not sure that it would count  
22 as a public authority because --

23 MR FRAZER: Oh, it will not be. Because 10(2)(b)  
24 seems to suggest that the scheme it is given there  
25 primary (inaudible) is for the giving of subsidies

1 by "other public authorities".

2 MR PERETZ: Yes. Also Cardiff Airport is not  
3 giving subsidies. It is receiving the subsidies  
4 here, because the deals it enters with the  
5 airlines are not subsidies. What is being  
6 controlled here is Cardiff's ability to draw down  
7 particular bits of funding in order to fund the  
8 deals that it chooses to try and explore.

9 MR FRAZER: What, you mean even by a public  
10 authority in addition to:

11 "... the primary public authority for the  
12 giving of subsidies by other public authorities  
13 (in addition to the primary public authority ...)  
14 ..."

15 MR PERETZ: We say it does not fall under that  
16 subsection at all.

17 MR FRAZER: I see.

18 MR PERETZ: It is simply -- I mean, actually, the  
19 more routine element of the subsidy scheme is  
20 an authority that is not one of those listed can  
21 do is it can make a scheme. That was what, for  
22 example, was at issue in Durham. I think  
23 I touched on earlier why we think the Durham obiter  
24 gets the analysis wrong. But what, I think, was  
25 clearly right in Durham was that, as a matter of

1 principle, Durham City Council, which is not one  
2 of those listed, could make a subsidy scheme. It  
3 had the capacity to do it. A public authority can  
4 always make a subsidy scheme for itself. It is  
5 just that some public authorities, essentially the  
6 devolved governments and the national parliaments,  
7 can -- I do not know whether there are any, but  
8 there are probably schemes made by the Welsh  
9 ministers that apply to the giving of subsidies by  
10 Welsh local authorities at particular times, and  
11 if there are not, there could be.

12 MR TIDSWELL: (Off microphone) We are not very  
13 interested in giving you a view on the difference  
14 between subsidies and schemes, and the reason for  
15 not being very interested is that actually it is  
16 not really necessary for to decide that in this case --  
17 because the case before us at least in terms of  
18 (inaudible) in relation to the scheme was  
19 (inaudible) and that is the case that has been  
20 (inaudible) by the appellant.

21 MR PERETZ: Yes.

22 MR TIDSWELL: (Off microphone) So I suppose the  
23 question is, well, if, as seems apparent, it is  
24 possible for there to be (inaudible) but actually  
25 probably the right answer is (inaudible) subsidy

1       scheme (inaudible).

2       MR PERETZ: I think we are entirely in the  
3       tribunal's hands on that. If the tribunal wishes  
4       to help clarify the law in this area, which might  
5       be generally useful, that is up to the tribunal.  
6       If the tribunal says, "Actually, we just do not  
7       see why this is relevant to the other issues we  
8       have to decide", and I can well see why it might  
9       take that view, then we will just then have to  
10      take a view. We have indicated what a view is.  
11      We can reflect on anything the tribunal might  
12      choose to say about it and then reach a further  
13      view. We can take it from there.

14      MR TIDSWELL: (Off microphone) Yes. (inaudible)  
15      if you make a decision about subsidy (inaudible).  
16      If you look at decision 12 and the way in which  
17      the (inaudible) clear distinction between subsidy  
18      and scheme. (Inaudible) but they are actually  
19      different legal concepts, are they not?

20      MR PERETZ: Yes, they are. I mean, what we would  
21      say is, substantively, the way in which one goes  
22      about evaluating them is pretty much exactly the  
23      same. I mean so obviously subsection (1) does not  
24      deal with schemes. Subsection (3) does deal with  
25      schemes. It is effectively the same obligations;

1       it has got to consider the subsidy control  
2       principles and it cannot do the thing, take the  
3       subsidy decision, make the scheme, unless it is of  
4       the view that the subsidy/scheme is consistent  
5       with those principles.

6       MR TIDSWELL: (Off microphone) But it is possible,  
7       is it not, that (inaudible) answer there might  
8       have to be (inaudible) in different ways  
9       (inaudible).

10      MR PERETZ: The CMA knew what it had got in terms  
11      of the arrangements notified to it. It obviously  
12      did not take the point. It could have gone, "Hang  
13      on, this looks to us more like a subsidy scheme  
14      than a subsidy". It clearly has the ability to do  
15      that and it did not. Maybe it did not consider  
16      the point at all. It treated the analysis as  
17      subsidy.

18                But, I mean, my learned friend struggled  
19      yesterday, and I think will continue to struggle  
20      to identify any material respect in which either  
21      the process or the consideration would have been  
22      different had this been, as it were, correctly  
23      labelled, assuming the subsidy scheme analysis is  
24      right.

25      MR TIDSWELL: (Off microphone) But it is possible,

1 is it not, that if you went back to the CMA with a  
2 subsidy scheme, it might, it might analyse it, not  
3 in a substantially different way, but it might at  
4 least look at it in a different way? It might say  
5 if you are devising a scheme you think about the  
6 way in which you set up (inaudible) should be done  
7 in a different way, more reflective of the way the  
8 scheme works rather than (inaudible).

9 So I am not sure you can say, can you,  
10 that there is no (inaudible)? It might be you get  
11 the sense of it, but you are going down different  
12 route, are you not?

13 MR PERETZ: Yes, but I think that -- I mean,  
14 anything might happen. The CMA is not under our  
15 control, and I cannot possibly say that it is  
16 completely impossible that the SAU would have  
17 looked at it in a different way because I do not  
18 know that. What I can say is I cannot see any  
19 reason why it would, and my learned friend has  
20 been unable to identify any reason why it would,  
21 because the substance of what is being looked at  
22 is exactly the same.

23 MR TIDSWELL: He said that the -- the framework --

24 MR PERETZ: Yes. The framework under schedule 1.

25 MR TIDSWELL: (Off microphone) In a sense, if you

1       were right, why have a distinction between a  
2       subsidy and a scheme at all? (Inaudible) -- this  
3       may be a very legalistic way of looking at it, but  
4       after all we are a court of law. So if they are  
5       different things and you make a decision on  
6       a statutory basis under -- I think it has to be  
7       the case you make the decision on a statutory  
8       basis applying section 12(1) --

9       MR PERETZ: Yes.

10      MR TIDSWELL: I do not think you can say that you  
11      apply section 12(3) (inaudible). It may be that  
12      the effect of that would be the same. The simple  
13      fact is you have done one thing and not the other,  
14      and your decision must be defined by that, must it  
15      not? Surely, if you are working on that basis and  
16      effectively there is some other brief that would  
17      have been done the same way, does not mean you are  
18      entitled to switch between two points. They are  
19      different in your (inaudible).

20      MR PERETZ: Yes, I think one wants to avoid  
21      being -- getting --

22      MR TIDSWELL: Too legal. I understand (inaudible)  
23      point. The problem with this is -- it is not the  
24      first time that we have had decisions which have  
25      been altered --

1 MR PERETZ: Yes.

2 MR TIDSWELL: -- (inaudible) if one looks at it.

3 I do not think we have any authority from anybody

4 on what that is about, what happens in the

5 circumstances. I mean, there clearly there is law

6 on that. But, certainly, you know, the

7 (inaudible) baseline, generally, is that if you

8 withdraw your decision, then it is all over and we

9 start again. It seems to me you are perilously

10 close to that position. You may say you are not

11 actually (inaudible) for good reasons, but you are

12 creating an issue for us, which I wonder really is

13 worth (inaudible).

14 MR PERETZ: Well, I think we would be entirely --

15 you know, we consider it our duty to flag up the

16 point, put it this way. I think in reality, if

17 the tribunal said, "Actually we" -- I mean, for

18 a start the decision has not been altered. That

19 is obviously a fact.

20 MR TIDSWELL: Well, that was a question I wanted

21 to ask you. So there has been no decision --

22 MR PERETZ: Yes, and that would have to go back to

23 the Welsh Ministers, and that has obviously not

24 happened.

25 MR TIDSWELL: What would you say is the status of

1 your --

2 MR PERETZ: We are simply putting forward  
3 a possible argument.

4 MR TIDSWELL: So you have not -- you are not  
5 saying that you have formally withdrawn the  
6 (inaudible)?

7 MR PERETZ: Absolutely not, no. I have no  
8 instructions to do that. If the tribunal wanted  
9 to say, "Well, we note this legal argument but we  
10 do not see it necessary to decide it. We are  
11 going to approach the decision as it actually was"  
12 -- and of course my learned friend has not taken  
13 anywhere a point -- it is not a ground or  
14 challenge -- that this is a -- we have got it  
15 wrong and we wrongly classified it as a subsidy  
16 scheme, it is not a ground of appeal. The  
17 tribunal of course has to determine the appeal by  
18 reference to grounds of appeal.

19 MR TIDSWELL: (Off microphone - inaudible).

20 MR PERETZ: So if the tribunal wants to say, "Well  
21 that is all very interesting but we do not need to  
22 decide it", then we are where we are. We will  
23 then take a view.

24 MR TIDSWELL: (Off microphone) Well, I think  
25 (inaudible) not only do we avoid dealing with that

1 (inaudible), but we also avoid dealing with the  
2 point which is that -- the (inaudible) point  
3 advanced.

4 MR PERETZ: Yes.

5 MR TIDSWELL: Which is that actually you are now  
6 in a position where you cannot defend your  
7 (inaudible) and it is not good enough to say  
8 (inaudible). Now, if we are not (inaudible) that  
9 decision, then that makes life a lot easier.  
10 (inaudible).

11 MR PERETZ: Yes.

12 MR TIDSWELL: (Off microphone - inaudible).

13 MR PERETZ: That is our position. We thought it  
14 right to put forward this legal argument for the  
15 tribunal's attention because it seemed to us to  
16 have quite a bit of merit. That is why we put it  
17 forward. But it is -- as it is not a ground of  
18 appeal, if the tribunal does not want to determine  
19 it, we will then go away and take a view.

20 Obviously if the tribunal wants to say anything  
21 about it at all, we will read that very carefully  
22 and that will influence our view. Otherwise, if  
23 we are not assisted by the tribunal and the  
24 tribunal is under no obligation to assist us with  
25 tricky points of law, we will go away and take

1 a final view, which will be whatever it is.

2 MR TIDSWELL: (Off microphone - inaudible). Yes.

3 (Pause).

4 Thank you.

5 Two things really. One is we would like  
6 to be absolutely clear that you are clear, and  
7 I mean no disrespect by that, we would like an  
8 absolutely clear statement of the status.

9 MR PERETZ: Yes.

10 MR TIDSWELL: We would like you to give us a clear  
11 statement of your position on instructions. So we  
12 might just take a short break and let you do that.

13 (Inaudible) -- but I do not want you to be  
14 in any position where you have not had the  
15 opportunity to take instructions.

16 MR PERETZ: Yes. Can I just check with the  
17 tribunal, the tribunal does not need any  
18 clarification from me on what the position is?

19 MR TIDSWELL: No, I do not think we do. I think  
20 we understand your position. But it does seem to  
21 me that we do need you to be clear in what we have  
22 said, and in the indications we have given, we  
23 would like a very clear statement from you about  
24 what was the (inaudible) --

25 MR PERETZ: Yes.

1 MR TIDSWELL: -- anything like that or are you  
2 content to leave it on the basis that (inaudible).  
3 MR PERETZ: I will take those --  
4 MR TIDSWELL: Just before we do, I know it is  
5 a bit odd and a bit out of order, but I do wonder  
6 whether we ought to give Mr West the opportunity,  
7 if he wants to say anything now (inaudible).  
8 Obviously he has got a right of reply. The reason  
9 for doing that (inaudible) and I would rather it  
10 happens now than later --  
11 MR PERETZ: If it assists on that,  
12 I have only one very short point -- further point  
13 to make, which is nothing to do with it. I have  
14 finished going through the grounds. It is a point  
15 that anyway the tribunal might want to deal with  
16 separately, which is questions of relief and  
17 timing of the judgment.  
18 MR TIDSWELL: Yes.  
19 MR PERETZ: I am perfectly happy to make those now  
20 or we -- Mr West -- and he could reply to  
21 everything, because timing and relief is  
22 a separate box.  
23 MR TIDSWELL: I do not mind how we do it.  
24 (Inaudible) and I am sure Mr West now understands  
25 the position that was not necessarily clear to him

1 before we started this discussion. I am concerned  
2 that he has the opportunity not only to address it  
3 (inaudible). In a way this might have been  
4 something to be raised in his initial opening  
5 (inaudible). I do not want to (inaudible).

6 So it is up to you -- do you want to say  
7 anything now before we take a break and Mr Peretz  
8 takes his (inaudible) instructions? If you would  
9 rather leave it to your reply, then you are  
10 welcome to do that (inaudible).

11 MR WEST: I am very happy to address the tribunal  
12 briefly. Obviously I have not taken instruction  
13 myself, because once again the position --

14 MR TIDSWELL: (Overspeaking - inaudible).

15 MR WEST: -- seems to have changed. What I would  
16 draw the tribunal's attention to in particular is  
17 what the pleaded position is. We amended our  
18 notice of appeal and received an amended defence  
19 in return supported by a statement of truth. You  
20 find the relevant paragraph at Bundle A, tab 2,  
21 page 80 and it is paragraph 61. You see what is  
22 said there:

23 "Having [now] considered the matter  
24 further since the taking of the Subsidy Decision,  
25 the Respondent now considers ... the proper

1 analysis ..."

2 "The proper analysis":

3 "... is that the Subsidy is, so far as the  
4 funds allocated to route development are  
5 concerned, a Subsidy Scheme under section 10 SCA  
6 2022."

7 There is then an explanation of why.

8 That was the pleaded position on which  
9 basis we have prepared a skeleton argument, we  
10 have turned up and we have addressed you. It now  
11 appears the position has shifted -- it was not in  
12 my learned friend's skeleton -- the position has  
13 now shifted into it is an either/or.

14 The second point is the suggestion --  
15 I just want to say this -- that somehow there is  
16 a burden on me and on my client to show that there  
17 would have been some different outcome if the  
18 decision had been to follow the subsidy scheme  
19 route. I mean, that is completely untenable for  
20 the reasons indeed, sir, that you yourself have  
21 explored. You go -- you know, nobody can say,  
22 because the exercise has not been done. As you  
23 say, sir, it may be, if you devised a subsidy  
24 scheme -- and of course there are no rules for  
25 this. We say this simply does not comply with

1        what is necessary for a subsidy scheme. They are  
2        two different beasts. You cannot jump from one to  
3        another. My learned friend has jumped from  
4        a subsidy to a subsidy scheme. We say that  
5        amounts to withdrawal of the decision. This was  
6        not before the ministers.

7                What is now happening is we appear to be  
8        going back to saying: we are still defending this  
9        as a subsidy, but the (inaudible) might  
10       alternatively be seen as a subsidy scheme. Deeply  
11       unsatisfactory and unacceptably so. It is unfair  
12       not to know the case that we have to address. We  
13       have been working on the basis that the amendment in 61  
14       sets out the position. A proper analysis is it is  
15       a subsidy scheme. We are now being told the  
16       proper analysis is it might be a subsidy scheme or  
17       might be a subsidy, but actually, you know what it  
18       does not really matter. We say that is just not  
19       acceptable, sir. That is my position.

20       MR TIDSWELL: (Off microphone) You have been  
21       running your case on the principles --

22       MR WEST: Indeed.

23       MR TIDSWELL: You are not suggesting you would  
24       have done anything different (inaudible).

25       MR WEST: Yes, because we do not know what the --

1 I mean, if this had been done as a subsidy scheme,  
2 it would have been different, there would have  
3 been a -- all we can challenge is the decision  
4 which is the decision that engages your  
5 jurisdiction.

6 MR TIDSWELL: So if Mr Peretz is now retreating  
7 back to the position before this, the question is  
8 what prejudice have you suffered, because if you  
9 have won your argument --

10 MR WEST: Yes.

11 MR TIDSWELL: -- (inaudible), have you not?

12 MR WEST: Yes, well, I mean, amongst other  
13 prejudice, there would be a serious prejudice in  
14 terms of preparation. We have spent time  
15 addressing the subsidy scheme issue, which would  
16 have been completely unnecessary.

17 MR TIDSWELL: (Off microphone - inaudible) -- of  
18 course (inaudible) costs.

19 MR WEST: We do say there has to be a very clear  
20 understanding what the position is. The position  
21 now seems deeply unsatisfactory because the  
22 pleaded -- this is now effectively removing  
23 the pleaded position to revert backwards. Now if  
24 this were a formal admission, it would require  
25 permission to move back in this way under normal

1 rules of pleading. So it is a very serious step.  
2 With the greatest respect to my learned friend,  
3 you cannot keep seguing from one to the other and  
4 then saying: "We will wait for the judge's  
5 decision and then we will decide what we might  
6 do". There has to be a very clear enunciation of  
7 the position in my respectful submission.

8 MR TIDSWELL: Yes. Well, I completely understand  
9 that. We are going to be assisted by that as  
10 well.

11 I mean, the question I think is, and you  
12 no doubt will take instructions on this as well,  
13 and I am not saying you do not have (inaudible).  
14 But just so we are clear, if Mr Peretz says that,  
15 on reflection, he wishes to adopt the position  
16 that it is -- notwithstanding that at he thinks  
17 that it may be characterised as a scheme, he is  
18 going to stick with what is actually in the  
19 decision, that characterises it as a subsidy, and  
20 that is his position, then I think you need to be  
21 telling why that causes you prejudice (inaudible)  
22 by costs or (inaudible) --

23 MR WEST: Well, I will take instructions.

24 MR TIDSWELL: -- we are where we are.

25 MR WEST: Yes.

1 MR TIDSWELL: I will hear from Mr Peretz. What  
2 I wanted to hear from you was if (inaudible) on  
3 the basis of the decision (inaudible). So if  
4 I can leave that to you.

5 MR WEST: Indeed.

6 MR TIDSWELL: (Off microphone - inaudible).

7 MR WEST: Indeed.

8 MR PERETZ: I will take instructions as  
9 (inaudible) indicated. It is slightly early for  
10 the transcriber break, but it may as well count as  
11 that.

12 MR TIDSWELL: Why do we not do that, and then we  
13 will see how much longer (inaudible).

14 MR PERETZ: The only point I have left to make is  
15 about timing of the judgment and relief.

16 MR TIDSWELL: Mr West, do you know how long you  
17 might need?

18 MR WEST: It is not going to be the 45 minutes I  
19 thought I might need. I mean (inaudible) point  
20 depends on how it develops (inaudible) -- a  
21 succession of six or seven fairly short, discrete  
22 points to make arising largely out of this  
23 morning.

24 MR TIDSWELL: So I do not think we are going to be  
25 pushing up against the --

1 MR PERETZ: No, I -- it sounds as if we may  
2 actually get off early, as it were, into what  
3 appears to be improving weather outside.

4 MR TIDSWELL: (Off microphone - inaudible).

5 MR PERETZ: By 4.30.

6 MR TIDSWELL: (Inaudible) -- we will come back  
7 again and start.

8 (2.43 pm)

9 (A short break)

10 (2.56 pm)

11 MR PERETZ: Yes, I have taken instructions and the  
12 position is as I set it out so ...

13 MR TIDSWELL: (Overspeaking - inaudible).

14 MR PERETZ: The position is confirmed.

15 May I also have instructions, if the  
16 tribunal thinks it is required, formally to apply  
17 to amend paragraph 61. I mean, we note that  
18 footnote -- I cannot read the number -- 18, below,  
19 makes the point that we are really rather waiting  
20 on the tribunal's view, if it chooses to give one.  
21 So I draw that to your attention.

22 I mean, fundamentally, the position here  
23 is that we are a public authority. We do not take  
24 an adversarial approach to judicial review  
25 legislation, we try and cooperate with the

1 tribunal. If it strikes us, in the course of  
2 analysis, that there is an alternative view that  
3 might be better, it seems to us we are duty bound  
4 to put it forward.

5 If the tribunal -- I certainly picked up  
6 (inaudible) from the tribunal that it does not  
7 think it is necessary to decide this issue, we are  
8 perfectly happy to leave that. We have done our  
9 duty by flagging the issue up. As I said, we also  
10 considered it might actually assist Bristol  
11 Airport in subsequent -- if there were to be any  
12 subsequent challenges to particular funding  
13 decisions in relation to particular routes, it  
14 might assist them, but if they do not want the  
15 help, we are not going to insist on pushing it on  
16 them.

17 So that is the position. I am perfectly  
18 happy for the tribunal to proceed without deciding  
19 this point, to proceed on the basis that it is  
20 simply a subsidy (inaudible). If the tribunal  
21 does that, then we will take a view as to what, if  
22 anything, we need to do as a result of that.

23 MR TIDSWELL: (Off microphone - inaudible) -- on  
24 the question of the amendment (inaudible) to an  
25 extent your amended pleadings indicate that you

1 are asserting that (inaudible) -- this is all  
2 subject, of course, to Mr West and any points of  
3 prejudice.

4 MR PERETZ: Yes --

5 MR TIDSWELL: So I think you do need to make an  
6 application and we will hear --

7 MR PERETZ: (Overspeaking) -- would be appropriate  
8 for me to do that and make that formal. I mean,  
9 we have -- obviously do not have any particular  
10 wording, but perhaps we will have to do it in  
11 writing afterward.

12 MR TIDSWELL: Well, I certainly think we ought to  
13 have a discussion about whether that is the right  
14 answer and then (inaudible).

15 MR PERETZ: Yes.

16 MR TIDSWELL: I mean, I think we are clear on the  
17 principle (inaudible) and it seems to me that was  
18 not a principle of (inaudible) rather than  
19 a subsidy --

20 MR PERETZ: Yes.

21 MR TIDSWELL: -- (inaudible) then it is not  
22 consistent with the position that needs to be  
23 met --

24 MR PERETZ: In which case, we will prepare, or as  
25 soon as we can do that, put forward an application

1 in writing on which my learned friend will have  
2 obviously have a chance to comment.

3 MR TIDSWELL: Yes, but I will certainly invite him  
4 to say something now if he wants to.

5 In the meantime, why do you not finish.

6 MR PERETZ: I will finish and then Mr West can  
7 deal with his other points.

8 As I said, the remaining issues to address  
9 you on are timing and relief. Both really are  
10 issues that arise only if you find the decision or  
11 any part of it to be unlawful. So I proceed on  
12 that basis throughout.

13 In relation to remedies, we think there  
14 would need to be a separate hearing. We have not  
15 really discussed at all what the appropriate  
16 remedy would be. There is obviously the  
17 possibility of a recovery order.

18 MR TIDSWELL: Payment has been made, has it not?

19 MR PERETZ: Payment has been made, yes.

20 MR TIDSWELL: The payment was announced and  
21 (inaudible).

22 (Off microphone discussion)

23 MR PERETZ: So there is a possibility of recovery,  
24 obviously that would be the first time the  
25 tribunal has ever been invited to make such

1 an order. It has a discretion as to which to do,  
2 so there would have to be at least the possibility  
3 of argument about whether that discretion should  
4 be exercised and, of course, given that it would  
5 be the first time the tribunal has done it,  
6 a discussion about what the appropriate principles  
7 to apply at that stage would be.

8 Then, of course, there might be discussion  
9 about what other forms of relief might be  
10 appropriate, and particularly so if the tribunal  
11 takes a view in particular there is a particular  
12 problem in relation to routed -- the route  
13 incentive aspect of the scheme, a question of  
14 whether there could be a partial annulment and  
15 what the consequences would be if that happened.

16 So we say there would, we think, need to  
17 be a remedies hearing in practice before whoever  
18 it is would be decided. Obviously the tribunal  
19 might indicate at this stage in its judgment what  
20 the appropriate remedies might be. We suspect  
21 there would need to be a hearing before any final  
22 order were made.

23 In relation to the timing of judgment, no  
24 doubt the tribunal has noticed, being here in  
25 Wales in February, that there is an election

1 campaign in reality going on. The Senedd  
2 (inaudible) rises on 30 March for a short recess,  
3 after which it is dissolved. So effectively its  
4 last sitting is on 30 March. The technical period  
5 of purdah starts on 8 April. (Inaudible) - Mr Alty, I am  
6 sure you are aware what that means. But  
7 essentially it is a period at which ministers have  
8 to be extremely careful about what is said in  
9 public and there is strict rules on what  
10 government machinery can say on behalf of existing  
11 ministers and so on. But the fundamental point  
12 here is -- well, there are two points.

13 One is that -- and also the tribunal may  
14 also have noticed that this is an issue that has  
15 achieved a certain amount of discussion as well,  
16 so there were ongoing news stories overnight, the  
17 tribunal may or may not have seen. So this is  
18 a live political issue potentially in Wales, and  
19 particularly if a judgment landed during the  
20 purdah period, there might be issues affecting  
21 election results, which the tribunal would  
22 doubtless wish to bear in mind in terms of timing.

23 There is a fundamental point, though, that  
24 if a judgment is handed down before 7 May, at  
25 which point there would be a new Senedd and we

1 know for a certainty, without at all speculating  
2 on the results of the election, but we know,  
3 because the current ministers are standing down  
4 and there will be new ministers, it seems to us  
5 there would be -- if the decision is adverse,  
6 a number of decisions are going to need to be  
7 made -- taken quite quickly about future plans for  
8 Cardiff Airport, because, as you can see, there  
9 are alternative -- you have seen discussion  
10 throughout of what the alternative possibilities  
11 might be. Those would obviously all have to be  
12 explored and it is quite likely/quite possible  
13 decisions taken early would rather sort of set the  
14 course on that.

15 So we say it is really quite important as  
16 a matter of principle that those decisions, which  
17 will have important implications for the Welsh economy,  
18 South Wales in particular, Cardiff Airport  
19 obviously, should be taken by the new ministers  
20 accountable to the new Senedd and not left in the  
21 hands of the old ministers responsible either to  
22 the outgoing Senedd (inaudible) if the Senedd has  
23 risen by that stage.

24 MR TIDSWELL: So, just to be clear, what are you  
25 saying that --

1 MR PERETZ: (Inaudible) -- judgment can be handed  
2 down after the Senedd (inaudible) the election  
3 date.

4 MR TIDSWELL: (Off microphone) Even if it was  
5 possible, and it may well be possible to hand down a judgment before  
6 30 March (inaudible).

7 MR PERETZ: No. That would certainly be  
8 preferable than handing them down in the purdah  
9 period, but you would then still have the problem  
10 that the decision would be being -- I am assuming,  
11 of course, that it is an adverse judgment. If you  
12 are upholding the decision, then it does not  
13 matter.

14 MR TIDSWELL: (Off microphone - inaudible).

15 MR PERETZ: But it might mean decisions being  
16 taken by current ministers would effectively,  
17 (inaudible), to some extent, at least, tie the  
18 hand of incoming ministers of whatever political  
19 connection they might be. It is obviously  
20 a matter for the tribunal.

21 MR TIDSWELL: There is not very much we can do  
22 about that. I understand the point. But I think  
23 (inaudible).

24 MR PERETZ: I think it is our duty to draw these  
25 points to the attention of the tribunal. I think

1       it is entirely in the tribunal's discretion; I do  
2       not think there is any law on this or ... not  
3       (inaudible) where they are anyway, there is at  
4       certain times judgment around election time  
5       that -- dates have been chosen to hand them down  
6       with probably a bit of an eye on the electoral  
7       timetable, just as a matter of prudence; a number  
8       of judgments on important matters to do with  
9       refugees that were handed down just on the Friday  
10       immediately after the last election, no doubt  
11       because the judge was concerned that that was  
12       a very live issue in the UK election campaign. So  
13       it is a matter of judicial sensitivity.

14               I am simply drawing your attention. You  
15       cannot complain that you have not been informed by  
16       the Welsh government of what the issues are. We  
17       are then entirely, I think, in the hands of the  
18       tribunal as to what it chooses to do.

19       MR TIDSWELL: That is fine.

20       MR PERETZ: Yes. So those are -- unless there are  
21       any further questions, those are my submissions.

22       MR TIDSWELL: No. Thank you very much.

23               Reply submissions by MR WEST

24       MR WEST: It is probably going to be helpful if  
25       I start at the end and deal with the subsidy

1       scheme point, I suspect, which is where we will  
2       start.

3       MR TIDSWELL: Yes, of course.

4       MR WEST: Just a few points on that. I mean,  
5       obviously, as I have already submitted, we say it  
6       is very disappointing that we are in this  
7       position, and it is not possible for the  
8       respondent to have it both ways, as it appeared  
9       was the case before the break. I mean, we now  
10      have clarity, for which we are grateful. We are  
11      now proceeding on the basis that this is a subsidy  
12      and not a subsidy scheme. So I accept that is the  
13      basis on which we have approached our appeal,  
14      though we have on the way had to deal with what  
15      I do say was a change of position in relation to  
16      how it was characterised.

17                I do express concern on behalf of my  
18      client and those instructing me as to how this  
19      change came about. It was not put forward as  
20      an alternative. I mean, my learned friend says  
21      there is a duty to deal with the tribunal, but it  
22      was actually put forward as a properly pleaded  
23      amendment to the case. We do say that is  
24      concerning. Of course, we also say, inevitably,  
25      that this does raise concerns about the --

1 inevitably raises concerns about the robustness of  
2 the process that was actually followed. To  
3 suggest that you can --

4 MR TIDSWELL: (Off microphone - inaudible).

5 MR WEST: Leading up to the taking of the  
6 ministerial decision and thereafter, the whole  
7 process.

8 MR TIDSWELL: Not just a question about  
9 (inaudible).

10 MR WEST: Yes. It is a very serious and rather  
11 profound issue as to whether you think you are offering  
12 a subsidy or putting a subsidy scheme in place.  
13 Obviously it is for the tribunal to decide how to  
14 proceed, and you certainly could, if you wished  
15 to -- it is entirely in your discretion to refuse  
16 to allow any amendment and to hold the respondent  
17 to its pleaded case.

18 I am, though -- need to be realistic, sir,  
19 members of the tribunal. I have heard what you  
20 have said. I have detected a strong steer as to  
21 the direction in which you would wish to go. On  
22 that basis, I am not going to attempt to push  
23 water uphill and say that if you are content, that  
24 you should not allow this amendment to take  
25 place -- I would just like to say formally, we

1        have never had a reply in this case. We went  
2        straight from -- and I would like to reserve, just  
3        depending on what the -- I do not want to go  
4        through a round of pleading, but if the defence is  
5        being amended, I would just like to have the  
6        possibility to respond to that formally, if  
7        necessary. I hope it is not necessary. I am not  
8        trying to go into a spiral of pleading. I hope  
9        that is understood. I simply want to protect my  
10       client's position, because I have not seen -- in  
11       normal circumstances, I see the amendment, and  
12       I am sure -- I know Mr Peretz well, I am sure  
13       I would probably not have anything to want to come  
14       back on, but I feel, out of respect to my client,  
15       I need to protect the position. So I would just  
16       ask for that opportunity.

17                So we say, sir, yes, you know, it is very  
18       much up to the tribunal, but I apprehend the  
19       direction the tribunal is going in.

20                That brings me then to the issue of  
21       prejudice. There are really two issues of  
22       prejudice. I mean, the first one is that  
23       obviously when I was addressing the tribunal  
24       yesterday, to the extent I did in relation to  
25       ground 4, that was very much on the basis that we are

1 now in subsidy scheme territory. If we had not  
2 been in subsidy scheme territory, I might have  
3 said more, but I accept you have the benefit of  
4 the amended notice of appeal in our skeleton  
5 argument. So there is a limit to how far I can  
6 take that point in terms of the hearing.  
7 Obviously if I had not had to deal with the  
8 subsidy scheme, we would have saved time at the  
9 beginning of yesterday. There has obviously been  
10 some prejudice in that sense in terms of timing.

11 The other point then is the waste of  
12 preparation costs. I mean, we have been preparing  
13 since the Amended Defence came in -- from  
14 recollection it was mid-December -- we have been  
15 preparing on the basis that we have to address  
16 paragraphs 61 and following of the Amended  
17 Defence. That clearly has involved us in costs  
18 that are unnecessary and have been wasted. We  
19 would even say these are costs outside the normal  
20 course. It is an unusual state of affairs.

21 What we would say is I would urge the  
22 tribunal -- if the tribunal, as I apprehend is the  
23 case, is going to give permission to amend or  
24 re-amend, I think in the decision it would be  
25 appropriate for the tribunal to comment on the way

1       this has developed simply as a marker for  
2       subsequent appeals. We should not really be in  
3       this position, with the greatest respect to the  
4       respondents and their legal team.

5               Unless I can assist you further, those are  
6       my submissions on the subsidy scheme point.

7       MR TIDSWELL: Yes. So just in relation to the  
8       amendment point, thank you. That is very helpful  
9       in understanding the position. The way I am  
10      thinking about this is that it would be helpful to  
11      have the draft amendment and for you to be able to  
12      respond to that. At that stage you might well be  
13      able to say whether you think you can reply or not  
14      once you have seen it. Then I anticipate we would  
15      give permission, if we are going to give  
16      permission. It looks as if, given your  
17      observations, that is where we are going.

18      (Inaudible).

19      MR WEST: I hope I can read the room.

20      MR TIDSWELL: I mean, really I think the point  
21      was -- I think the point is obviously (inaudible).  
22      We had a conversation about that earlier. We will  
23      come to that in a minute, but I think what you are  
24      saying is, quite rightly and fairly it seems to  
25      me, there is prejudice, but you recognise it is

1       probably not sufficient. It is going to weigh in  
2       the balance against (inaudible).

3       MR WEST: Yes. If I could --

4       MR TIDSWELL: That is a very realistic position,  
5       if I may say so.

6       MR WEST: The reality is we have addressed both --  
7       we had to address the subsidy decision, because  
8       that is the decision under appeal. My submission  
9       is you only have jurisdiction anyway for that  
10       decision. We've had to deal with the subsidy  
11       scheme and addressed it. In terms of addressing  
12       you and in terms of what we've written, I mean,  
13       obviously if there had -- if you just think of the  
14       page limits on a skeleton argument, we might have  
15       spent longer on developing another point rather  
16       than doing this. I can only take that so far, so  
17       far in terms of what we would have said to you in  
18       front of the tribunal.

19       MR TIDSWELL: Let me come back to that in  
20       a minute. I think on the assumption that that is  
21       the direction of travel, it is more than likely  
22       (inaudible) obviously you should ask for one and  
23       I cannot see why there would be an objection to  
24       that (inaudible).

25       MR WEST: Indeed.

1 MR TIDSWELL: (Inaudible). I would like the  
2 answer before we get too far into writing the  
3 judgment.

4 MR WEST: Indeed.

5 MR TIDSWELL: (Inaudible) point about that.

6 In relation to prejudice, I am concerned  
7 to ensure that if you think there is anything you  
8 want to say, you have the opportunity to say that.  
9 Obviously you have the time now to do that.

10 I appreciate that is not ideal. So if there is  
11 anything you would have put in (inaudible) or  
12 anything you would have said yesterday, personally  
13 speaking, I would not have a problem with you  
14 giving us another short written submission. If you want  
15 to go down that road, I am not going to resist it  
16 and I am not saying that it would not be useful  
17 obviously if you have things to say and we would  
18 like to hear.

19 MR WEST: That is a very helpful and kind offer.  
20 I will reflect on that with those instructing me  
21 and see whether we think we do need to say  
22 anything. It may be we do not. We do not want to  
23 have another round of written submissions if it is  
24 unnecessary.

25 MR TIDSWELL: You already said (inaudible). If

1       there is anything you would have said on your feet  
2       or anything you might have expanded on  
3       (inaudible), then I'm very anxious that you do not  
4       go away feeling (inaudible). We cannot  
5       (inaudible) but maybe we can ameliorate it.

6       MR WEST: I am very grateful, sir.

7       MR TIDSWELL: What I suggest you do is have  
8       a think about that. Once you have reached  
9       your decision on that, then let us have a view on  
10      what you want to do. Inevitably we are going to  
11      say to you, "No more than X pages", but that  
12      rather depends on what it is you say you want to  
13      do. So there might be a bit of correspondence  
14      about that. If your solicitor writes to the  
15      registry and indicates the position that you are  
16      going to take.

17      MR WEST: To misuse a term, I will go away and  
18      contemplate what the counterfactual would be.  
19      I suspect -- I do not want to be held to anything  
20      that I said, but I suspect there will not be much,  
21      because, as I say, as ever in submissions, as  
22      I submitted to you at the beginning yesterday, you  
23      have to decide which points you are going to run.  
24      You cannot cover everything. If I had had a few  
25      more minutes, we would have had a few more pages.

1       What more would we have developed? You develop in  
2       oral submission that which you do not in writing.  
3       So it may be there is nothing or very little we  
4       would want to say, but I will just go away and  
5       take instructions on that.

6       MR TIDSWELL: (Inaudible.)

7       MR WEST: Well, I am very aware of the overriding  
8       objective, which, amongst other things, is not to  
9       deluge the tribunal and the other parties with  
10      unnecessary papers.

11      MR TIDSWELL: (Inaudible). I can see the point  
12      you make and I accept if you are right (inaudible)  
13      address this issue.

14      MR WEST: That is very kind. I am very grateful  
15      to you, sir, and the tribunal, for that.

16             My other points are all relatively small.  
17      They arise largely out of what was said today.  
18      Some of these I can deal with very briefly.

19             The first was at the beginning of today  
20      you were taken to the assessment of compliance.  
21      The relevant page is bundle B, tab 31, page 432.  
22      You were taken to the various benefits that were  
23      perceived.

24      MR TIDSWELL: This point goes to ...?

25      MR WEST: It is the major events. It is the major

1 events point at the bottom.

2 MR TIDSWELL: So this is the purpose point?

3 MR WEST: The purpose point.

4 MR TIDSWELL: (Inaudible.)

5 MR WEST: (Inaudible.) I was just making the  
6 point here -- I think I may have taken you to it  
7 yesterday -- if you go to the Oxera 2023 report,  
8 which is Bundle A, tab 41 --

9 MR TIDSWELL: (Inaudible.)

10 MR WEST: It is the major events point. I am  
11 looking at the bottom.

12 MR TIDSWELL: (Inaudible). Yes.

13 MR WEST: So this is the support to be given for  
14 major events which are listed there. My point, if  
15 we could go back to the Oxera 2023 report, which  
16 is Bundle A, tab 41, page 954 --

17 MR TIDSWELL: Sorry. Give me the reference again.

18 MR WEST: It is Bundle A, tab 41, page 954. I am  
19 sorry. Bundle C. I am sorry. It is on 952  
20 actually. I am terribly sorry. I have given you  
21 a wrong reference.

22 The point is made there in Oxera -- this  
23 is in the section where Oxera is commenting on --  
24 it largely mirrors what you have just seen, but  
25 then if we go down to -- starting on page 953,

1       there is the point about the challenges --

2       MR TIDSWELL:   Yes.

3       MR WEST:   -- and the same point is made there

4       I think that Bristol could equally be doing some

5       of this sort of support, and they do, of course,

6       as you will recall from my opening submissions.

7       That is a very short point.

8                 My second point is about the importance of

9       low cost carriers and short haul.  This leads up

10      to the discussion of Bristol's ambitions.  There

11      has been reference to low cost carriers and what

12      is being provided as a floor.  You were told that

13      the focus is going to be on business and inbound

14      leisure.

15                 Again the assessment of compliance, which

16      is bundle B, tab 31, page 461, you see what is

17      said there about the -- it is the first set of

18      bullets under 2.4.2.:

19                 "Strategy for new route development.  Key

20      economic centres for access to the EU market.  Hub

21      in North America.  Hub in the Middle East."

22                 That is what is said there.  I would then

23      like, if I may, please, to take you to page 465 in

24      the bundle, which gives you the actual amounts.

25      MR TIDSWELL:   Yes.

1 MR WEST: Now those amounts -- my simple point is  
2 if you look at the proportion that is being given  
3 to European routes and to low cost carriers, and  
4 you look at that as a percentage of the whole, the  
5 size of it, now those figures are confidential,  
6 but it was agreed and we were provided with a copy  
7 that we could share with our clients which gave  
8 percentage ranges, so I can say that in open  
9 tribunal. I think maybe I should, because it may  
10 be of benefit for the judgment.

11 The figures we have there for the European  
12 is a range of 10 to 20%, of the low cost carriers  
13 a range of 30 to 40%. I just say that because  
14 that is -- my clients have been able to see that  
15 and that is something you could put into  
16 a judgment if you needed to without having to give  
17 the confidential information. You could make this  
18 essential point, which is it is a large proportion  
19 of the overall cost, because the point was made  
20 again I think this afternoon by my learned friend  
21 that Cardiff was not focused on low cost tourist  
22 routes. I just make the point that when you hear  
23 that submission, you need to have that table in  
24 mind.

25 The third point I want to deal with is

1 Bristol's ambition. This is the main thrust point  
2 which my learned friend spent some time on. In  
3 that regard, sir, and members of the tribunal, we  
4 just invite the tribunal to look at the evidence  
5 and reach its own conclusion, but we do say, and  
6 just for the avoidance of doubt, we do say that  
7 Bristol's position has been mischaracterised.  
8 Bristol is already doing long haul. It has done  
9 long haul in the past, flights to New York 2005 to  
10 2010.

11 MR TIDSWELL: I am sorry, Mr West. When you gave  
12 us that (inaudible) reference, do we find that in  
13 (inaudible)?

14 MR WEST: No. That is just on instruction. I do  
15 not think we have that evidence in the bundle.

16 MR TIDSWELL: I do not think you can really  
17 (inaudible).

18 MR WEST: In that case -- in any event on the  
19 material that is in front of you we do not accept  
20 that Bristol has been properly characterised in  
21 terms of its ambition.

22 The next point I want to move to is  
23 incentives and one-off payments. Now what you  
24 were being told was -- we need to go to the Altair  
25 report for this. This is bundle B, tab 49, page

1 1355. Essentially, as I understood what my  
2 learned friend was submitting, he was drawing --

3 MR TIDSWELL: Did you say bundle B?

4 MR WEST: Bundle B, yes. Is it D? I am sorry.  
5 I have written down B.

6 MR FRAZER: What page? Sorry.

7 MR WEST: 1355. So there is talk there -- you  
8 will recall you were taken to the middle part of  
9 the paragraph and the suggestion was that these  
10 incentive payments were one-off payments over  
11 a short period.

12 Now we do not accept that, and at this  
13 point I just have to record that, as the tribunal  
14 will be aware, we were not permitted to rely upon  
15 expert evidence -- we covered this point -- but  
16 I can by reference to materials that are actually  
17 here show that it was not just simply a question  
18 of one-off incentive payments, which is certainly  
19 not what my client does.

20 If we just look at the paragraph above, it  
21 says:

22 "State owned long haul carriers may  
23 display more patience, since long haul routes  
24 typically require more time to establish  
25 themselves, but these airlines will nonetheless

1 expect to see their new routes break even within  
2 perhaps two to three years or to be financially  
3 supported by an airport if the breakeven time is  
4 longer."

5           So that contextualises -- there is  
6 obviously long haul, but that contextualises what  
7 then follows. If you then go to the top of the  
8 next page but one, top of page 1357, you look  
9 there about the amount of support that is been  
10 generated over -- this is a period of a year.  
11 This is a Ryanair flight to -- a tour of Val de  
12 Loire. So again that is a year period, which  
13 (inaudible). If you also look, please -- if we  
14 could go to the report on the Scottish Route  
15 Development Fund. I am here in bundle -- I think  
16 again this is bundle D. It is tab 49 and it is  
17 page --

18 MR FRAZER: That is the original report.

19 MR WEST: Sorry. I think it is C, 36, page 677.

20 MR TIDSWELL: Just to be clear, I think the  
21 position, as I understood it, is that although it  
22 says in the Altair report that in a relatively  
23 short period such as three months the airline will  
24 know the commercial trajectory of the route, I had  
25 understood that payments that were made upfront,

1       which is I think set out in 135, are quite  
2       substantial and actually may well relate to  
3       a longer period.  Indeed, (inaudible) reference to  
4       a particular airline and a particular period  
5       (inaudible).

6       MR WEST:  Yes.

7       MR TIDSWELL:  There is a difference, as  
8       I understand it, between payments made on  
9       commercial terms to secure (inaudible) six months,  
10      two years, four years.  (Inaudible.)  It may not  
11      be.  That is as we understood it.  (Inaudible),  
12      but they might be for the purposes of securing  
13      a much longer period.  I think that is in dispute  
14      (inaudible).

15      MR WEST:  I think that is in dispute.  There is  
16      also an example (inaudible).

17      MR TIDSWELL:  Mr Peretz, (inaudible).

18      MR PERETZ:  It might be sensible to have -- I'm  
19      afraid I have not turned the paragraph up.

20      MR TIDSWELL:  I think the point that is being made  
21      is -- this is in D at 1355.  (Inaudible) shortcut.  
22      Perhaps you should just carry on.

23      MR WEST:  The point I was going to make is if you  
24      look at the reports into the Scottish and Northern  
25      Ireland route development, and I accept this is

1 2009, so I accept it is an earlier period, which  
2 is bundle C, page 677, and if you look at what  
3 happens there -- it is paragraphs 236 and 237 --  
4 there is the final sentence of both. Look at  
5 23 ...:

6 "Investment was paid out retrospectively  
7 on the basis of passenger numbers."

8 So that is different. This is the point  
9 I was making. You do not just get the money  
10 upfront and that will deliver the traffic. You  
11 get the traffic and you get, as it were,  
12 reimbursed for having delivered the traffic. So  
13 that is why we say we do not accept it is all  
14 a question of one-off payments upfront. There is  
15 evidence in front of the tribunal that is not what  
16 always happens, and to the extent that it is being  
17 suggested that is the only thing that happens, we  
18 do not agree with that and that is not common  
19 ground.

20 MR TIDSWELL: (Inaudible) but I do think the  
21 Altair report is pretty clear about saying that is  
22 what happened.

23 MR WEST: Obviously you have heard my submission  
24 on --

25 MR TIDSWELL: (Inaudible). Of course (inaudible).

1 I am not sure the extra point (inaudible).

2 MR WEST: We do not think we could have done. It  
3 is not there. I am making my point on the basis  
4 of here, the example of an incentive payment that  
5 appears to go for a longer term, one-off.

6 There is, of course, the example I should  
7 take you to, which is in Mr Naylor's evidence.  
8 This is bundle A, tab 23, and it is page 180.  
9 This is paragraph 15. I think this might be the  
10 point that, sir, you were actually putting to me,  
11 because what it says there:

12 "One example of an airline that operated  
13 from Cardiff during that period but no longer does  
14 is Flybe. It established a base from  
15 Cardiff Airport in 2015 as part of ..."

16 MR TIDSWELL: Can you just give us a page number?

17 MR WEST: It is page 180.

18 MR TIDSWELL: Yes, I see. Paragraph 15.

19 MR WEST: Yes.

20 "One example of an airline that operated  
21 from Cardiff during that period but no longer does  
22 is Flybe. It established a base from Cardiff  
23 Airport in 2015 as part of a ten-year agreement to  
24 operate from Cardiff. I understand from Flybe's  
25 financial year 2016 annual accounts it received

1 5.7 million in association with our arrangement in  
2 Cardiff. In 2020 it entered administration and  
3 ceased operating from Cardiff Airport."

4 That would appear to be an example of the  
5 kind of payment that you were suggesting, sir,  
6 where you get at a --

7 MR TIDSWELL: (Inaudible) where this is going,  
8 Mr West. Obviously you are pushing at this point  
9 about how the low cost carrier (inaudible).

10 MR WEST: Yes.

11 MR TIDSWELL: I know that you obviously take  
12 a view or the parties take a view (inaudible)  
13 whether it is a good idea.

14 MR WEST: Yes.

15 MR TIDSWELL: (Inaudible). That is clear. Why is  
16 this helpful to your case?

17 MR WEST: It is simply I am trying to suggest to  
18 the extent that you might think that the only way  
19 that incentives operate is by paying a single sum  
20 of money upfront is just not the way that it  
21 necessarily works.

22 MR TIDSWELL: Well, it may be I know the answer  
23 (inaudible), because that actually goes to  
24 (inaudible).

25 MR WEST: It will go to the rationality, because

1 if you give a large incentive payment upfront --  
2 take the example we just looked at. Essentially  
3 you are putting all your money and you are taking  
4 a large amount of risk. That may have been  
5 developed --

6 MR TIDSWELL: (Inaudible).

7 MR WEST: That becomes -- that is what comes with  
8 the CMO principle in this context, because that --  
9 essentially as a matter of negotiation. I'm an  
10 airline. You are an airport. I say, "I will come  
11 and fly with you if you give me some money". You  
12 say, "I would like you to come, but I can only pay  
13 X". I say, "I want Y". At some point we either  
14 do or do not reach a middle ground, but it seems  
15 commercial market (inaudible) in that sense means  
16 what you can get out of a bilateral negotiation.  
17 It is not a yardstick by which you can measure  
18 that.

19 MR TIDSWELL: Well, I think (inaudible).

20 I suppose -- forgive me. I am sure it is my  
21 fault, but I --

22 MR WEST: No.

23 MR TIDSWELL: If there is an argument about  
24 whether people have paid a lot of money upfront or  
25 maybe paid reasonable amounts of money over time,

1       why does that make any difference to (inaudible)?  
2       MR WEST:  It makes a difference -- obviously in my  
3       respectful submission it is -- there will always  
4       have to be a situation by situation assessment,  
5       because you are going to have to look at what is  
6       the amount of money you are giving in return for  
7       what you are getting from the airline, but just as  
8       a matter of sort of normal, rational economic  
9       behaviour would you pay I say a large sum of money  
10      upfront over which you have -- which, where if the  
11      expected benefits do not deliver, you have already  
12      handed the money over, as supposed to something  
13      under, say, the Scottish Route Development Scheme  
14      where you say, "We are going to give you some  
15      money to support this.  You have to move.  You  
16      have to produce the traffic.  If the traffic goes  
17      up, you get some more money".  So that seems to go  
18      to the rationality.  You cannot take it any  
19      further without looking at a particular  
20      (inaudible) in a particular situation I think -- a  
21      particular payment.  Sorry.  
22      MR TIDSWELL:  (Inaudible) as a matter of logic  
23      (inaudible) less money upfront and more later.  
24      I thought you were challenging -- you were arguing  
25      that that was what was happening in the market.

1 MR WEST: Yes, but it appears here what is being  
2 said is that -- if I have misunderstood what was  
3 being said -- it appears what was being said today  
4 is the way in which the market operates is giving  
5 a large sum of money upfront and we are saying it  
6 is not.

7 MR TIDSWELL: You are saying (inaudible).

8 MR WEST: Yes.

9 MR TIDSWELL: (Inaudible).

10 MR WEST: I just wanted to make the point that we  
11 do not actually accept it. I am sorry if it was  
12 not clear.

13 MR TIDSWELL: No, no, it is clear now. It was my  
14 fault.

15 MR WEST: It was not at all, sir.

16 May I go to forecasts now? There are two  
17 points to make here. The first was the point  
18 actually that you, sir, put to my learned friend  
19 when he talked about forecasts being essentially  
20 a political matter. We do not accept that.

21 Forecasts are obviously a commercial matter, but  
22 also there is a very important question about the  
23 reliability that can be placed on forecasts,  
24 because my learned friend did this morning in my  
25 respectful submission tread into giving evidence

1 when he said after 18 months it is very hard to  
2 rely on forecasts. I am paraphrasing, probably  
3 unfairly, but that was the thrust of it.

4 Now that actually is not -- (a) that is  
5 evidence which is inadmissible, but it is actually  
6 not consistent with the actual evidence that you  
7 have from the respondent.

8 If you could go, please, to Mr Slade's  
9 first witness statement, which is Bundle A,  
10 tab 22, page 154 and paragraphs 59 and 60, this is  
11 the beginning of the work on the assessment of  
12 compliance. You see that from paragraph 58. Then  
13 we say in 59:

14 "In parallel Cardiff was asked to produce  
15 a ten-year business development strategy, which  
16 was submitted in early 2024."

17 So this is the business strategy.

18 "It forms the basis for ..." --

19 Well, you can see it says in the last  
20 sentence:

21 "Referenced extensively in the Subsidy Advice  
22 Unit ... and formed the basis for the Grant Thornton  
23 economic impact assessment."

24 Then it said:

25 "The ten-year business plan was central to

1 the Welsh Ministers' case for the proposed  
2 subsidy. It provided the evidential basis for the  
3 projected benefits and was used to demonstrate  
4 alignment with the national policy framework."

5 So that seems to be saying very clearly  
6 and perhaps unsurprisingly, given the nature of  
7 running an airport, that actually a longer time  
8 frame for forecasts is very important and it is  
9 certainly not 18 -- to suggest all you are worried  
10 about is 18 months does not seem to be at all  
11 consistent with the actual evidence that is relied  
12 upon.

13 My penultimate point -- I'm sorry, sir --  
14 I will stop typing -- is the point about  
15 section 24 and going concern. I just wanted to  
16 make sure that my position had been accurately  
17 recorded in this regard, which is this, which is  
18 that if an entity is not a going concern, then our  
19 case is that means it is going to fall within the  
20 category of being ailing or insolvent, but the  
21 fact that it is certified as a going concern does  
22 not mean that it cannot still be ailing, because  
23 the time periods are we say different on our  
24 analysis of section 24.

25 If I could then just take -- then just in

1 that regard in terms of what was actually the  
2 situation in July 2024, you have already seen it.  
3 Para 32 of the Ministerial advice in July 2024.  
4 You have seen that. I just want to refresh your  
5 memory of what actually the situation was at that  
6 point.

7 Then, finally, my final point is --

8 MR TIDSWELL: Do you want us to look at that?

9 MR WEST: I just want to remind you. You have  
10 seen it already.

11 MR TIDSWELL: Give me the reference, would you?

12 MR WEST: It is Bundle A, tab 22, page 299 and it  
13 is paragraph 32. This was just to remind you what  
14 the financial situation actually was. If you wish  
15 to look at it again, it is fine. You have seen  
16 it. I think you might have seen it twice  
17 possibly.

18 My final point is about Cardiff's  
19 financial -- he used -- "financial stability"  
20 I think was the phrase he was using. Just to be  
21 clear, we are saying that Cardiff would not be  
22 financially stable without the extended SCF. I do  
23 not think that will come as any surprise to the  
24 tribunal. It did then need the subsidy in the  
25 large amount given to, as it were, put it over the

1 line.

2           There was a question I think from Mr Alty  
3 about the extent to which failures in the past  
4 were taken into account, and my learned friend's  
5 response to that was past performance is not  
6 a guide to the future. We say we do not agree  
7 with that. It actually is in our respectful  
8 submission a very helpful guide to what may be  
9 likely to happen and it was a matter that should  
10 be taken into account.

11           That leaves me a sort of sub-point of  
12 that, which is simply one of timing. We have  
13 heard what my learned friend has said about relief  
14 and timing of the judgment. From our point of  
15 view obviously Bristol's position is that it is  
16 prejudiced by the decision and we do urge the  
17 tribunal -- we respect, of course, the need for  
18 the tribunal to take the appropriate time to write  
19 its decision, but it is important it is produced  
20 as speedily as possible commensurate with the  
21 speed with which the tribunal has listed this  
22 appeal, for which, as I said yesterday, we are  
23 very grateful.

24           Unless I can assist you further, those are  
25 my submissions in reply.

1 MR TIDSWELL: Thank you very much. That is very  
2 helpful. So I think just in terms of things that  
3 are going to happen next I think, Mr West, you are  
4 going to have another stab at the table just with  
5 those principles --

6 MR WEST: You will have that tomorrow at the  
7 latest.

8 MR TIDSWELL: No rush at all. It would be very  
9 helpful to have it. That is very helpful. Thank  
10 you.

11 Mr Peretz, I think you are going to  
12 produce a draft amended pleading. When do you  
13 think you could do that by?

14 MR PERETZ: I have not had a chance to consult  
15 with my learned juniors about commitments  
16 tomorrow.

17 MR TIDSWELL: Yes. I do not think it is  
18 (inaudible).

19 MR PERETZ: Tomorrow or Thursday.

20 MR TIDSWELL: I was going to give you a week or  
21 so. Is that acceptable?

22 MR PERETZ: I will repeat that for the benefit of  
23 the transcript. A week would be fine. We will  
24 aim to get it done this week, partly because we  
25 would like to get it off our desks.

1 MR TIDSWELL: I am talking about next Tuesday.

2 MR PERETZ: Yes, that is fine.

3 MR TIDSWELL: Mr West, if we were to hear back  
4 from you in response to that obviously anything  
5 you want to say about the format, but also as to  
6 whether you wish to reply another week after that  
7 --

8 MR WEST: That would be fine, yes.

9 MR TIDSWELL: -- and similarly in relation to any  
10 further submissions you wish to make --

11 MR WEST: Yes. I am in the tribunal's hands.

12 MR TIDSWELL: -- by end of this week?

13 MR WEST: That should be possible. I will talk to  
14 my --

15 MR TIDSWELL: Obviously if you do, then we will  
16 need to canvass with Mr Peretz whether he  
17 (inaudible) anything else and how that is all  
18 going to work, but I think meantime why do we not  
19 just see whether your (inaudible).

20 MR WEST: I'm very grateful.

21 MR TIDSWELL: Thank you. Anything else we need to  
22 deal with?

23 MR WEST: Just to say I trust the issue of  
24 confidentiality was addressed satisfactorily,  
25 there was nothing you would want to ask me in

1 confidential session? I mean, I just ploughed on  
2 and assumed if you had had a question, you would  
3 have raised it at the time, but I just thought  
4 I would clarify that.

5 MR TIDSWELL: Well, I have to say, I was thinking  
6 on it this morning, I was quite surprised at how  
7 well it went so ...

8 MR WEST: That was my impression too, but I  
9 thought I would just check.

10 MR TIDSWELL: No, no, (inaudible) both of you  
11 actually, and particularly Mr West, it was not an  
12 easy hand, but it is always difficult when  
13 (inaudible) is so generalised (inaudible).

14 Good. Unless there is anything else, it  
15 just remains to thank you both particularly, and  
16 also your teams. We are very grateful to  
17 everybody for the hard work you put in to get to  
18 this point. I know it is been probably harder  
19 work than a lot of hearings because there has been  
20 travel involved, and we are very grateful for that  
21 as well and also grateful for the hospitality we  
22 have had here.

23 So we will reserve our judgment and we  
24 will deliver that as soon as we sensibly can.

25 MR WEST: Yes. Thank you, sir.

1 (3.42 pm)

2 (The hearing concluded)

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